

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.04.2019

Coram::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.172 of 2011

A. Marimuthu. ... Appellant/Complainant

/versus/

K.Kumarasamy,
Arunodhaya Textiles. ... Respondent/Accused

Prayer:- This Criminal Appeal is filed under Section 378(4) of Cr.P.C., praying to set aside the judgment of an acquittal dated 20.07.2010 made in C.A.No.53 of 2010 on the file of the I Additional Session Judge, Erode reversing the judgment of conviction dated 19.10.2009 made in C.C.No.555 of 2006 on the file of Judicial Magistrate No.II, Erode and allow the appeal.

For Appellant : Mr.C.S.Saravanan

For Respondent : Mr.V.S.Kesavan

J U D G M E N T

This appeal is preferred by the complainant before the Judicial Magistrate-II, Erode.

2. Aggrieved by the dismissal of the complaint by the Lower Appellate Court in the appeal preferred by the accused, the present appeal is filed by the complainant.

3. The brief facts of the case as found in the complaint is that the respondent herein borrowed a sum of Rs.1,00,000/- from the complainant on 19.07.2004, in order of discharge the said debt. The complainant issued cheque for Rs.1,00,000/- drawn from his bank. When the cheque was presented for collection, it returned with endorsement "funds insufficient". Statutory notice was sent by the complainant on 21.07.2004, calling upon the accused to discharge the cheque amount. The accused received the notice, however, sent a reply, denying the liability. Hence the complaint.

4. To prove the case, the complainant has examined as PW.1. The subject cheque for Rs.1,00,000/- dated 19.07.2004 was marked as Ex.P.1. The Bank return memo marked as Ex.P.2. Statutory notice sent through his counsel marked as Ex.P.3. The postal acknowledgement card marked as Ex.P.5. Reply Notice of the complainant marked as Ex.P.6. In defence, the accused has taken out an application to forward the subject cheque for hand writing expert opinion is marked as DW.1 and the report marked as Ex.D.1.

5. The trial Court held that the complainant has proved the guilt of the accused and established the subject cheque was issued to discharge an legally enforceable debt. Regarding the defence taken by the accused, the trial Court, after considering the hand writing expert opinion and the corrections found on the cheque held that the accused admits that after correcting the date in the cheque, he has affixed the signature in full and therefore, it has to be presumed that the drawer of the cheque was conscious of the fact that there is an alteration in the cheque and same been cured by affixing his signature, where the alteration is found. Further, the defence of the accused that the blank cheque given to one Kumar of Arunodhaya Textile in the year 1996 was misused by the complainant was also rejected by the trial Court since, the accused failed to examine the said Kumar.

6. On appeal, the Lower Appellate Court on re-appreciating the evidence has pointed out that PW.1 who admittedly an employee in a Textile shop drawing a meager salary could not have advanced a loan of Rs.1,00,000/-. The ignorance of the complainant about the basic details and information about the accused, coupled with the corrections found in the cheque, particularly the date, which is almost 9 years after the date originally found in the cheque. The Lower Appellate Court has held that the material alteration in the impugned cheque Ex.P.1 and the failure of the complainant to prima facie prove the cheque was issued by the accused to discharge debt entails the accused an acquittal.

7. The short point canvassed before this Court by the learned Counsels is whether the cheque Ex.P.1 carries any material alteration. While, the learned counsel for the appellant/complainant would submit that undoubtedly there is an alteration in the date, but it has been endorsed by the accused by affixing his signature. The entire writing on the cheque has now been proved by his own witness and expert in hand-writing that it was made by one and the same person. While so, the correction which has been duly endorsed will not amount to material alteration.

8. Contrarily, the learned counsel appearing for the respondent would submit that the subject cheque was issued by Arunodhaya Textiles, Proprietor. The respondent has signed as its Proprietor. Whereas, the signature found near the date column does not have the seal of the proprietor concern. Further, the hand-writing expert has categorically opined that there is an alteration in the year "1995" corrected as "1996" and same has been struck off by a line and "19.07.2004" as written above the said date. The hand-writing expert has opined that while all other writings are in different ink, the original dated 28.05.1995 altered as "1996" has been struck off and written as "19.07.2004" in a different ink. In his evidence, PW.1 has deposed that the said cheque was given at his house on 19.07.2004. The details were written by the accused is contrarily to the expert opinion. Therefore, the Lower Appellate Court has rightly dismissed the complaint by allowing the appeal.

9. The cheque Ex.P.1 on scrutiny, this Court would easily find that originally there is an alteration in the year, later that has been struck off in entirety and new date has been written. The hand-writing expert has not given any opinion regarding the new date 19.07.2004, which has been written after striking 28.05.1995 and altering as "1996". Obviously the cheque carries two corrections. The drawer of the cheque has affixed only one signature in the corrected portion. The seal of the drawer firm is also not found.

10. The learned counsel for the appellant would submit that it is new plea taken by the counsel which has not been canvassed either in reply notice or before the Lower Appellate Court. No doubt, this point now raised before this Court was not pointed before the Lower Appellate Court. However, the Lower Appellate Court being convinced that there is a material alteration in the instrument, negated the validity of the instrument, it has not gone further.

11. The point now being canvassed by the learned counsel for the respondent is only an additional point which the Court endorse the view of the Lower Appellate Court regarding the material alteration. The material alteration found in the cheque coupled with the testimony of PW.1 who feign ignorance of several vital details about himself as well as the complainant, causes grave doubt about the transaction, as alleged by the complainant.

12. When the accused by preponderance of probability has discharged the burden of rebuttal, the complainant ought to have proved his case with material evidence.

13. In this case, the complainant has only filed the subject cheque and the documents related to return of the subject cheque. No material evidence is placed before the Court to show that there was some money transaction between him and the accused, prior to issuance of the cheque and to discharge the said debt, Ex.P.1 cheque was issued to him. Therefore, this Court finds no error or legality in the order of the Lower Appellate Court.

14. Accordingly, the Criminal Appeal is dismissed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

bsm

To,

1. The I Additional Session Judge, Erode.
2. The Judicial Magistrate No.2, Erode.
3. The Section Officer, Criminal Section, High Court, Madras.

+1 cc to M/s.C.S.Saravanan, Advocate Sr.No.35156

+1 cc to Mr.V.S.Kesavan, Advocate Sr.No.35615

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CSL/28.05.2019

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