IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 10.04.2019

Coram::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.32 of 2011

J. Mukesh @ Mukesh Siyal ... Appellant/Complainant

/versus/

S.Dharmalingam, ... Respondent/Accused

Prayer:- This Criminal Appeal is filed under Section 378 of Cr.P.C., praying against the judgment dated 28.04.2010, passed in C.A.No.22/09 by the learned Sessions Judge, Nilgiris at Udhagamandalam, reversing the well considered judgment of conviction in S.T.C.No.473 of 2006, dated 21.10.2009, passed by the learned Judicial Magistrate, Kotagiri and prays that this Hon'ble Court may be pleased to set-aside the order of acquittal and convict him under Section 138 of the Negotiable Instruments Act.

For Appellant : Mr.Jayasri Baskar

For Respondent : Mr.C.Samivel
Legal Aid Counsel

O R D E R

Heard the Learned Counsel for the appellant and the Learned Aid Counsel for the respondent.

2. This Appeal is preferred by the complainant aggrieved by the reversing judgment of the Lower Appellate Court dismissing the private complaint filed under Section 138 of Negotiable Instrument Act.

3. The brief facts of the case is that the appellant herein has advanced loan of Rs.4,00,000/- to the respondent herein and to discharge the said debt, the respondent gave a cheque bearing No.782761 dated 24.12.2006 for Rs.4,00,000/- drawn on Canara Bank, Aravenu Branch, Nilgiris District. When the cheque was presented for collection, it was returned for "insufficient fund". The banker intimated about the return of cheque vide memo dated 28.01.2006 thereafter, a statutory notice dated 25.02.2006 was sent to the accused, through registered

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post. Since, the accused has failed to collect the notice, despite intimation, same was returned un-served. With these facts, complaint was filed and same was taken on file by the Judicial Magistrate, Kotagiri.

4. To prove his case, the complainant has examined himself as PW.1, The subject cheque is marked as Ex.P.1. The Drawers Bank memorandum and the payee bank memorandum were marked as Ex.P.2 and Ex.P.3. The statutory notice and returned postal cover marked as Ex.P.4 and Ex.P.5. The accused has not examined any witness or documents.

5. The trial Court found the accused guilty and sentenced him to undergo two years S.I and fine of Rs.4,000/-, in default 6 months S.I. Further, ordered the cheque amount of Rs.4,00,000/- to be paid as compensation.

6. On appeal, the Lower Appellate Court accepted the plea of the accused that the statutory notice as well as the complaint is conspicuously silent, about the alleged borrowing against pro-note. The complainant has failed to prima faciely prove the legally enforceable debt. While so, the presumption under Section 139 of Negotiable and Instrument Act cannot be drawn against the accused. Holding so, the Lower Appellate Court has allowed the appeal and consequently the complaint was dismissed.

7. Aggrieved complainant is before this Court by way of this appeal.

8. The learned counsel appearing for the appellant/complainant would submit that the omission to mention date of borrowing in the statutory notice as well as in the complaint, is not an inherent defect to reject the complaint. More so, when the complainant, in the cross examination of the accused has disclosed that the money was borrowed by the accused during the month of November-2005 and as against that borrowing, he executed a pro-note, which he took back after giving cheque (Ex.P.1). Without a cumulative assessment of the facts and evidence, the Lower Appellate Court has reserved the well considered judgment of the trial Court.

9. The learned counsel appearing for the appellant would also submit that when the accused admits the execution of the cheque and failure to prove that the cheque was stolen by one Balachandran, and misused by the complainant. The Lower Appellate Court ought not to have arrived at a wrong conclusion that the accused has discharged the burden of rebutting the presumption.

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10. Heard the learned Counsels and perused the records.

11. The complainant, no doubt not mentioned in his statutory notice marked as Ex.P.4 or in his complainant about the date of borrowing. He has mentioned that for the money borrowed to discharge the sum, the subject cheque (Ex.P.1) was issued by the accused. In the cross examination, he has mentioned about the month and year of borrowing. The Lower Appellate Court has presumed that it is an afterthought. If, it is an afterthought, the complainant would have said that in its chief examination itself. It is an answer elicited by the accused, when the witness at his hands. Therefore, the conclusion of the Lower Appellate Court that mentioning the date and year of borrowing is an afterthought cannot be countenance.

12. Further, the learned counsel appearing for the respondent would submit that, admitting that there was a pro-note executed by the accused. Non-production of pro-note is fatal to the complainant. The perusal of the PW.1 testimony indicates that the pro-note executed by the complainant was taken back by him, after giving the subject cheque (Ex.P.1). Having said so, this Court also finds that the complaint is very vague, without certain basic information. But for Section 139 of Negotiable Instrument Act, the case of the complainant cannot be taken as a proved one. Since, there is a statutory burden of presumption against the accused and the accused has not made any attempt to rebut the same, the Lower Appellate Court judgment is bound to be set-aside. The reason given by the Lower Appellate Court to reverse the finding of the trial Court, per se improper and illegal. Thus that illegality is bound to be pointed out and corrected. Hence, the Lower Appellate Court judgment is set-aside.

13. As far as conviction is concerned, this Court is of the view that the trial Court sentence is contrary to law. After imposing fine, in addition the entire cheque amount has been ordered as compensation, which is contrary to the code of procedure. Taking into consideration of other facts and the order of acquittal, which stands in advantage to the accused, this Court while confirming the conviction modifies the sentence as fine of Rs.4,000/-, in default 4 months S.I. Accordingly, the Criminal Appeal is Partly Allowed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To,

1. The Sessions Judge, Nilgiris,
   Udhagamandalam.

2. The Judicial Magistrate,
   Kotagiri.

3. Do Thro' The Chief Judicial Magistrate,
   Nilgiris at Udhagamandalam.

4. The Section Officer,
   Criminal Section,
   High Court, Madras.

+1cc to Mr.K.V.Sridharan, Advocate, S.R.No.35455

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