IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.02.2019

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THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.691 of 2011

Venkatesan,
S/o.Ramachandran,
No.1, Neeli Veersamy Street,
2nd lane, Triplicane,
Chennai-600 005. ... Appellant

/versus/

Ashok Kumar,
S/o.Subramani,
No.6, Vaikolkaran Street,
1st Floor, Purasawakkam,
Chennai-600 007. ... Respondent

Prayer:- Criminal Appeal is filed under Section 387 of Criminal Procedure Code, praying to set aside the judgment of the Additional District and Sessions Judge, (FTC No.1), Chennai made in C.A.No.138 of 2008 dated 10.12.2010 in setting aside the judgment of the learned XIV M.M.Egmore, Chennai-8, made in C.C.No.3742 of 2004 dated 25.03.2008 and convict the Accused/respondent herein for the offence under Section 138 of the Negotiable Instruments Act and sentencing him to undergo three months simple imprisonment and to pay a compensation of Rs.2,00,000/- (Rupees Two Lakhs only) under Section 357 of Cr.P.C to the appellant herein.

For Appellant : Mr.T.R.Ravi

For Respondent : No appearance

J U D G M E N T

Heard the learned Counsel for the appellant.

2. This appeal is directed against the dismissal of the complaint under Section 138 of Negotiable Instrument Act by the Appellate Court reversing the finding of the trial Court.

3. The case of the complainant is that the respondent herein issued cheque for Rs.2,00,000/- on 05.02.2004 to discharge his loan liabilities. However, when it was presented for collection, returned for want of fund. Statutory notice dated 08.02.2004 was issued to the accused. In spite of receiving the notice, he failed to reply or to pay the cheque amount. Hence, complaint is filed under Section 138 of N.I. Act.

4. Before the trial Court, the complainant was examined as PW.1, the subject cheque was marked as Ex.P.1, Bank Return Memo (Ex.P.2), Statutory notice caused by the complainant (Ex.P.3) and the postal acknowledgement card indicating the receipt of the notice (Ex.P.4) were relied by the complainant in support of his complaint.

5. On the side of the prosecution, 2 witnesses were examined and 2 documents were marked.

6. The trial Court has held that the accused and the complainant are known to each other. The signed cheque was issued by the accused not disputed by him. Therefore, the presumption under Section 138 and 139 of N.I Act has to be drawn against him. To rebut the presumption the accused has examined 2 witnesses and marked 2 Exhibits. DW.1 is none other than the sister of the accused. DW.2 is the Bank Manager of the complainant Bank. Through, DW.1 the accused able to establish the fact that DW.1 and the accused were partners in a business concern. The defence taken by the accused that the subject cheque was not issued by him to discharge his loan of Rs.20,000/- was not believed and accepted by the trial Court. As a result, the trial Court found the accused guilt and sentenced him to undergo 3 months S.I and pay a sum of Rs.2,00,000/- as compensation in view of fine.

7. In the Appeal preferred by the accused, the Appellate Court on re-appreciation of the evidence has allowed the appeal, on the ground that the complainant has not proved his source of income to advance loan of Rs.2,00,000/-. The signature found in the cheque and the other document differs to doubt, whether the cheque was given voluntarily to discharge any legally enforceable debt. The signature and writing in the cheque was in 2 different colours, so using 2 different inks one to sign and another to fill up the cheque has been taken serious note by the Lower Appellate Court to disbelieve the case of the complainant that subject cheque was issued to discharge the loan amount of Rs.2,00,000/-. Also the Appellate Court has observed that the complainant has failed to prove his source to lend loan of Rs.2,00,000/-. So accepting the defence that blank signed cheque was given to the complainant along with blank signed pro-notes, the Lower Appellate Court allowed the appeal. The

Appellate Court took note of the admission by PW.1 that when the accused borrowed Rs.2,00,000/-, he also executed a pro-note and he is in possession of the pro-note, if necessary, he will produced it. When the Court adjourned for further examination of witness to produce the pro-note, the complainant has not produced the said pro-note. Drawing adverse inference for not producing the pro-note against which the loan of Rs.2,00,000/- was borrowed by the accused, the Lower Appellate Court has held that the cheque cannot be presumed to have given to discharge any legally enforceable debt.

8. The learned Counsel appearing for the Appellant would submit that in the cross examination PW.1 has not admitted that he has no source of income, in fact, he has specifically stated that cash of Rs.2,00,000/- was given to the accused and the said money belongs to him. He has only admitted that he never had such huge money in his bank account. It does not mean that the complainant has no source of income to advance Rs.2,00,000/-.

9. The learned Counsel would submit that, ignoring the spirit of Section 20 of Negotiable Instrument Act, the Lower Appellate Court has compared the colours of the ink used in the subject cheque. Since, the signature and the writing are in two different colours. He has erroneously held the cheque is not for discharge of liability. The Lower Appellate Court has disbelieved the very execution of the cheque. This observation is against the spirit of Section 20 of Negotiable Instrument Act. Merely because the writing and the signature are in two different colours, the cheque cannot be invalidated or cannot be presumed that it was not given for any legally enforceable debt.

10. Despite notice, the respondent has not entered appearance.

11. After considering the submissions made by the learned counsel for the appellant and on perusal of the judgment, this Court finds that the reasoning of the Lower Appellate Court to allow the appeal on the ground that the source of money advanced by the complainant and the difference in the colour of the ink found in the cheque may not be legally correct, in the light of Section 139 of Negotiable Instrument Act and Section 20 of Negotiable Instrument Act. But drawing adverse inference based on the fact that while the complainant has said that he advanced loan of Rs.2,00,000/-, after obtaining pro-notes and to discharge that debt, the accused issued the subject cheque and took time to produce the pro-note. He has failed to produce the pro-note is legally sustainable. Furthermore, the relationship between the complainant and the accused is not merely the relationship between the money lender and the borrower but some prima facie material has been placed by the accused that sister

of the accused and the complainant were partner in a business and few unfilled instruments were executed during the said transaction. Therefore, the possibility of misusing one such instrument has also been probablised by examining DW.1, DW.2 and marking two Ex.D1 and Ex.D2.

12. In the light of the above fact, since the statutory presumption which was initially in favour of the complainant has been shifted by the accused by examining witnesses and adducing document and by elucidating certain facts in the cross examination of PW.1, the advantage of presumption under Section 139 of Negotiable Instrument Act, no more exist for the complainant. He should have positively established the existence of legally enforceable debt by adducing better evidence, which he has failed to do so. Hence, this Court finds no reason to interfere the finding of the trial Court.

13. In the result, the Criminal Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Additional District and Sessions Judge, (FTC No.1), Chennai.

2. The XIV M.M.Egmore Court, Chennai-8.

3. - do - through The Chief Metropolitan Magistrate, Chennai.

+1 cc to Mr.T.R.Ravikumar, Advocate, S.R.No.12984

Criminal Appeal No.691 of 2011

KAN(CO)
SSM(25/03/2019).