THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.160 OF 2012

JUDGMENT:

This Criminal Appeal, under Section 378 (4) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), is filed by the appellant-complainant aggrieved by the judgment, dated 24.06.2008, rendered in C.C.No.1915 of 2002 on the file of the Judicial Magistrate of First Class, Godavarikhani, whereby and whereunder respondent No.2/accused was acquitted for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'N.I.Act').

2. Heard the learned counsel for appellant/complainant and learned counsel for respondent No.2/accused and perused the record.

3. Learned counsel for the appellant/complainant would contend that for the legally enforceable debt of Rs.38,000/- by respondent No.2/accused to the complainant, the subject cheque was issued. The said cheque is marked as Ex.P.1 and the same was returned by the Bank concerned due to insufficient funds in the account of respondent No.2/accused. Thereafter, a legal notice was issued as contemplated under Section 138 (b) of N.I. Act. Even then the cheque amount was not paid. Hence, the appellant-complainant had fulfilled all the required legal necessities to constitute the offence under Section 138 of N.I. Act. However, the Trial Court disbelieved the money transaction in between the parties and erroneously dismissed the complaint and ultimately prayed to set aside the impugned judgment and allow the complaint by convicting and sentencing respondent No.2-accused for the offence under Section 138 of N.I.Act.

4. On the other hand, learned counsel for respondent No.2-accused would contend that there is inconsistency in the evidence of P.W.1. There is no pronote or any other document to establish that the accused is due an amount of Rs.38,000/- and Ex.P.1 cheque is issued towards discharge of said loan amount. As there is no legally accepted evidence to substantiate the requirements of Section 138 of N.I.Act, the trial Court rightly dismissed the complaint and acquitted the accused and ultimately prayed to sustain the judgment under appeal.

5. In view of the submissions on both sides, the following points fall for consideration:

1) Whether the accused borrowed an amount of Rs.38,000/- from the complainant?
2) Whether the accused had given Ex.P.1 cheque towards repayment of loan amount?
3) Whether the complainant proved the requirements under Section 138 of N.I.Act? and
4) Whether the impugned judgment passed in C.C.No.1915 of 2002 on 24.06.2008 by the Judicial Magistrate of First Class is liable to be set aside?

6. The specific case of the appellant-complainant is that there is friendship between him and the accused, due to which, he advanced a sum of Rs.38,000/- to the accused and the accused promised to repay the same within three months from the date of borrowing, but failed to do so. On demand, the accused had issued Ex.P.1 cheque dated 31.03.2002 for Rs.38,000/- in favour of the complainant. The cheque was presented in the Bank.

However, it was returned for want of sufficient funds in the account of the accused on 17.08.2002. Thereafter, the cheque was re-presented and again it was returned on 27.09.2002 with same endorsement as there were no sufficient funds in the account of the accused. A legal notice dated 07.10.2002 was issued. In spite of receipt of legal notice, the accused did not pay the cheque amount and the complainant was constrained to file a complaint before the Court below.

7. To substantiate the same, PWs 1 to 3 were examined and Exs.P.1 to P.7 were marked. On behalf of the accused, Ex.D.1-a portion of the complaint was marked.

8. As per the pleadings in the complaint and also the legal notice issued to the accused, there is specific allegation that the accused received an amount of Rs.38,000/- as hand loan. But, when the complainant deposed as P.W.1 he set up a different story and stated that he purchased a Hero Honda motor cycle from the accused for Rs.42,000/- and as the accused did not furnish the documents of Hero Honda motor cycle, he returned the motor cycle to the accused and the accused agreed to return Rs.38,000/- to him. In that connection the subject cheque under Ex.P.1 was issued for Rs.38,000/- in favour of the complainant by the accused. What P.W.1 stated in his evidence before the Court below is quite different from his pleadings. So, the initial burden to substantiate that the accused borrowed an amount of Rs.38,000/- as hand loan from the complainant had not been discharged by the complainant. When initial burden of borrowing is not proved, the issuance of Ex.P.1 cheque and dishonour of the same for want of sufficient funds in the account of the accused are not helpful to complainant. The requirements of Section 138 of N.I. Act are not proved by the appellant-complainant. The trial Court has also taken a similar view basing on the evidence and documents on record. There is no infirmity and there is nothing to take a different view. The appeal is devoid of merits.

9. Accordingly, the appeal is dismissed confirming the judgment, dated 24.06.2008, rendered in C.C.No.1915 of 2002 on the file of the Judicial Magistrate of First Class, Godavarikhani.

10. Miscellaneous Petitions, if any, pending in this Criminal Appeal shall stand closed.

Dr. SHAMEEM AKTHER, J

23rd January, 2019.
sur