IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 11.03.2020
PRONOUNCED ON:19.03.2020

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

Crl.A.No. 526 of 2013

Ugam Raj ...Appellant

-Vs-

Kaliyamoorthi ... Respondent

Prayer: Criminal Appeal filed under section 378 of Cr.P.C to setaside the order of acquittal passed in CA.No.2 of 2020 on the file of the Sessions Court, Nagapattinam dated 02.01.2012 reversing the judgment of conviction and sentence passed in STC.No.523 of 2008 on the file of the Judicial Magistrate No.2, Mayiladuthurai dated 10.12.2009.

For Appellant : Mr.S.Sounthar

For respondent : Mr.V.Perarasu
Counsel appointed through HCLSC

JUDGEMENT

The respondent/accused has been convicted for the offence punishable under section 138 r/w 142 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1000/- in default to undergo simple imprisonment for one month by the Judicial Magistrate Court No.II, Mayiladuthurai. Impugning the abovesaid conviction and sentence imposed on him, the respondent/accused has preferred the Crl.A.No.2 of 2010 on the file of the Sessions Judge, Nagapattinam. The Sessions Judge, Nagapattinam was pleased to setaside the conviction and sentence imposed on the accused by the Judicial Magistrate Court No.II Mayiladuthurai and consequently acquitted the respondent/accused of the offence punishable under section 138 r/w 142 of the Negotiable Instruments Act and resultantly, allowed the appeal, as abovestated, preferred by the respondent/accused. Impugning the same, the present Criminal Appeal has been preferred by the complainant.

2. Briefly stated according to the complainant, the respondent/accused borrowed a sum of Rs.3,00,000/- from him and towards the said liability, the respondent/accused had

issued a cheque in his favour on 02.06.2008 drawn on Indian Overseas Bank, Kuthalam Branch bearing No.261329 and the abovesaid cheque on presentation, had been returned for the reason “insufficient funds” and thus according to the complainant, the accused knowing fully well that he has no sufficient funds in his account, had issued the cheque with the dishonest intention and thereby cheated the complainant and the complainant had issued the statutory notice on 20.06.20008 setting forth the abovesaid facts and called upon the respondent/accused to discharge the said amount due under the cheque and that the respondent/accused though had received the notice on 01.07.2008, he has neither replied nor complied with the demand made thereunder and hence according to the complainant, the respondent/accused should be punished for the offence under section 138 of the Negotiable Instruments Act.

3. To sustain the complainant's case, P.Ws.1 to 3 were examined. Exs.P1 to P 5 were marked. On the side of the Accused, D.W.1 was examined. Ex.D1 was marked.

4. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Judicial Magistrate No.II, Mayiladuthuai had convicted and sentenced the accused as afore pointed out and on appeal by the respondent/accused, the appellate court had acquitted him of the offence putforth against him. Challenging the same, the complainant has preferred this Appeal.

5. The respondent/accused, during the course of his evidence has not disputed that it is he who had issued the cheque in question in favour of the complainant dated 02.06.2008 marked as Ex.P1. Now according to the complainant, only towards the subsisting liability ie., inasmuch as, the respondent/complainant had borrowed a sum of Rs.3,00,000/- from him towards the family expenses, to discharge the liability, the respondent/accused had issued the abovesaid cheque in his favour. As above pointed out, the cheque on presentation got bounced. Thus, it is found that the respondent/ accused without having any money in his account, had issued the cheque in favour of the complainant and the abovesaid act of the respondent/complainant would only go to expose the dishonest intention on his part in deceiving the complainant. Following the abovesaid developments, the complainant had issued the statuary notice on 20.06.2008 calling upon the respondent/accused to discharge the amount due under the cheque. The cheque in question got bounced for the reason “insufficient funds” and the same could be gathered from the Bankers'memo marked as Ex.P3. It is found that the respondent/accused has received the statutory notice and the acknowledgment card received from him has been marked as Ex.P5, however, the respondent/accused had not chosen to

repudiate the case putforth by the complainant in the statutory notice by sending a reply nor complied with the demand made by the complainant thereunder. In the light of the abovesaid factors, as rightly determined by the trial court, the presumption would arise in favour of the complainant as contemplated under Section 139 of the Negotiable Instruments Act and in the light of the abovesaid position, it is for the respondent/accused to discharge the abovesaid presumption raised in favour of the complainant.

6. Now according to the respondent/accused, he had actually issued the cheque in question only to one Mahendiran at the time of receiving the loan from Mahendiran and further according to him, at the time of receiving the loan from Mahendiran, he had also entrusted his property documents to him and further would state that he had discharged the loan received from Mahendiran, however, despite the same, Mahendiran had not returned back the property documents and the cheque issued to him by the respondent/accused. However, with reference to the abovesaid defence, no acceptable and reliable material is forthcoming on the part of the respondent/accused. To substantiate the abovesaid contention as rightly determined by the trial court, the respondent/accused should have endeavored to summon and examine Mahendiran in support of his case. If really the respondent/accused had borrowed any amount/money from Mahendiran and in connection with the same, had issued the cheque in question as well as the property documents to Mahendiran, to prove the same, the respondent/accused had not placed acceptable and reliable materials pointing to the same. The respondent/accused had not stated as to when he had received the loan from Mahendiran, what are the terms of the loan, when he had discharged the same and why he had not endeavored to secure the property documents and cheque immediately on the date of discharge, with reference to the abovesaid factors, there is nil material on the part of the respondent/accused. Further, if really, the abovesaid facts have any semblance of truth, as a prudent person, the respondent/accused would have endeavored to issue a notice to Mahendiran calling upon him to return the property documents and the cheque given to him as security for the alleged loan said to have been received from him. However, no such steps had been taken by the respondent/accused. That apart, according to the respondent/accused, on the receipt of the statutory notice from the complainant, he had met Ramachandiran who had introduced him to Mahendiran and as Ramachandiran pacified him that no action would be initiated pursuant to the statutory notice, according to the respondent/accused, he had not chosen to send any reply. When the abovesaid case of the respondent/accused is being challenged, atleast to sustain the same, as rightly determined by the trial court, the respondent/accused should have

endeavored to examine the said Ramachandran in support of his version. However, the respondent/ accused had not chosen to examine the said Ramachandiran. Therefore, all the abovesaid defence version projected by the respondent/accused are not established by placing acceptable and reliable evidence even prima facie other than his Ipsi Dixit testimony. In the light of the abovesaid factors, merely on the footing that the complainant had not marked the promissory note under which he had advanced the loan to the respondent/accused, it cannot be held that respondent/accused had not received any debt from the complainant. When according to the complainant, the cheque in question has been issued to him by the respondent/accused only towards the loan received from him and accordingly when the respondent/accused had admitted that it is he who had issued the cheque in question and his version that he had issued the cheque in question to Mahendiran having not been proved in any manner and furthermore, when there is no material to hold that Mahendiran and the complainant had connived together and created the cheque in question, in the light of the above position, the mere non- filing of the promissory note on the part of the complainant, by itself, would not sufficient to hold that there was no legally enforceable debt and therefore the trial court had rightly rejected the abovessaid version projected by the respondent/accused to reject the complainant's case.

7. The respondent/accused would also putforth the contention that his age has not been correctly mentioned in the complaint and according to him on the date of the compliant his age is about 68 years. In this connection, he would rely upon the document projected by him marked as Ex.R1. No doubt the respondent's age has not been correctly mentioned in the complaint. On that score it cannot be inferred that the respondent/accused had not borrowed the amount from the complainant and issued the cheque in question in favour of the complainant. When even according to the respondent/accused, he had not entrusted any document evidencing his proof of age, in such view of the matter, as above pointed out, when the respondent/accused has failed to establish his version that he had issued the cheque in question only in favour of Mahendiran and the said Mahendiran had instigated the complainant to institute the case against him falsely, in all, it is found that, the abovesaid defence version, by itself, would not lead to the conclusion that no subsisting creditor/debtor relationship existed between the complainant and the respondent/accused. In such view of the matter, the reasonings of the appellate court that the complainant had failed to establish his case by producing his accounts evidencing the debt transaction as such cannot be accepted and hence the appellate court had erred in disbelieving the complainant's case on the footing that he had not produced the accounts to show that he had advanced Rs.3,00,000/- to

the respondent/accused . When the duty is cast upon the respondent/accused to discharge the presumption raised in favour of the complainant as per law and as above pointed out when the respondent/accused had failed to discharge the burden in any manner, in such view of the matter, the appellate court had erred in rejecting the complainant's case and consequently thereby setting aside the conviction and sentence imposed on the respondent/accused by the Judicial Magistrate No.II Court, Mayiladuthurai.

8. In the light of the abovesaid facts, I hold that the complainant has established that only towards a legally enforceable debt, the respondent/accused had issued the cheque in question and the said cheque having been dishonored as above pointed out and despite the intimation of the same, the respondent/accused, having failed to discharge the debt within the time allowed by law and when the respondent had issued the cheque in question, knowing fully well that he had no money in his account, it is evident that the respondent/accused had issued the cheque in question only on the sole dishonest intention of deceiving the complainant and considering the abovesaid factors, as held by the trial court, the respondent/accused has committed the offence punishable under under section 138 r/w 142 of the Negotiable Instruments Act and accordingly it is found that the trial court had correctly sentenced him for the abovesaid offence.

9. For the reasons aforestated, the judgment passed by the Sessions Court, Nagapattinam in CA.No.2 of 2010 acquitting the respondent/accused of the offence punishable under section 138 r/w 142 of the Negotiable Instruments Act is setaside and resultantly the conviction and sentence imposed on the respondent/accused by the Judicial Magistrate No.II, Mayiladuthurai are confirmed. The Criminal Appeal is accordingly allowed. The trial court is directed to secure the presence of the accused to undergo the sentence of imprisonment imposed on him as per law, if he had not complied with the sentence.

Sd/-
Assistant Registrar(CS-III-MDU)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
   Sessions Court,
   Nagapattinam.

2. The Judicial Magistrate No.2,
Mayiladuthurai.

3.The Public Prosecutor,
High Court, Madras.

4.The Section Officer,
Criminal Section,
High Court, Madras-104.

+1cc to Mr.S.Sounthar, Advocate SR.24362
+1cc to Mr.V.Perarasu, Advocate SR.24195

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VSN II(CO)
CB(19/06/2020)