

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.121 of 2019

S.Sathyathan Robert
S/o. Solomon

... Appellant/ Respondent/complainant

Versus

E.Sathish David Respondent/ Appellant/ Accused

PRAYER: Criminal Appeal is filed under Section 378 of Cr.P.C, to set aside the Judgment passed by the learned XVIII Additional Sessions Judge, Chennai dated 04.09.2018 in C.A.No.175/2018, acquitting the accused for the offences under Section 138 of Negotiable Instruments Act, 1881, thereby modifying the Judgment passed by the learned Metropolitan Magistrate, Fast Track Court No.IV, George Town, Chennai dated 12.03.2018 made in C.C.No.653/2016 and allow the Criminal Appeal.

For Petitioner : Mr.B.Maheswaran

For Respondents : Mr.T.Gowthaman

O R D E R

This Criminal Appeal is preferred by the appellant/complainant against the order passed by the learned XVIII Additional Sessions Judge, Chennai dated 04.09.2018 in C.A.No.175/2018, acquitting the accused for the offence under Section 138 of Negotiable Instruments Act, 1881.

2. The appellant is complainant and respondent is accused. The appellant filed a complaint before the learned Metropolitan Magistrate, Fast Track Court - IV, George Town, Chennai, for the offence under Section 138 of Negotiable Instruments Act and the learned Magistrate after enquiry convicted the accused and sentenced him to undergo six months Simple Imprisonment and to pay a compensation of Rs.10,00,000/- to the complainant under Section 357 (3) Cr.P.C., within one month and in default payment of the compensation, the accused shall undergo a further period of two months Simple Imprisonment. Challenging the said conviction and sentence, the respondent/accused filed C.A.No.175 of 2018 before the XVIII Additional Sessions Judge, Chennai. The learned Additional Sessions Judge, Chennai after hearing arguments, allowed the appeal and set aside the judgment of

conviction and sentence passed by the learned Metropolitan Magistrate.

3. Aggrieved against the judgment dated 04.09.2018, the appellant/complainant is before this Court with the present appeal.

4. The learned counsel for the appellant would submit that the respondent/accused borrowed a sum of Rs.10,00,000/- in October 2013 from the appellant and issued two cheques each Rs.5,00,000/- dated 27.01.2015 drawn on DCB Bank Limited. When the appellant/complainant presented the cheques for encashment, the same were returned as "insufficient funds". Hence the appellant issued legal notice and even after receipt of the legal notice, neither the respondent repaid the amount, nor sent any reply. Therefore, the appellant constrained to file a criminal complaint against the respondent for the offence under Section 138 of Negotiable Instruments Act. The learned Magistrate has rightly convicted the respondent/accused to undergo six months simple imprisonment and also directed him to pay the compensation of Rs.10,00,000/- to the appellant/complainant. However, the Appellate Court, without considering the materials, simply allowed the appeal and set aside the judgment passed by the learned Metropolitan Magistrate. He would further submit that the respondent has admitted the borrowal of money and executed the cheques and executed the two promissory notes (Exs.P.11 and P.12) and hence the appellant has proved his case. The lower Court had rightly come to the conclusion that when the execution of the cheques are admitted, it is for the respondent/accused to rebut the presumption under Section 118 and 139 of NI Act. However, the respondent/accused failed to rebut the said legal presumption and hence the learned Magistrate had rightly convicted the petitioner. However, the learned Sessions Judge failed to consider the same and allowed the appeal, which warrants interference.

5. The learned counsel for the respondent/accused would submit that the cheques were issued in the name of Vaagai Business Services and Education Private Limited, and the complainant instituted the case without adding the company as a party, whereas the appellant issued legal notice in the name of the respondent/accused and not issued in the name of said company. He would further submit that the appellant / complainant filed the complaint against the respondent stating that cheques were issued by the Company, but, the appellant/complainant neither added the company as a party nor served notice to the Company. In the absence of company being served with notice, prosecution of accused is not maintainable, that too, when there is no demand notice against the Company, which is a precondition under Section 138 of the Negotiable

Instruments Act and therefore, the complaint itself is not maintainable. In support of his contentions, the learned counsel has cited the Judgment of the Hon'ble Supreme Court in the case of Himanshu Vs. B.Shivamurthu [(2019) 3 SCC 797].

6. Heard the learned counsel appearing on either side and perused the materials available on record.

7. Admittedly, the appellant filed a complaint before the learned Metropolitan Magistrate in C.C.No.653 of 2016 for the offence under Section 138 of Negotiable Instruments Act. During the trial, in order to prove the charges, on the side of complainant, the complainant himself was examined as P.W.1 and 13 documents were marked as Exs.P.1 to P.13 and on the side of defence, the accused was examined as D.W.1 and five documents were marked as Exs.D.1 to D.5. On a reading of the entire materials on record, though admittedly, the respondent had borrowed money and issued cheques, it is the case of the respondent/accused that he borrowed money on behalf of the company and issued the cheques on behalf of the company. On a perusal of Exs.P.1 and P.2, copy of the cheques were signed by the respondent as authorized signatory of the Vaigai Business Services and Education Pvt. Ltd, which clearly shows that the cheques were issued on behalf of the company. However, the complaint has been filed by the appellant/complainant against the respondent/accused as an authorized signatory in his individual capacity and also notice sent to the respondent in his individual capacity. However, the appellant has not lodged the complaint against the company, therefore, the said company was not arrayed as accused. As per the decision of the Hon'ble Supreme Court reported in [(2019) 3 SCC 797], the complaint itself is not maintainable. Though the learned counsel for the appellant vehemently contended that the respondent/accused has not objected the borrowal of money, it is for the appellant/complainant to prove that the respondent/complainant borrowed the money on his individual capacity, and not on behalf of the company. Under these circumstances, the appellant/complainant cannot say only the borrowal of money by the respondent in his individual capacity and cheques also issued only in the individual capacity. As per the decision of the Hon'ble Supreme Court, the complaint should be filed against the Company and the Company has to be arrayed as one of the accused. Therefore, the complaint against the respondent/accused in the individual capacity is not maintainable. The trial Court failed to consider the same and however, the appellate Court, rightly re-appreciated the entire evidence and has given independent findings. Therefore, this Court appreciated the judgment of the appellate Court and confirms the findings of the learned XVIII Additional Sessions Judge, Chennai. The possibility of two views in the appeal is,

one, this Court can interfere with the Judgment of the appellate Court and another, it is to be tested that whether, the question of law involved in this appeal, as per the decision of the Hon'ble Supreme Court in the case reported in [(2019) 3 SCC 797], that, in the absence of the company being arrayed as an accused, a complaint against the respondent itself is not maintainable. Admittedly, in the case on hand, the appellant/complainant has not impleaded the Vaigai Business Services and Education Pvt. Ltd as a party in this case.

8. Under these circumstances, this Court does not find any perversity in the order passed by the XVIII Additional Sessions Judge, Chennai. Accordingly, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

dh

To
The XVIII Additional Sessions Judge,
Chennai.

2.The Metropolitan Magistrate,
Fast Track Court No.IV, George Town, Chennai

3. The Section Officer,
Criminal Section, (Records)
High Court, Madras

+1cc to Mr.T.Gowthaman, Advocate SR.No. 26166

+1cc to Mr.B.Maheswaran, Advocate SR.No. 25710

CrI.A.No.121 of 2019

GMI (CO)

A.SK(06.07.2021)

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