



Crl.A.No.136 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.04.2023

CORAM :

THE HONOURABLE Dr. JUSTICE **G.JAYACHANDRAN**

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F.Ashok Kumar

.. Appellant

Vs.

T.Kamalakkannan

..Respondent

PRAYER : Criminal Appeal has been filed under sections 378 of Criminal Procedure Code to set aside the judgment dated 18.11.2019 in Criminal Appeal No.50 of 2018 passed by the learned I Additional Sessions Judge, City Civil Court, Chennai-104, by which the judgment and conviction dated 18.01.2018 passed in C.C.No.7112 of 2004 by the learned Metropolitan Magistrate, FTC-III, Saidapet, Chennai-15.

For Appellant : M/s.K.Kugan

For Respondent : Mr.S.Subramanian

JUDGMENT

This Criminal Appeal is filed by the complainant being aggrieved



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by the order of the lower Appellate Court reversing the judgment of the Trial Court and acquitting the respondent for an offence under Section 138 of Negotiable Instruments Act.

2. The sum and substance of the complaint laid by the appellant herein is that the respondent, who is known to him for several years, requested a hand loan of Rs.3,00,000/- in the month of June 2003 and same was advanced to him. Towards part payment of the loan amount, the respondent issued a cheque dated 31.05.2004 for a sum of Rs.1,50,000/- drawn in favour of the appellant. But on presentation of the said cheque, it was returned with an endorsement “payment stopped” by the drawer. Statutory notice under Section 138 of N.I. Act was caused by the appellant through his lawyer on 07.06.2004 and same was received by the respondent. However, he did not send any reply to the said notice, thereby, he prompted the appellant to file a private complaint. The said complaint was taken on file by the learned Metropolitan Magistrate Fast Track Court No.III, Saidapet in C.C.No.7112 of 2004.



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3. Before the Trial Court, the accused took the plea that the cheque was obtained under threat and coercion and therefore, he instructed the bank to stop the payment and also instituted a suit for declaration that the cheque is invalid. The said suit in O.S.No.2484 of 2004 has been instituted prior to the presentation of the cheque and no cause of action for prosecuting the case under Section 138 of N.I.Act prevails.

4. The Trial Court, considering the facts and the judgments of the higher Courts, has arrived at a conclusion that for the statutory notice [Ex.P4], the accused has not replied and instructing the banker to stop the payment. Once the cheque has been issued, it will not protect the drawer of the cheque for being prosecuted under Section 138 of N.I.Act. Therefore, the Trial Court held the accused guilty for issuing the cheque without intention to honour it and sentenced him to undergo 6 months S.I., and to pay the cheque amount as compensation.



5. Being aggrieved, the accused preferred an appeal on the file of the learned I Additional Sessions Judge, Chennai. The lower Appellate Court framed the following points for consideration:-

“1. Whether the appellant as accused had committed the offence punishable under Section 138 of N.I. Act?

2. Whether the Judgment of conviction and sentence passed by the trial Court is sustainable in law?

3. To what relief? ”

6. The lower Appellate Court taking note of the fact that in the complaint, the date of borrowing of the loan amount has not been mentioned and the complainant admits in the cross examination that he is not aware of the date on which he advanced the loan amount of Rs.3,00,000/- to the accused. That apart, the contention of the accused in his response to the 313 Cr.P.C., questioning before the Trial Court is that after giving a false complaint against him and his wife before the central crime branch, the cheque marked as Ex.P1 was obtained under threat and coercion and therefore, a declaration suit in O.S.No.2484 of 2004 was



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filed by the accused before the City Civil Court, Chennai to declare the cheque is void and invalid and obtained under force.

7. Accepting the findings of the Trial Court that instructions to the bank to stop payment will not preclude the holder of the cheque from initiating the offence under Section 138 of N.I.Act. However, taking note of the institution of the suit to declare the cheque as void as a rebuttal sufficient to shift the onus on the complainant held that the complainant has not proved the legally enforceable liability attached to the cheque. Therefore, offence under Section 138 of N.I.Act does not attract. Thus, reversed the findings of the Trial Court and acquitted the accused.

8. Being aggrieved, this Criminal Appeal is filed by the complainant. The learned counsel appearing for the appellant /complainant emphatically submitted that the rebuttal evidence presumed by the lower Appellate Court has not been spoken by the accused by mounting the witness box and providing an opportunity to the complainant to cross examine about the veracity of the alleged plaint



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averments. Mere informing the bank to stop the payment and filing the suit will not satisfy the decree of proof required to rebut the present statutory presumption without affording an opportunity to the complainant to test the rebuttal evidence.

9. According to the learned counsel for the appellant, the accused having issued the cheque to discharge the part liability accrued is legally bound to honour the cheque. Even after receipt of the statutory notice, he did not reply. Before the Trial Court, he did not mount the witness box to put forth his rebuttal evidence. Therefore, the Trial Court has rightly ignored the so called defence taken by the accused disputing his liability to pay the cheque amount. Whereas in the appeal, the lower Appellate Court heard and taking note of the plaint annexed with the statement given by the accused under Section 313(5) of Cr.P.C.

10. Per contra, the learned counsel for the respondent submitted that no doubt that the plaint was not marked as Exhibit on the side of the accused. However, in the cross examination of PW.1, he has admitted



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about the pendency of O.S.No.2484 of 2004, before the City Civil Court, Chennai. The said admission is suffice to indicate that a sum of Rs.1,50,000/- shown in the cheque is a disputed fact besides the manner in which it was obtained from the accused. Since the suit has already been initiated, to test the veracity, legality and enforceability of the cheque, the lower Appellate Court has rightly dismissed the complaint as offence under Section 138 of N.I.Act is not made out.

11. This Court, on considering the rival submissions and the facts concur the view expressed by the lower Appellate Court, however the cavil that the dismissal of the complaint under Section 138 of N.I.Act on the ground that the liability is disputed and the civil suit is pending should not be the reason to allow the suit which requires different degree of proof by the plaintiff, who has pleaded the factum of force, threat and coercion, the degree of proof and presumption which is contemplated under the Negotiable Instruments Act has rendered the complaint not sustainable. However, Civil Court which has seized of the matter has to apply its mind independently and appreciating the evidence of the



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respective parties regarding the execution of the cheque. Any observation made by this Court or the Courts below in the complaint under Section 138 of N.I.Act, shall prejudice any of the parties concerned.

12. With these observation, this Criminal Appeal is disposed of.

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Internet : Yes/No

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To

1.The I Additional Sessions Judge, City Civil Court, Chennai-104.

2.The Metropolitan Magistrate, FTC-II, Saidapet, Chennai-15.



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Dr.G.JAYACHANDRAN, J.

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