BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 15.09.2023

Delivered On : 27.09.2023

CORAM

THE HONOURABLE MR. JUSTICE P. DHANABAL

Crl. A.(MD)No.300 of 2013

G.R.Usha .. Appellant

Vs.

Pushpa .. Respondent
(Cause title amended as per the order of this Court dated 21.01.2014 and made in M.P.(MD)No.1 of 2014 in Crl.A.(MD)No.300 of 2013)

Prayer : This Criminal Appeal is filed under Sections 378 of Cr.P.C., to call for the records in C.C.No.47 of 2006 on the file of the learned Judicial Magistrate No.II, Trichy and set aside the order passed on 01.08.2013.

For Appellant : Ms.B.Tamil Nidhi
For Respondent : Mr.K.Muthumalai

JUDGMENT

This appeal has been filed to set aside the judgment of acquittal passed in C.C.No.47 of 2006 dated 01.08.2013 on the file of the learned Judicial Magistrate No.II, Trichy.

2.The case of the prosecution is that the respondent/accused borrowed a sum of Rs.2,50,000/- on 18.07.2004 for the family expenses and in order to discharge her legal liability, the respondent/accused issued a cheque dated 10.08.2005 bearing No.358104 for a sum of Rs.2,50,000/- drawn in Indian Overseas Bank, Sathanur Branch, Trichy. The appellant presented the cheque for collection through Indian Bank, Sundar Nagar Branch on 14.10.2005 but the said cheque was returned unpaid with an endorsement 'funds insufficient' on 15.10.2005 with return memo dated 14.10.2005. Thereafter, the appellant issued legal notice dated 19.10.2005 to the respondent/accused through RPAD and the same was received by the accused on 21.10.2005. After the receipt of the notice, the respondent neither repaid the amount nor send the reply. Thereby, the appellant/complainant filed a private complaint under Section 138 of Negotiable Instruments Act. The trial Court has taken cognizance for the offence under Sections 138 of Negotiable Instruments Act and issued summons and on summons, the respondent/accused appeared before the trial Court. The trial Court framed charges for the offences under Section 138 of Negotiable Instruments Act. After framing charges, the charges were read over and explained to the accused but the accused denied the charges.

3.The appellant had himself examined P.W.1 and marked Exs.P.1 to P.6 and on the side of the accused, he has examined himself as D.W.1 and marked

Exs.D.1 & D.2. After examination of witness, the accused was examined under Section 313(1)(b) of Cr.P.C., with regard to incriminating circumstances found in the prosecution evidences. The accused denied the evidences.

4.Upon perusing the oral and documentary evidence, the trial Court acquitted the respondent/accused from the charges under Section 138 of Negotiable Instruments Act. Aggrieved by the acquittal judgment, this appeal has been filed on the following grounds:-

The judgment of the trial Court is against law and weight of evidence and other probabilities of the case. The learned Judge failed to apply his mind to the evidence adduced by the appellant and accused before the trial Court. The learned Judge has passed the judgment only on presumption and not based on evidence adduced before him. The learned Judge has acquitted the respondent on two grounds viz., first, that the respondent/accused is working as a home maid and how the appellant relied on her to repay the cheque amount and secondly the learned Judge doubted the capacity of the appellant/complainant to loan a huge amount of Rs. 2,50,000/- the accused the learned Judge has come to the above conclusion without any material available before him. The learned Judge has passed the judgment out on surminses and conjectures and not based on the evidence available before him. Neither P.W.1 nor D.W.1 has stated that the respondent/complainant as a house maid but strangely the learned Judge has concluded that the respondent/complainant is a house maid. The learned Judge was wrong in coming to a conclusion that the appellant/complainant was not having capacity to loan Rs.2,50,000/- to the respondent/accused.

5.The learned counsel appearing for the appellant would contend that the respondent/accused borrowed a sum of Rs.2,50,000/- from the appellant/complainant. In order to discharge the said loan, she issued a cheque dated 10.08.2005 for a sum of Rs.2,50,000/- drawn in Indian Oversesas Bank, Sathanur, Trichy. When the same was presented for collection, it was returned as 'insufficient funds'. Thereafter, the appellant/complainant issued a statutory notice and the same was received by the respondent/accused. But no reply was sent and not paid the cheque amount. Thereby, she filed a complaint before the trial Court and the trial Court examined the appellant as P.W.1 and marked Ex.P1 to Ex.P6. The appellant/complainant categorically deposed about the borrowal of the amount and the rate of interest and cheque returned as 'insufficient fund' and thereafter, the notice was sent to the accused. But he failed to repay the same and also not sent the reply. The appellant has discharged the burden and presumption under Section 139 of Negotiable Instruments Act is in favour of the appellant. The respondent also admitted the signature found in the cheque but defence theory is that he respondent already borrowed a sum of Rs.30,000/- and the same was repaid. The trial Court failed to consider the aforesaid evidence and documents and believed the defence theory and erroneously acquitted the accused. Therefore, the judgment of the trial Court is liable to be set aside by allowing this appeal.

6.The learned counsel appearing for the respondent would contend that the appellant has filed the cheque case against the respondent/accused but already the respondent/accused gave a complaint before the Police as against the appellant for charging of exorbitant interest and FIR also registered in Crime No.429 of 2005. In fact the respondent/accused already borrowed a sum of Rs.30,000/- from the appellant/complainant and for that amount, she charged exorbitant interest and thereby, the respondent/accused gave the complaint. Further the complainant herself has not proved her source of income. The cheque was given for the aforesaid amount of Rs.30,000/- borrowed by the respondent/accused as a security and the same was misused by the appellant/complainant. The appellant/complainant has not proved the foundational facts with regard to the commission of offence. In order to invoke presumption under Section 139 of Negotiable Instruments Act, the initial burden is on the appellant/complainant to find the foundational facts. She failed to prove the foundational facts. Thereby, the trial Court has elaborately discussed about the aspects and correctly acquitted the accused. Therefore, the present appeal is liable to be dismissed.

7.To support of his contention, he relied upon the judgment of this Court in the case of ***V.Ezhilvanan v. R.Pugazhendhi*** reported in ***2023 (2) MWN (Cr.) DCC 20 (Mad.)***.

8.Upon hearing both sides and perusing the records and grounds, the points for determination in this appeal is whether the complainant has proved the charges against the respondent under Section 138 of Negotiable Instruments Act in accordance with law and the judgment and conviction passed by the trial Court are sustainable or not.

Point:-

9.The case of the appellant/complainant is that the respondent/accused borrowed a sum of Rs.2,50,000/- on 18.07.2004 and to discharge the said loan, she issued a cheque for a sum of Rs.2,50,000/- drawn Indian Overseas Bank, Sathanur Branch, Trichy. When the cheque was presented for collection, the cheque was returned as 'insufficient funds'. Thereafter, she issued notice and the same was received by the accused on 19.10.2005. Thereafter, the respondent/accused neither repaid the amount nor sent reply. Thereafter, she filed a complaint.

10.The respondent's contention is that she already borrowed a sum of Rs. 30,000/- from the appellant/complainant and for that she issued cheque leaves for security purpose and she already gave a complaint before the jurisdictional police station for charging exorbitant interest as against the appellant/complainant. Therefore, she denied that the cheque was not issued to discharge the legal liability. On the side of the appellant/complainant, she herself examined as P.W.1 and she deposed that the respondent/accused borrowed a sum of Rs.2,50,000/- from her and issued cheque and the same was presented for collection, which was returned as 'insufficient funds'. Then she issued notice and after receipt of notice, the respondent/accused has not repaid the amount nor sent the reply.

11.The same P.W.1 during her cross examination stated that the respondent/accused is not her relative and the respondent/accused is not known to her directly and she has no income and her husband also doing repair works of refrigerator and working on a commission basis. While so, the appellant/complainant has not proved her source of income to pay a huge amount of Rs.2,50,000/-. Further P.W.1 in her cross examination stated that she had given the aforesaid amount to the respondent/accused from the money given by her father. In this context, during cross examination, she stated that her father died in the year 2009 and she got married in the year 2000. While so, the aforesaid amount was alleged to be given in the year 2005. Therefore, the aforesaid version of P.W.1 that the amount given in the year 2000 was kept with her upto year 2005 is unacceptable.

12.Further P.W.1 in her cross examination stated that the interest was fixed as 1%. But cheque was only for the principal amount and no reference about the interest. Further P.W.1 herself admitted that already the respondent/accused had given a complaint and based on the complaint, Crime No. 429 of 2005 was registered against her in respect of money dispute. Further at the time of cross examination, the learned counsel appearing for the respondent/accused suggested the question to the P.W.1 that the respondent/accused borrowed a sum of Rs.30,000/- from the appellant/complainant, for that, she gave promissory note and two cheque leaves and property document in the name of her father. But D.W.1 in her chief examination has not stated anything about the same. However, the appellant/complainant has to prove the case and initial burden is on the side of the appellant/complainant to prove the foundational facts.

13.In this context, the learned counsel appearing for the respondent has relied on the judgment of this Court in the case of ***V.Ezhilvanan v. R.Pugazhendhi*** reported in ***2023 (2) MWN (Cr.) DCC 20 (Mad.)***, wherein this Court in para nos.9

and 13 held as follows:-

"9. The principle of law is now well settled. Before drawing statutory presumption under Section 139 of the Negotiable Instruments Act, 1881, the Court should satisfy whether the complainant has placed details about the foundational fact and evidence to prove it. The foundational facts are the proximity between the parties, the nature of transaction leading to liability and the subject cheque given to discharge that liability. If the complainant prima facie satisfy the Court providing the above details either in the notice or in the complaint or through documentary evidence, the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881 should be drawn. In the absence of material to substantiate the foundational fact, presumption under Section 139 of the Negotiable Instruments Act, 1881 cannot be drawn merely because the signature found in the cheque is that of the accused.

13. The Omission to reply to the statutory notice or the agreement to settle the dispute pending appeal cannot be taken adverse to the accused. Whether to reply to the notice or to the suggesting settlement are the prerogative of the persons accused of any offence. The responsibility of the complainant under Section 138 of the Negotiable Instruments Act,1881 to prove the foundational facts cannot be shifted for these reasons. The Court shall exercise its discretion of drawing the presumption, if the necessary foundational facts are proved. Without proof of foundational fact, the Court cannot draw presumption contemplated under Section 139 of the Negotiable Instruments Act, 1881."

14.On careful reading of the aforesaid judgment, it is clear that before drawing statutory presumption under Section 139 of the Negotiable Instruments Act, 1881, the Court should satisfy whether the complainant has placed details about the foundational fact and evidence to prove it. The foundational facts are the proximity between the parties, the nature of transaction leading to liability and the subject cheque given to discharge the liability. In the case on hand also, P.W.1 has not stated anything about the proximity between the appellant and the respondent and also failed to prove the source of income. Therefore, in order to draw the statutory presumption under Section 139 of Negotiable Instruments Act, the appellant has not proved the foundational facts with regard to proximity between the parties and the transaction. Therefore, as discussed supra and in view of the aforesaid judgment, this Court is of the opinion that the respondent/complainant has not proved the case and the trial Court also in its judgment elaborately discussed about all the aspects and correctly dismissed the complaint and acquitted the accused. Therefore, there is no infirmity found in the judgment of the trial Court and thereby, this Court has no warrant to interfere with the judgment of the trial Court. Hence, the appeal has no merits and deserves to be dismissed.

15.In the result, the Criminal Appeal is dismissed and the judgment of acquittal passed by the learned Judicial Magistrate No.II, Trichy in C.C.No.47 of 2006 on 01.08.2013 is confirmed.

27.09.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
Mrn
To

1.The Judicial Magistrate No.II, Trichy.

P.DHANABAL, J.

Mrn

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