IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2024

CORAM

THE HONOURABLE MRS. JUSTICE **R. HEMALATHA**

Crl.A.No.12 of 2016

M.Venkatesan ... Appellant

Vs.

A.Gulzar Ahamed ... Respondent

Prayer : Criminal Appeal filed under Section 378 of Criminal Procedure Code 1973 against the judgement and orders dated 22.03.2013 passed in C.C.No.76/2011 by the learned Judicial Magistrate, (Fast Track Court), Vellore.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.R.Surya Prakash
Legal Aid Counsel

JUDGMENT

Challenging the order of acquittal dated 22.03.2013 passed in C.C.No.76/2011 by the learned Judicial Magistrate, (Fast Track Court), Vellore, the present appeal is filed by the appellant / complainant.

2. For the sake of convenience the parties are referred to as per their ranking in the trial court and at appropriate places, their ranks in the present appeal would also be indicated.

3. The case of the appellant / complainant in a nutshell is as follows :

3.1. The respondent / accused borrowed a sum of Rs.1,50,000/- from the complainant on 17.05.2005 for his business purpose and executed a promissory note (Ex.P6) promising to repay the principal together with interest @ 24% per annum.

3.2. In order to liquidate the said loan amount, the accused issued a cheque bearing number 328290 dated 12.09.2006 (Ex.P1) for a sum of Rs.95,000/- drawn on Canara Bank, Vellore Branch, in favour of the complainant.

3.3. When the complainant presented the cheque for collection on 27.12.2006 through his bankers, viz., Andhra Bank, Vellore Branch, the same was returned on 03.01.2007 for the reason “Funds Insufficient”, as is seen from the cheque Return Memo dated 28.12.2006 (Ex.P2).

3.4. Thereafter, the complainant issued a statutory notice dated 23.01.2007 (Ex.P3) to the accused calling upon him to pay the amount due under the cheque within 15 days from the date of receipt of the notice.

3.5. The accused received the statutory notice on 25.01.2007, as is evidenced by the postal acknowledgement card (Ex.P4) and sent a reply notice dated 09.03.2007 (Ex.P5), which according to the complainant contained false allegations.

3.6. Therefore, the complainant filed a private complaint before the Judicial Magistrate, (Fast Track Court), Vellore, under Section 200 Cr.P.C. against the respondent / accused for the offence punishable under Section 138 of Negotiable Instruments Act (in short N.I. Act) in C.C.No.76/2011.

3.7. The learned Judicial Magistrate took cognizance of the offence under Section 138 of N.I. Act and issued summons to the accused under Section 204 Cr.P.C.

3.8. On the appearance of the accused, the copies of records were furnished to him under Section 207 Cr.P.C. The substance of accusation made in the complaint was put to the accused and since he pleaded not guilty, the case was posted for trial.

3.9. On the side of the complainant, the complainant examined himself and one another witness and marked Ex.P1 to Ex.P6.

3.10. When the accused was questioned under Section 313 of Cr.P.C., with regard to the incriminating circumstances appearing in evidence against him, he denied of having committed any offence. He examined four witnesses and marked Ex.D1 to Ex.D4.

3.11. The learned trial court judge after analysing the oral and documentary evidence on record acquitted the accused under Section 255(1) Cr.P.C. for the offence punishable under Section 138 of N.I. Act vide his judgment and orders dated 22.03.2013.

3.12. Thereafter, the accused filed an appeal in C.A.No.38/2013 before the Principal District and Sessions Court, Vellore. The learned Principal District and Sessions Judge, Vellore, dismissed the said appeal with a liberty to file an appeal before the proper forum by observing thus:

> *"Complainant can challenge the order of acquittal only by filing application for special leave in High court and not in Sessions Court - Once a case instituted on complaint, whether offence be bailable or non-bailable, cognizable or non-cognizable and order of acquittal is passed, complainant can file appeal only U/s. 378(4) before High Court."*

Now the present criminal appeal is filed by the complainant.

4. Heard Mr.E.Kannadasan, learned counsel for the appellant / complainant and Mr.R.Surya Prakash, learned Legal Aid Counsel for the respondent / accused.

5. In the instant case, the accused had not denied his signature on the cheque (Ex.P1). Once the signature is admitted, there is a presumption under Sections 118 and 139 of the Negotiable Instruments Act unless the contrary is proved. The accused in his reply notice dated 09.03.2007 (Ex.P5) had stated that he borrowed a sum of Rs.15,000/-

during 2003 and had issued three cheques for a sum of Rs.5,000/- each drawn on ICICI Bank, Vellore Branch. According to him, he repaid the entire amount of Rs.15,000/- with interest during December 2003. However, the complainant had added number 9 before Rs.5,000/- and had issued the statutory notice, as if, the accused has to pay a sum of Rs.95,000/- to him. His another contention in his reply notice was that the cheque (Ex.P1) was issued only as a security for the loan amount obtained by him during 2003.

6. The trial court judge had observed that when the accused had taken a defence that the cheque was issued only as a security for the loan amount obtained by him during 2003 the complainant has to prove his case to the hilt and observed thus :

> "............................
> *So, the complainant has not stated the source of income to arrive such huge amount to lend to the accused. The accused denied the borrowal of amount in his reply notice which the defence taken by the accused to rebut the presumptions raised by the complainant side. The onus of proof has shifted upon the*

complainant to prove that the borrowal amount as well as to the consideration passed in the transaction. No such evidence was let by the complainant to prove such huge amount has been arranged to lend to the accused. So, the complainant has filed to prove that the cheque was drawn to discharge of the particular debt or liability. The complainant also admitted in his evidence that he has not relied and he has not averred with regard to the promissory note executed by the accused in the statutory notice. What the averment stated in the complaint has not insisted and incorporated in the statutory notice. The omission to demand the contents in the statutory notice amounts to non-existence of facts on the side of the complainant which creates doubt over on such aspects. If at all such promissory note being in existence that will be definitely stated in the statutory notice. The non-compliance of the facts in the statutory notice issued by the complainant against the accused will not survive to file a case against the accused u/s. 138 of Negotiable Instruments Act. So, failure on the part of stating such averment in the statutory notice will defeat the basic principles of law enshrined in the provision of section 138 of Negotiable Instruments Act. So, the complaint has not attracted under Section 138 of Negotiable Instruments Act. The complainant miserably failed to establish the legally enforceable debt or liability to be discharged by the *accused in this case."*

7. When the accused had not denied his signature on the cheque (Ex.P1) the presumption under Sections 118 and 139 of the Act is in favour of the complainant. On the contrary, the trial court judge had observed that the complainant had not proved his source of income to lend a huge sum of Rs.95,000/- to the accused. In fact in the reply notice (Ex.P5) the accused had not questioned the financial capacity of the complainant. Therefore, the above observations of the trial court judge are totally erroneous and perverse.

8. The accused had relied on the complaint dated 12.09.2006 allegedly given by the father of the complainant against the complainant. In the said complaint, it is alleged that the complainant is doing money lending business and used to obtain unfilled blank promissory notes from the borrowers. Though the challan issued by the police was marked as Ex.D4, the said complaint has not been pursued by the complainant's father. However, the complaint (Ex.D4) dated 12.09.2009 is totally not relevant to the present case and it is

incomprehensible as to what the accused wants to prove by filing this complaint. Moreover, the accused did not also get into the box to prove his various contentions in his reply notice (Ex.P5). The trial court had gone wrong in deciding the case against the complainant and the same warrants interference by this Court.

9. In the result,

i. This Criminal Appeal is allowed.

ii. The judgment and orders dated 22.03.2013 passed in C.C.No.76/2011 by the learned Judicial Magistrate, (Fast Track Court), Vellore, is set aside.

iii. The accused is found guilty of the offence under Section 138 of N.I. Act and is convicted and sentenced as detailed hereunder :

Conviction	***Sentence***
138 of N.I. Act	Simple imprisonment for a period of one year and to pay a sum of Rs.95,000/- towards compensation to the complainant under Section 357(3) Cr.P.C. in default, to undergo simple imprisonment for

Conviction	***Sentence***
	four weeks.

iv. The accused shall surrender before the learned Judicial Magistrate, (Fast Track Court), Vellore, within 15 days from the date of receipt of a copy of this order / uploading of the order, failing which, the Trial Court shall take steps to secure the presence of the accused for serving the period of sentence.

v. This Court places on record its appreciation to Mr.R.Surya Prakash, learned Legal Aid counsel, for his valuable assistance in deciding this case. The Legal Services Committee is directed to pay a sum of Rs.10,000/- to the said counsel towards his fee.

19.06.2024

Index: Yes/No
Internet: Yes/No

Speaking/Non-Speaking order
mtl

Copy to :
The Secretary,
High Court Legal Services Committee,
High Court Campus, Chennai - 104.

To

1.The Judicial Magistrate, (Fast Track Court), Vellore.

2.The Principal District and Sessions Court, Vellore.

3.Public Prosecutor, High Court, Madras.

4.The Section Officer, Criminal Section, Madras High Court, Chennai.

R. HEMALATHA, J.

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