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CrI.A.No.345 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2024

CORAM

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

CrI.A.No.345 of 2020

N.K.Palanisamy

... Appellant

vs

M.Pradeep Kumar

... Respondent

Prayer: Criminal Appeal filed under Section 378 of Criminal Procedure Code, to set aside the judgment of acquittal dated 28.07.2020 made in C.C.No.428 of 2011, on the file of the Judicial Magistrate, Fast Track Court No.1, Coimbatore.

For Appellant : Mr.B.R.Shankaralingam

For Respondent : Mr.J.Jayan
for Mr.P.Saravana Sowmiyan

JUDGMENT

Aggrieved by the order of acquittal passed in C.C.No.428 of 2011 dated 28.07.2020 on the file of the Judicial Magistrate, Fast Track Court No.1, Coimbatore, the complainant herein has preferred this criminal appeal.

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2. The case of the complainant in brief is given hereunder:-

The accused borrowed a total amount of Rs.7,00,000/- on various dates from the complainant for his urgent building construction works. On 10.06.2010, the accused executed a Demand Promissory Note in favour of the complainant for Rs.7,00,000/- and agreed to repay the said principal amount together with interest @ 24% p.a. on demand. On repeated demand made by the complainant, the accused did not re-pay any amount to the complainant either towards the principal or towards the interest. On persistent demand, the accused finally issued a cheque bearing No.130527 dated 09.09.2010 for an amount of Rs.7,00,000/- towards the principal amount and the above said cheque was drawn on ICICI Bank, Ramnagar Branch, Coimbatore in favour of the complainant. Based on the assurance given by the accused, complainant presented the cheque for encashment with his banker-Indian Overseas Bank, Edayarpalayam Branch, Coimbatore on 15.09.2010. The said cheque was dishonoured with a return memorandum on the same day with an endorsement “insufficient funds”. The complainant caused to issue statutory notice to the accused calling upon the accused to settle the amount due under the dishonoured cheque on 11.10.2010. He responded to the notice by



sending a reply notice on 22.10.2010 with frivolous details. As he had without arranging sufficient funds in his bank account to honour the cheque, issued to the complainant, amounts to fraud and the amount still remains unpaid. These acts amount to offence under Section 138 of Negotiable Instruments Act, 1881.

3. The defence set up by the respondent is that through reply notice Ex.P.7, borrowal of Rs.7,00,000/- from the complainant and the execution of Demand Promissory Note dated 10.06.2010 was denied. The complainant who is a building contractor was engaged to construct a house of the accused. While the construction was going on, the complainant left the building unfinished and on compulsion the accused issued four cheques ICICI Bank cheque bearing Nos.130527, 133882, 132635 & 133890. Though the accused negotiated with the complainant to return back the bank cheque, he did not do so.

4. Mr.B.R.Sankaralingam, learned counsel appearing for the appellant/complainant strenuously argued that once the accused has admitted



the signature in Ex.P2 - cheque presumption under Section 139 of Negotiable Instruments Act arise in favour of complainant. This presumption was not rebutted suitably by the accused. It is further contended that in order to prove the source of money, complainant has marked Ex.P.9 sale deed, through which he sold the property and got money. Therefore, the trial Court misconceived the facts and his complaint was dismissed and pleaded to allow this appeal.

5. Per contra, Mr.J.Jagan for Mr.P.Saravana Sowmiyan, learned counsel appearing for the respondent vehemently contended that originally the complainant was engaged to construct a house of the accused and in half way he left the work. In Ex.P7 reply notice itself the accused has denied the issuance of Ex.P1 Promisory Note and the four cheques bearing Nos.130527, 133882, 132635 & 133890 of the accused were forceably taken by the complainant is the say of the accused. It is his further argument that the presumption arise under Section 139 of Negotiable Instruments Act was rebutted by the accused through the cross examination of PW1 and by examining himself and one Balaraman. He would further contend that the accused at the first instance responded to the legal notice of the complainant



by issuing reply notice. Therefore, the complainant has not proved the reversal burden placed on him.

6. At the trial to prove the complaint contents, the complainant has examined himself and nine documents were marked. On the defence side one Balaraman and the accused were examined and 11 documents were marked.

7. It is the evidence of PW1 / Palanisamy / complainant that the accused borrowed a total amount of Rs.7 lakhs on various dates for his urgent building construction works and for the said sum he executed a Demand Promissory Note on 10.06.2010 and agreed to repay the said principle amount together with interest @ 24% p.a. on demand.

8. One Balaraman sand supplier was examined as DW1. It is his evidence that he used to supply sand to the complainant and whenever he supplies sand to the complainant for construction purpose, the complainant used to give him cheque. At the later point of time Palanisamy would pay the amount for the sand supplied and he would receive back the cheque.



9. During the cross examination of DW1 he has stated that he does not know the accused, then after answering few questions he has accepted that at the request of the accused Pratheep he has deposed in the said case.

10. The accused has examined himself as DW2. It is the evidence of DW2 that he did not execute Ex.P1 pronote. As per the reply notice issued by the accused, the cheque Ex.P2 was forceably taken from him.

11. On the complainant side totally nine documents were marked. Ex.P.1 is the Promissory Note dated 10.06.2010 said to have been executed by the accused in favour of the complainant for an amount of Rs.7 lakhs. Ex.P2 is the cheque issued by the accused for an amount of Rs.7 lakhs. Ex.P3 is the return memorandum with an endorsement as “in sufficient funds”. Ex.P5 is the copy of legal notice issued by the complainant to the accused. Ex.P7 is the reply notice issued by the accused. Ex.P8 is the Promissory Note dated 19.05.2009 said to have been executed by the accused in favour of the complainant. Ex.P9 is the sale deed (down loaded copy dated 27.08.2008) executed by the complainant to show that he has got source of money.



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12. Ex.P2 Cheque No.130527, was drawn on ICICI Bank, Ramnagar Branch, Coimbatore. From the evidence of both sides, it is known that the complainant is a building contractor, constructed house of the accused and he did not complete the construction. During the said period, the promissory note and the cheques appeared to have been executed / drawn. In Ex.P.8 Promissory Note, the accused has made an endorsement to the effect that on 12.07.2010 he has totally paid Rs.44,000/- for the principal amount.

13. In the reply notice, the accused has made a mention in his reply notice about re-payment without quantifying the said amount. During the cross examination of PW1 when he was questioned to the effect that whether the accused has paid some amount towards Ex.P8 Promissory note, he has answered in positive.

14. Contrary to the said facts, the complainant has mentioned in his petition that on various occasions he had lent money to the accused on various dates and the total amount borrowed is Rs.7,00,000/-. During the cross examination of PW1, contrary to the said pleadings he has stated that on 10.06.2010 he gave money to the accused in cash and when he was posed



a question about the details of denomination, he has answered that Rs.1000/- (4 bundles) and Rs.500/- (6 bundles). On what basis and under what circumstances the amount was given is not clearly mentioned in the complaint and totally contra to the pleadings of the complaint, he has answered during cross examination. The case of the complainant is that Ex.P2 Cheque was given to the complainant by the accused on the date of Ex.P8. The complainant has totally failed to put forth the facts based on the details found in Ex.P8. The fact that the accused has repaid a part of loan to the tune of Rs.44,000/- as on 12.07.2010 is also not whispered either in the notice or in the complaint.

In order to prove the offence punishable under Section 138 of Negotiable Instruments Act five ingredients shall be proved as laid down by the Hon'ble Supreme Court of India in the case of ***Kusum Ignotes and Alloys Ltd., Vs Pennar Peterson Securities Ltd.***, reported in (2000) 2 SCC 745.

The said ingredients are extracted as hereunder:-

- (i) A person must have drawn a cheque on an account maintained by him in a Bank for payment of certain amount of money to another person from out of that account for the discharge



of any legally enforceable debt or other liability.

(ii) that cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the Bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the Bank

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of the information by him from the Bank regarding return of the cheque as unpaid.

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 30 days of the receipt of such notice.

15. On a careful perusal of the legal notice Ex.P5 and the details of complaint, the proof affidavit of PW1 different details have been given. As mentioned supra, Ex.P2 Cheque No.130527 is mentioned in Ex.P8 Promissory Note dated 19.05.2009. Part payment made is not mentioned in the legal notice/complaint. Ex.P8 Promissory note is not found in Ex.P5



statutory notice and in the complaint, which is very fatal to the case of the complainant. In order to have more clarity the omissions of the complainant are listed as hereunder:-

1. Endorsement of part payment made in Ex.P8 Promissory Note dated 19.05.2009 and these details are not mentioned in Ex.P5 legal notice.

2. In the notice Ex.P5 it is mentioned that the accused borrowed an amount of Rs.7,00,000/- from him on various dates for urgent building construction works and executed a demand promissory note for Rs.7,00,000/- , agreed to repay the said principal amount with interest @ 24 p.a. and as the accused did not choose to pay the said loan, accused issued a cheque for the said sum on 09.09.2010 (Ex.P2)

3. When Ex.P1 Cheque number is found in Ex.P8 Promissory Note dated 19.05.2009 he has put forth totally a different version which is not acceptable in law.

16. The consistent case of the complainant is that on various dates he gave loan to the accused totally Rs.7,00,000/- and on 10.06.2010 he issued a demand Promissory Note for Rs.7,00,000/-. Contra to the said pleadings during the cross examination of PW1 he has stated that he gave cash to the



accused.

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17. More so, how come the total amount due of Rs.7,00,000/- was arrived at was not explained either in the notice or in the complaint. When the accused has repaid the some amount towards debt as per Ex.P8 Promissory note which is also admitted by PW1. Without accounting for the same, the complaint was filed is totally not acceptable. Therefore, as per the ingredients enumerated under Section 138 of the Negotiable Instruments Act, the complainant has utterly failed to establish that what is the total debt due or other liability of the accused. In the absence of said details, his complaint cannot be enforced under Section 138 of the said Act. Therefore, the case put forth by the complainant falls on the ground on account of the above said omissions.

18. Based on the aforesaid discussions, this Criminal Appeal stands dismissed.

19. In the result, the judgment and decree passed by the trial Court in C.C.No.228 of 2011 dated 28.07.2020 stands confirmed.



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Index: Yes/No
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To

1. The Judicial Magistrate,
Fast Track Court No.1 @ Magisterial Level,
Coimbatore.

R. KALAIMATHI, J.
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