



WEB COPY



Crl.O.P.No.21087 of 2024

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in
Crl.A.SR.No.43324 of 2024

M.NIRMAL KUMAR, J.

This petition has been filed seeking to grant special leave to appellant herein to file an appeal against the order of the Court of Metropolitan Magistrate (FTC-II), Allikulam Complex, Chennai in STC.No.10535 of 2022 dated 25.06.2024.

2. The petitioner/complainant has filed a private complaint against the respondent. During the trial, the petitioner himself examined as PW1 and marked Exs.P1 to P9, on the side of the defendant, the defendant examined himself as DW1 and no exhibits were marked. The Trial Court dismissed the complaint on 25.06.2024, against which the present leave appeal.

3. The contention of the petitioner is that the respondent in discharge of his liability had issued a cheque under Ex.P1 to P5 and all got dishonoured and the petitioner caused statutory notice which was refused by the respondent. Thereafter, following the statutory conditions complaint was filed under Section 138 of NI Act and the Trial Court in its judgment in



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paragraph 8 had come to the conclusion that the presumption is in favour of the petitioner confirming that the signature is not in dispute. The issuance of cheque is not in dispute. But, in paragraph 10, it takes a different view and dismissed the complaint for the reason that the respondent had examined himself as DW1 and he was not cross examined.

4. Taking the evidence of the DW1 to be true is unacceptable and more-so proof affidavit by the defence witness is not acceptable. The Hon'ble Apex Court in the case of *Mandvi Co-operative Bank Ltds., vs. Nimesh B.Thakore* reported in *AIR 2010 SC 1402* has clearly held that the evidence of the defence witness can be done only when the defence witness gets into the box and records his evidence not by filing a proof affidavit. Further, in the DW1 evidence, though he had stated about the repayment of loan by way of depositing in the ATM. There is no details whatsoever has been given. In view of the same, discharge of liability cannot be construed. Further, the petitioner had filed a petition to recall the DW1 under Section 311 CrPC on 06.06.2024, the same has been returned for the reason that the petitioner has been filed without affidavit, which is not a required procedure.



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But any how in obedience to the directions of the Trial Court, the counsel had later filed affidavit on 25.06.2024 and a petition to recall, the same has been dismissed for the reason that on the date of the judgment it has been filed and the judgment has been rendered on 25.06.2024.

5. In view of the above and finding reason and force in the petitioner's submission, this Court is inclined to grant leave. Accordingly, leave is granted.

6. The Registry is directed to number the appeal and post for admission, if it is otherwise in order.

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