BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.10.2024

DELIVERED ON : 13.11.2024

CORAM:

THE HON'BLE MR JUSTICE G.ILANGOVAN

Crl.A.(MD).No.116 of 2018

N.P.Sakthivel ... Appellant/Respondent/Complainant

Vs.

S.Vivekananadan ... Respondent/Appellant/Accused

Prayer: Criminal Appeal has been preferred under Section 372 Cr.P.C., to set aside the Judgment and order of acquittal passed by the learned Principal Sessions Judge, Tiruchirappalli in Criminal Appeal No.31 of 2017, dated 23.08.2017 and confirm the Judgment dated 27.02.2017 passed in S.T.C.No. 156 of 2012 by the learned District Munsif cum Judicial Magistrate, Lalgudi, convicting the respondent for the offences under Section 138 r/w Section 142 of Negotiable Instruments Act.

For Appellant : Mr.VR.Shanmuganathan

For Respondent : Mr.M.Kanaga Sabai for
Mr.J.Alaguram Jothi

J U D G M E N T

This Criminal Appeal has been filed by the appellant to set aside the Judgment and order of acquittal passed by the learned Principal Sessions

Judge, Tiruchirappalli in Criminal Appeal No.31 of 2017, dated 23.08.2017 and confirm the Judgment dated 27.02.2017 passed in S.T.C.No.156 of 2012 by the learned District Munsif cum Judicial Magistrate, Lalgudi, convicting the respondent for the offences under Section 138 r/w Section 142 of Negotiable Instruments Act.

2.The facts in brief:

The accused and the complainant were known to each other for about 15 years. On 22.12.2011, the accused borrowed a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) as hand loan promising to return the same within a month. On the date of borrowal itself, he issued post dated cheque, dated 20.01.2012, with request him to present the same on the date mentioned in the cheque. Cheque was presented for payment on 20.01.2012 through Indian Overseas Bank, Lalgudi. On 23.01.2012, it was returned due to insufficient funds. Therefore, after completing the statutory formalities this private complaint has been filed.

3.To substantiate the case, the complainant himself was examined as PW1 before the trial Court and 5 documents were marked. On the side of the respondent none was examined and no documents were marked.

4.At the conclusion of the trial, the trial Court came to the conclusion that the guilt of the accused was proved beyond all reasonable doubt and accordingly, convicted the accused and sentenced him to undergo 9 months simple imprisonment and ordered to pay Rs.10,00,000/- as compensation amount to the petitioner within a period of two months from the date of judgment. Failing which 3 months simple imprisonment was imposed.

5.Against which, appeal was preferred in Crl.A.No.31 of 2017, before the appellate Court namely the Principal District Judge, Tiruchirappalli. It differed from the finding recorded by the trial Court and found that the guilt of the accused was not proved beyond all reasonable doubt and accordingly, conviction and sentence were set aside and accused was acquitted. Against which, this appeal is preferred by the complainant.

6.It is a case of reversal. So we will straight away go to the judgment of the trial Court. On the side of the accused, the transaction itself was denied and disputed. It is stated that the complainant some have managed to obtain or secure the deposited cheque and foisted the case. Apart from that it is contended that cheque was alleged to have been issued on behalf of the partnership firm called “Nallaponni Enterprises”. The partnership firm is not added as a party. The third contention on the part of the accused is that the statutory notice was not properly served upon him.

7.Since because the accused admitted the signature in the disputed cheque, the trial Court recorded a finding that the presumption under Section 139 of the Negotiable Instruments Act is available and accused has not rebutted the presumption successfully. The capacity of the complainant to pay the money was not negatived. Regarding the omission to add the partnership firm, on the basis of the Judgment of the Honourable Supreme Court in the case of ***Mainuddin Abdul Satta Shaikh Vs. Vijay D.Salvi*** reported in ***2015-2-L.W. (Crl.) 771 SC,*** it recorded a finding that it does not affect the case of the prosecution. Regarding non service of statutory notice, it recorded a finding that since notice was properly stamped and sent through registered post to the ordinary residence of the accused deemed service of notice as per the Section 27 of the General Clauses Act was drawn. So felt to be proper. Regarding the incapacity, it was concluded that it was not properly established.

8.Now coming to the judgment of the appellate Court, it recorded a finding that the complainant not even having knowledge about the correct name of the accused. Complaint was filed by mentioning the name of the accused wrongly. Later it was amended. So this itself created doubt in the minds of the appellate Court. Regarding the issue of the partnership Firm, it recorded a finding that no plea was raised by the complainant as to the date on which, the accused issued the cheque in the individual capacity. Apart from that the capacity of the complainant was also doubted. In all those aspects it recorded a finding of fact against the complainant.

9.Now in this case, the learned counsel for the appellant in the light of the above said judgment of the trial court and appellate Court would submit that since the accused has admitted the signature in the disputed cheque, automatically presumption is available; It was correctly drawn by the trial Court. But, the appellate Court failed. The identity of the accused was not disputed by him; Statutory notice was properly sent pre-stamping through registered post with acknowledgment due to the address of the accused. So the deemed service was correctly drawn by the trial Court, but the appellate Court failed; The capacity of the complainant was not disputed by the accused during the course of trial. So according to him, judgment of the appellate Court must be set aside and the trial Court must be restored.

10.Per contra, the learned counsel for the respondent would submit that the date of loan alleged is not properly stated by the complainant in the complaint. Notice was sent to a wrong person by mentioning the name of the accused as 'Vivek' instead of 'Vivekanandan'. The very fact that the correct name of the accused was not known to the complainant, would show that he does not know the accused; To unknown person no one will lend money. In Ex.P1, the accused has signed as a partner of a Firm. No notice was issued to the Firm. Firm is not added as a party and went to the extend of stating that the respondent has not signed in the cheque. Since huge amount is involved, unless the complainant is able to convince the Court that the transaction is valid, no offence will lie and rightly the appellate Court decided the issue.

11.Now we will first take the issue of identity of the accused. As mentioned above, the original complaint was filed by mentioning the respondent's name as 'Vivek'. Later it was amended stating that it is a clerical mistake. The very same mistake has been committed by the complainant in sending the notice mentioning the name of the accused as 'Vivek'. As mentioned above, it is contended by the complainant that there is no identity issue here. But that cannot be taken as a simple issue. A person who has lent a huge amount of Rs.10,00,000/- was not aware of the correct name of the borrower. No doubt Section 27 of the General Clauses Act can be invoked when proper notice was sent to the accused. But as mentioned above, it was sent in the name of 'Vivek' and not 'Vivekandan'. So question of deemed service under Section 27 of the General Clauses Act may not be attracted. When the accused denies the very transaction itself, it is the duty of the appellant herein to satisfactorily bring on record the relevant circumstances.

12.He must clear the first issue with regard to the non adding of the partnership firm. Perusal of Ex.P1 cheque does indicate that the cheque was issued on behalf of one 'Nallaponni Enterprises' by its partner. Now the accused says that he did not sign in the cheque. But as mentioned above, the trial Court has recorded a finding that the accused has not denied the signature in the disputed cheque. We will go to the evidence on that particular aspect as to whether there is any admission the part of the accused. The complainant says that on 22.12.2011, the accused borrowed a sum of Rs.10,00,000/- as hand loan. But, never stated that the amount was borrowed on behalf of partnership firm and never stated that in the capacity of the partnership, in his individual character, he issued the cheque. It was suggested to PW1 that the accused was running a company, because of loss, it was closed. The cheque was taken by some one stealthily and case is foisted. There is no direct question or suggestion to the effect that the accused never signed in the cheque. But, the accused has not chosen to examine himself as a witness. So the accused is not clear in his case namely at the time of cross examination of PW1 that Ex.P1 was not signed by him. Omission on the part of the respondent herein, whether it will amount to admission of signature is the point for consideration. This must be answered in the light of the other circumstances.

13.Now coming to the second issue of non inclusion of partnership Firm. PW1 had stated that at the time of handing over the cheque seal of the partnership Firm was not available. How he is able to say this particular fact is not clear on record. It is the specific case that only the accused brought the cheque filled up at the time of borrowing handed over the same to him. Then how the seal came to be affixed is not explained by him.

14.As mentioned above, it is not the case of the complainant that the cheque was issued on behalf of the partnership firm. So when that is being so, the non adding of the partnership firm itself is fatal to the case.

15.Now coming back to the identity, even father's name is not mentioned in the complaint. So also in that statutory notice. All those things were corrected and amended after filing of the complaint. He admits that at the time of sending notice itself he was aware that the father name of the respondent is Subramanian. But father's name was mentioned in the statutory notice as Bala Subramanian. How all those things happened is not explained by him. In the light of the inconsistent statement made by the complainant before the trail Court, I am of the considered view that the presumption drawn by the trial Court under Section 139 of the Negotiable Instrument Act is absolutely out of place and that was rightly interfered by the appellate Court.

16.In the light of the above said factual position, judgment of this Court made in the case of ***K.P.Murali Vs. M/s.Vitan Departmental Sores Rep. by its Director V.P.Chokkani Rep. by his P.A. Rthiah*** reported in ***2009 1 MLJ (Cri) 181*** has no application at all. Section 27 of the General Clauses Act can be invoked, only conditions mentioned in the Section are satisfied. Here as mentioned above, the name, father's name is wrongly mentioned. So when the basic things are not available in the notice, the appellant cannot take recourse to Section 27 of the General Clauses Act.

17.The next point is the capacity of the appellant to pay such a huge amount. Absolutely, there is no evidence on record to show that the complainant was in possession of such a huge amount on the date of loan. Where from the money was arranged is not explained by him. Moreover, in view of the inconsistent stand taken by the complainant, the non proof of availability of source to lend such a huge amount also assumes importance. The learned counsel for the appellant in this context relied upon the Judgment of this Court in the case of ***M.Vairavan vs. T.M.Selvaraj*** in Crl.A.No.352 of 2009 dated 03.12.2010.

18.No doubt that mere non production of the account books or the source of the complainant may not be fatal. But, in the circumstances of the case it assumes importance. When the accused denies the very transaction itself, it is the duty of the complainant to lay the foundational facts. As mentioned above there is no specific admission on the part of the accused that his signature is available in the disputed cheque. So in the light of the above said factual circumstances, I am of the considered view that the appellate Court has correctly decided the issue reversing the judgment of the trial Court, which requires no interference.

19.Accordingly, this appeal stands dismissed. The Judgment passed by the appellate Court is hereby confirmed.

13.11.2024

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

1.The Principal District and Sessions Judge, Tiruchirappalli.

2.The District Munsif cum Judicial Magistrate, Lalgudi.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

G.ILANGOVAN, J

TM

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