

Sripad Vs. Ramadas M. Shet

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Court : Karnataka Dharwad

Decided On : Jun-02-2014

Judge : K.N. Phaneendra

Appeal No. : Criminal Appeal No. 2689 of 2009

Appellant : Sripad

Respondent : Ramadas M. Shet

Judgement :

(Prayer: This Criminal Appeal Is Filed Under Section 378(4) Of Code Of Criminal Procedure, Praying To Set Aside The Order Dated 11.06.2009 Passed By The J.M.F.C., Honnavar In C.C. No. 77/2006 And Respondent May Be Convicted For The Offence Punishable Under Section 138 Of The Negotiable Instruments Act By Allowing This Appeal With Cost Through Out.)

1. The present appeal is preferred against the Judgment passed by the Principal J.M.F.C., Honnavar in C.C. No. 77/2006 dated 11.06.2009 in acquitting the accused for the offence punishable under Section 138 of Negotiable Instruments Act.

2. Being aggrieved by the said Judgment and Order passed by the Trial Court, the complainant approached this Court seeking indulgence of this Court to reverse the judgment of acquittal and to convict the accused for the offence under Section 38 of Negotiable Instruments Act.

3. The respondent appeared before this Court through his Counsel. I have heard the learned Counsel for the appellant and as well as the respondent.

4. I have gone through the oral and documentary evidence submitted by both the parties before the Trial Court and also the Judgment of the Trial Court. On overall analysis of the entire materials on record, a point that would arise for consideration of this Court is :

"Whether the Appellant has made out any reasonable or substantial ground to interfere with the Judgment of acquittal recorded by the Trial Court" ?

5. The learned Counsel for the appellant strenuously contended that on overall leading of the materials on record including the cross-examination of the complainant and the evidence of the accused it is clearly established that the accused has admitted the transaction between himself and the complainant and the accused has taken up his plea by way of defence that the cheque which was presented by the complainant to the Bank was forged one and the said cheque was forged by his brother's son. The second contention taken up by the accused was that he has repaid the entire amount under the cheque on different dates by way of issuing cheques and also by way of giving cash amount to the wife of the complainant. The last contention taken up by the accused is that there was absolutely no amount due, therefore, he has not replied the legal notice issued by the complainant under Section 138 of N.I. Act.

6. The learned Counsel strenuously contended that these defence taken by the accused have not been proved even by preponderance of probabilities. When such being the case, the initial presumption under Section 113 and 139 of the N.I. Act shall be drawn in favour of the complainant holding that the complainant has proved his case and therefore, the Trial Court ought to have convicted the accused person for the offence under Section 138 of N.I. Act.

7. Per contra, the learned Counsel for the respondent strenuously contended that the accused in fact has admitted that he had previously issued a cheque for Rs.50,000/- and the said cheque was not presented. He has also entered into further transaction and the further transaction has been completely cleared by the

accused by making the payment to the complainant. He further contends that the accused has specifically stated in his evidence that, the cheque was forged one and therefore, it becomes the burden on the part of the complainant to establish that the said cheque was issued by the accused by referring the cheque to the expert in order to prove the signature on the cheque by the accused. When the complainant has not done that the complainant has failed in his case and accordingly, the Trial Court has rightly recorded reasons for acquittal. He further contends that the complainant has not produced any iota of evidence to show that he has such money with him to advance any loan to the accused. He has not produced any income tax returns in order to show that he has money transaction with the accused. Therefore, culminating all the above said circumstances, the Trial Court has rightly acquitted the accused and the said judgment does not call for any interference at the hands of this Court.

8. Having heard the above said arguments, this Court has to see under what circumstances the Court can interfere with the judgment of conviction passed by the Trial Court.

9. It is well known principle of Law as laid down by the Hon'ble Supreme Court in a recent decision giving certain guidelines under what circumstances the Court can interfere with the judgment of acquittals. In a decision between S. Govindaraju Vs. State of Karnataka reported in 2013 (4) AKR 289 at paragraph 15 the Hon'ble Supreme Court has laid down certain principles i.e. to say:

"It is a settled legal proposition that in exceptional circumstances, the appellate Court, for compelling reasons, should not hesitate to reverse a judgment of acquittal passed by the Court below, if the findings so recorded by the Court below are found, to be perverse, i. e. if the conclusions arrived at by the Court below are contrary to the evidence on record, or if the Court's entire approach with respect to dealing with the evidence is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on an erroneous understanding of the law and of the facts of the case: While doing so, the appellate Court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the Court below bolsters such presumption of

innocence".

Bearing in mind the above said principles, now let me consider the materials on record.

10. I have carefully perused the complaint averments and the evidence of the complainant in his examination- in-chief. It is the case of the complainant that the accused has taken a loan of Rs.50,000/- from the complainant and for discharge of the said loan he has issued a cheque in No. 749402 dated 28.02.2005 for a sum of Rs.50,000/-. The said cheque was presented to the Bank and the same was returned with a shara "funds insufficient". There alter, the complainant has issued a notice on 02.04.2005 and thereafter he has given Rs.5,000/- cash and he pleaded for time to pay the remaining amount. Again, the complainant has asked for the remaining amount of Rs.45,000/- and for repayment of the said amount the accused has issued a cheque bearing No. 005342 for a sum of Rs.45,000/- drawn on Honnavara Town Co-Operative Bank, Honnavara Branch dated 15.07.2005 and the same was bounced on the shara that "the account was closed" and the said cheque was returned on 21.07.2005. The complainant has issued a notice on 28.07.2005 but the said notice though served on the accused he has not replied nor he has paid any amount. Therefore, the complaint came to be lodged. The defence has not been disclosed by the accused by means of issuing any reply notice. The parties in fact went on for trial and both have led the evidence. In fact, the complainant has examined himself as PW-i and accused examined himself as DW-1 and also examined two witnesses DWs 2 and 3. The complainant has got marked 8 documents Ex.P1 to P8 and accused also produced 3 documents Ex.D1 to D3. The accused was also examined under Section 313 of Cr.P.C. The Trial Court after analysing the evidence, recorded the judgment of acquittal.

11. It is seen from the records that during the course of examination in chief the complainant has reiterated the averments made in the complaint, has categorically stated the issuance of cheque for Rs.45,000/- in No. 005342 and the bouncing of the said cheque for closing of the account and issuance of notice and non-reply by the accused in his examination-in-chief. The cross- examination portion though lengthily done by the accused, but ultimately it is admitted during the course of

cross-examination at paragraph 5 by way of suggestions that the complainant has given to the accused a sum of Rs.50,000/- by cash but not by way of cheque. In the course of cross-examination at paragraph 6 it is categorically suggested to the complainant that the accused is no way liable to pay any amount to the complainant. The accused has also suggested repayment schedule. It is specifically suggested that the assistant of the accused by name Gangadhar G. Sankolli had been to the house of the accused to give a cheque for Rs. 10,000/- for repayment of the debt. Then the complainant has demanded for cash and thereafter the said Gangadhar G. Sankolli has paid the amount of Rs. 10,000/- by way of cash. It is also suggested that during April 2005 the accused has paid Rs.5,000/- by way of cash. It is also further suggested that even earlier to April 2005 the accused has paid an amount of Rs.30,000/- by way of three cheques of Rs. 10,000/- each and also paid an amount of Rs. 10,000/- by way of cash. Further, it is suggested as on 06.05.2005 an amount of only Rs.5,000/- was due on the part of the accused. The records disclose that the cheque for Rs.45,000/- was issued on 15.07.2005. In view of these suggestions the accused has made it clear that prior to 15.07.2005 itself he has paid the entire amount due under the earlier cheque of Rs.50,000/-. If it had been so, there was no necessity for the accused to issue a cheque for Rs.45,000/- in favour of the complainant. Perhaps that may be the reason the accused has taken up the contention that the cheque was forged by one of his brother's son. But the examination-in-chief of the accused, if it is read in consonance with the cross-examination of the complainant it gives a clear picture that the said allegations of the forgery of the cheque has not been plausibly explained before the Court.

12. The evidence of the accused DW-1 is very shabby in nature. In the examination-in-chief he has categorically denied that he was due in a sum of Rs.50,000/- to the accused, but in the very next sentence he admitted that he has taken some hand loan from the accused and he has discharged the said loan in its entirety. When actually he has taken the said loan, how much amount, when he discharged the said loan has not been categorically and specifically stated in the examination-in-chief itself. The next sentence, in my opinion, clears all the doubts, that the accused has stated that, when the complainant has issued the notice immediately he has discharged the entire amount. That means to say, after

issuance of the notice after the disputed cheque was bounced for Rs.45,000/- it should be understood that the accused discharged the said loan. The question is whether, this discharge of the loan is properly established before the Court at least by means of preponderance of possibility has to be looked into by the Court. It is stated by accused that when he has received the notice on 05.08.2005 he told the complainant that transaction between himself and the complainant was already completed. Therefore, he deposed that he has not issued any reply to the complainant's notice. This aspect clears out the doubt that, only after the issuance of the notice i.e. after bouncing of the cheque issued by the accused according to accused he has discharged the entire loan in favour of the complainant. But in the examination-in-chief itself nothing has been elicited on what dates the amounts have been repaid to the complainant. It is worth to note here, though it is suggested to the complainant that an amount of Rs.45,000/- has been repaid to him i.e. three cheques worth Rs. 10,000/- each and Rs. 10,000/- cash and another Rs.5,000/- cash has been given to the complainant, but suggestions are denied by the complainant as discussed by me above. The accused has not translated the same into evidence in his examination-in-chief and that supporting evidence has not been produced to show that the said amount has been repaid to the complainant. In the course of cross-examination of the accused, it is clear that he has taken up the plea and in one sentence he has stated that his brother's son has forged the cheque for Rs.45,000/-. Atleast when it has come to his notice that the said cheque was bounced, a notice was issued and the same was well within the knowledge. In spite of that he has not taken any action with regard to this, atleast by intimating his Bankers that the said cheque was forged by his brother's son nor he has taken any action against his brother's son. He gives an evasive reply in the course of cross-examination, because the said cheque was forged by one of his brother's son, therefore, due to the close relationship he has not taken any action. That means to say, even he forgoes the offence being committed by his relative even it causes inconvenience to others. Ultimately it is clear that he has not taken any action. Atleast when the notice was issued to the accused by the complainant, he should have replied that he has not issued any such cheque and the said cheque was forged one. Therefore, the said defence taken by the accused has not been probablised by any of the materials on record.

13. One more aspect to be borne in mind that when the cheque was presented by the complainant to his Bankers the same was returned with shara 'account was closed'. It is pertinent to note that the said cheque was not returned with any shara that the specimen signature of the accused does not tally with the signature on the cheque. This also fortifies the case of the complainant that the complainant was innocent of the signature on the said cheque, how the complainant could know that it is forged cheque issued when it is the specific case of the complainant that the said cheque was issued by the accused himself not by any other person. In the course of cross-examination, a new case attempted to be made out by the accused. He has stated that he has only taken an amount of Rs.37,000/- from the complainant and he has returned the same by issuing three cheques for Rs. 10,000/- each and also paying Rs. 10,000/- by cash to the complainant. It is also admitted that even after discharging his loan earlier he has made further transaction with the complainant and he discharged the said loan also. The above evidence in facts supports the case of the complainant. Even admitting for a moment that the previous transaction under the earlier cheque for Rs.50,000/- has been discharged by the accused. But according to his own admission he has made further transaction, perhaps that may be the reason he has issued a cheque for Rs.45,000/-.

14. In this background, the case of the complainant that after issuance of the first cheque for Rs.50,000/- when notice was issued to the accused, the accused has paid an amount of Rs.5,000/- and issued cheque for Rs.45,000/- for the remaining amount has to be accepted and believed in view of the surrounding circumstances of the case. All these factors, in my opinion, has not been properly considered and appreciated by the Trial Court. The Trial Court has culled out certain unimportant factors into its judgment stating that the complainant has not produced any material to show that the complainant has got such an amount of Rs.50,000/- to advance loan to the accused. Secondly, he has not produced any income tax returns and thirdly the complainant has admitted that he has filed several complaints on the basis of the cheque for recovery of the amount. These materials, in my opinion, are totally irrelevant so far as this case is concerned. The Trial Court has not appreciated the evidence on record led by the parties but swayed away by relying upon unimportant and irrelevant materials. Of course, the

non-production of the income tax returns, non- explanation by the complainant as to how in what manner, on what dates he has paid the amount to the accused may have some bearing to the case of the complainant, when there is a denial by the accused with regard to the amount taken by him, issuance of the cheque. Then only all those factors shall be taken into consideration for the purpose of drawing inference in favour of the accused. When there is sufficient material to establish before the Court that the accused has transacted with the complainant, taken the loan and taken up the specific defence that he has repaid the said amount, in my opinion, on the ground that the complainant has not produced any income tax returns, not explained whether he has got such amount to pay to the accused, all these questions becomes totally irrelevant. These factors have not been properly appreciated and considered by the Trial Court.

15. Looking to the above said circumstances, I am of the opinion, the initial presumption under Sections 118 and 139 of Negotiable Instruments Act cannot be said to have been rebutted by the accused. Of course, the accused need not rebut the presumption beyond all reasonable doubt as it is incumbent upon the complainant to prove his case beyond reasonable doubt. Nevertheless, the accused has to place sufficient materials to convince the Court that his case is probablised when it is compared with the case of the complainant. If the accused has failed to establish that his case is proved by means of preponderance of possibility that is to say, probabilities placed by the accused have the capacity to preponder over the case of the complainant then only such materials should be accepted. Mere a distorted version or mere taking up the plea or the defence that he is not liable to pay any amount or he discharged the amount are not sufficient to put back the burden on to the complainant to prove his case beyond reasonable doubt.

16. Under the above said circumstances, I have absolutely no hesitation to hold that the Trial Court has committed a serious error in appreciating the legal aspects and as well as the factual aspects as detailed above, and came to a wrong conclusion. No Court can come to such conclusion on the basis of above said materials on record. The findings recorded by this Court are based on the evidence on record. The Trial Court even not taken any pains to appreciate the

evidence on record in detail to arrive at a proper conclusion.

17. Under the above said circumstances, I am of the opinion, the Trial Court has committed a serious error in acquitting the accused even though sufficient materials are available on record in favour of the complainant and that the accused has not proved his defence by probabilities. Hence, the Judgment of the Trial Court acquitting the accused is liable to be reversed. Hence; I answered the above said point in the Affirmative and proceed to pass the following :

ORDER

The Appeal is hereby allowed. Consequently, the judgment of acquittal recorded by the Trial Court in C.C. No. 77/2006 dated 11th June 2009 is hereby set aside consequently the accused/respondent is convicted for the offence punishable under Section 138 of Negotiable Instruments Act. The accused is sentenced to pay a fine of Rs.75,000/-. In default to undergo simple imprisonment for a period of six months.

Out of the fine amount an amount of Rs.70,000/- shall be paid as compensation to the complainant.

Send a copy of this order to Trial Court for further necessary action to implement this order.

Accordingly, the appeal is disposed of.

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