

G.H. Prabhakara Vs. E. Narayanagowda

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Court : Karnataka

Decided On : Mar-01-2016

Judge : H. Billappa

Appeal No. : Criminal Appeal No. 41 of 2010

Appellant : G.H. Prabhakara

Respondent : E. Narayanagowda

Judgement :

1. This appeal by the appellant-complainant is directed against the judgment and order dated 6.11.2009 passed by the Fast Track Court-V, Madhugiri, in CrI.A.No.81/2008.

2. By the impugned judgment and order, the Appellate Court has set aside the conviction and sentence passed by the Addl. Civil Judge (Jr.Division) and JMFC., Madhugiri in C.C.No.890/2006 and has acquitted the accused i.e., the respondent herein for the offence punishable under section 138 of the Negotiable Instruments Act.

3. Aggrieved by that, the appellant-complainant has filed this appeal.

4. Briefly stated the facts are:

The appellant-complainant filed a private complaint for the offence punishable under section 138 of the N.I. Act. The case of the appellant-complainant was that he is a business man. He used to go to Tumakuru. At that time, the respondent-accused used to meet the appellant. They are good friends. Thereafter, the respondent was transferred to Chilling Centre situated at Hindupura road, Madhugiri. The respondent used to visit the house of the appellant. It is stated, the respondent was doing money lending business and took loan of ₹1,00,000/- from the appellant on 1.1.2006 agreeing to repay the said amount within one month. Thereafter, the respondent postponed repayment of the amount on one or the other pretext. Thereafter, the respondent issued a cheque dated 30.6.2006 bearing No.044332 for repayment of the When the cheque was presented for encashment on 1.7.2006 at Puravara Branch of State Bank of Mysuru, it was returned for want of sufficient funds on 5.7.2006. Thereafter, the appellant issued legal notice dated 15.7.2006 to the respondent both by registered post and also under certificate of posting. The notice sent by RPAD was returned with a shara 'not claimed'. The notice sent under certificate of posting was not returned. In spite of that, the respondent failed to pay the amount. Therefore, the appellant filed a private complaint for the offence punishable under section 138 of the N.I. Act.

5. The parties have led their evidence. The appellant has examined himself as PW-1 and one witness by name Ravi as PW-2 and Exs.PI to P9 have been marked.

6. On behalf of the respondent, the respondent has examined himself as DW-1 and Ex.D.1 has been marked.

7. The Trial Court on appreciation of the evidence on record has held that the respondent is guilty of the offence punishable under section 138 of the N.I. Act and has sentenced the respondent to pay a fine of Rs. 5,000/- and in default of payment of fine, to undergo S.I. for a period of three months. Further, the respondent has been directed to pay compensation of Rs. 1,40,000/- to the appellant and in default of payment of compensation, to undergo S.I. for a period of six months.

8. Aggrieved by that, the respondent-accused has preferred an appeal before the FTC-V, Madhugiri, in CrI,A.No.81/2008. The Fast Track Court by its judgment and order dated 6.11.2009 has set aside the conviction and sentence passed by the Addl. Civil Judge (Jr.Dn.) and JMFC, Madhugiri in C.C.No.890/2006 and has acquitted the respondent-accused for the offence punishable under section 138 of the N.I. Act.

9. Aggrieved by that, the appellant-complainant has filed this appeal.

10. The learned counsel for the appellant- complainant contended that the impugned judgment and order passed by the Appellate Court cannot be sustained in law. He also submitted that the Appellate Court has failed to consider the evidence on record in proper perspective. Further he submitted that the Appellate Court has erred in observing that both the loans were advanced by the appellant and the appellant being an agriculturist could not have advanced so much of money to the respondent- accused. Further he submitted that the Appellate Court has also erred in relying upon Section 269-SS of the Income Tax Act. It has nothing to do with the offence punishable under section 138 of the N.I. Act. In fact, Section 259-S3 of the Income Tax Act provides that a person who takes or accepts the amount must accept it through account payee cheque. It does not in any way bar loan transactions. Further he submitted that the issuance of cheque has been admitted by the respondent. But, the respondent contends that the cheque was issued to one Kaki Mallaiah and not to the appellant. Therefore, the burden was on the respondent to show that the cheque was issued to Kaki Mallaiah and not to the appellant. The respondent has not examined Kaki Mallaiah. When once issuance of cheque has been admitted, there is a legal presumption under Sections 139 and 118 of the N.I. Act. Therefore, the respondent has failed to discharge his burden. Further he submitted that the appellant has sent legal notice to the respondent both through registered post and also under certificate of posting. The notice has been sent to the correct address of the respondent. The respondent has not disputed that he is residing at the address given in the postal covers. In fact, the respondent has admitted that he might have received the notice, but he does not remember the date and after receiving the notice, he has not met Kaki Mallaiah and he has also not replied the

notice. Therefore, it is clear that the notice was served on the respondent. The respondent has not replied the notice. It is only in the course of evidence the respondent has contended that the cheque was issued to one Kaki Mallaiah and not to the appellant. Therefore, the stand taken by the respondent cannot be accepted. When once issuance of cheque is admitted, there is a legal presumption that consideration was passed. In the absence of rebuttal evidence, it must be held that the respondent was liable to pay the amount and he has not paid the amount. Therefore, the impugned judgment and order passed by the Appellate Court cannot be sustained in law. In support of his submission, he placed reliance on the following decisions:

(a) 2007 AIR SCW page 3578(1)

(b) Samarendra Nath Das Vs. Supriyo Maitra disposed of or; 16.12.2015, by the Calcutta High Court.

11. As against this, the learned counsel for the respondent-accused submitted that the impugned judgment and order passed by the Appellate Court does not call for interference. The Appellate Court on proper consideration of the material on record has rightly held that the appellant has failed to prove that he advanced loan to the respondent and the presumption available stands rebutted.

12. Further he submitted that the Appellate Court has relied upon section 269 SS of the Income Tax Act and has held that a loan exceeding Rs. 20,000/- could not have been advanced except by way of account payee cheque. There was no transaction between the appellant and the respondent. The cheque was issued to one Kaki Mallaiah in connection with the loan transaction with him. At the instance of Kaki Mallaiah, the appellant has filed false case. The material on record shows that the appellant had no capacity to advance the loan and there was no loan transaction between the appellant and the respondent. Nothing is produced to show that the appellant was capable of advancing the amount and loan was advanced. Therefore, there is no legally enforceable debt at all.

13. The material on record clearly establishes that the presumption available under Section 139 and 118 of the N.I. Act stands rebutted. Further he submitted

that the appellant herein and the complainant in C.C.Nc.227/2007 are relatives and they belong to the same family. Except the interested version, there is nothing on record to show that the amount was advanced. Further he submitted that the notice sent by registered post and under certificate of posting were not served on the respondent. The certificate of posting is a got up document. Further he submitted that there is no proof of actual lending of the amount. Therefore, there is no legally enforceable debt. Fie also submitted that it is alleged that the cheque was issued in the month of June 2006. The cheque bearing No.44337 was issued to one N.Rudresh and it was encashed on 30.4.2005. Therefore, there is no possibility of issuing the cheque bearing No.044332 in the month of June 2006. Fie also submitted that the evidence of PWs.I and 2 is inconsistent. Further, the accused can establish his defence by adducing his evidence or by the material available on record. In the present case, the accused has examined himself and also elicited answers which support. There is no legally enforceable debt. Therefore, the Appellate Court was justified in reversing the judgment and order passed by the Trial Court. This Court cannot interfere with the judgment and order passed by the Appellate Court unless it is perverse. Therefore, the impugned judgment and order passed by the Appellate Court does not call for interference. In support of his submission, he placed reliance on the decision of the Hon'ble Supreme Court reported in AIR 2010 S.C. page 1898.

14. I have carefully considered the submissions made by the learned counsel for the parties.

15. The point that arises for my consideration is:

Whether the impugned judgment and order passed by the Appellate Court in CrI.A.No.81/2008 calls for interference?

16. It is relevant to note, the appellant has filed private complaint for the offence punishable under section 138 of the N.I. Act.

17. It is the case of the appellant that the respondent had taken loan of Rs. 1,00,000/- on 1.1.2006 agreeing to repay the said amount within one month. Thereafter, the respondent did not repay the amount. Subsequently, the

respondent issued a cheque dated 30.6.2006 bearing No, 044332 for repayment of the amount. When the cheque was presented for encashment, it was returned with an endorsement 'insufficient funds' on 5.7.2006. Thereafter, notice was sent to the respondent both by registered post and also under certificate of posting. In spite of that, the respondent failed to pay the amount. Therefore, it is alleged, the respondent has committed an offence punishable under section 138 of the N.I. Act.

18. The respondent has contended that there was no loan transaction between the appellant and himself. He had borrowed money from one Kaki Mallaiah. Towards the said loan, the cheque was issued. As the relationship between Kaki Mallaiah and the respondent is strained, Kaki Mallaiah has set up the appellant to file a false case.

19. The appellant and the respondent have led their evidence. The Trial Court on appreciation of the evidence on record has held that the appellant has proved the loan transaction between himself and the respondent and Ex.PI cheque was issued towards discharge of said loan. The cheque has been dishonored for want of sufficient funds. The respondent has failed to discharge the burden regarding the presumption available under Section 139 of the N.I. Act. Consequently, the Trial Court has convicted the respondent-accused for the offence punishable under section 138 of the N.I. Act.

20. In the appeal, the Appellate Court has reversed the judgment and order passed by the Trial Court holding that the appellant being an agriculturist, it is not clear, how he arranged Rs. 1,00,000/- to pay to the respondent. Further, the appellant has advanced loan of Rs. 1,50,000/- on 1.3.2006 and has filed another case against the respondent in C.C.No.227/2007. It is not possible to understand as to how on 1.3.2006 the appellant could have advanced the loan without recovering the amount of Rs. 1,00,000/- paid on 1.1.2006. The Appellate Court has also held that the appellant could not have advanced Rs. 1,50,000/- and Rs. 1,00,000/- by way of cash to the respondent. When the appellant has failed to convince that he had paid Rs. 1,50,000/- and further sum of Rs. 1,00,000/- it cannot be said that the respondent had issued two cheques. Therefore, the presumption cannot be raised. Consequently, the Appellate Court has reversed

the judgment and order passed by the Trial Court and acquitted the accused.

21. A careful perusal of the judgment of the Appellate Court shows that the Appellate Court has misdirected itself. The Appellate Court proceeds on the basis that the appellant has advanced loan of Rs. 1,00,000/- in this case and a sum of Rs. 1,50,000/- in C.C.No.227/2007. It is totally incorrect. The appellant contends that he had advanced loan of Rs. 1,00,000/- on 1.1.2006. To discharge the said loan, cheque bearing No.044332 dated 30.6.2006 was issued for a sum Rs. 1,00,000/-. When the cheque was presented for encashment, it was returned with an endorsement 'insufficient funds'. Thereafter, legal notice was sent to the respondent by registered post as well as under certificate of posting as per Exs.P7, P8 and P9. It was contended by the learned counsel for the respondent that no such notice was sent or received by the respondent.

22. I do not find any merit in the contention of the learned counsel for the respondent, for the reason, Ex.P7 shows that notice was sent to the respondent under certificate of posting for the following address;

E. Narayanagowda

S/o.Eregowda,

Dairy Supervisor,

KMF Chilling Center,

Hindupura Road,

Madhugiri.

E. Narayanagowda

S/o.Eregowda,

Dairy Supervisor,

4th Cross, Barline Road,

K.R.Extension,

TUMAKURU.

By registered post the notice has been sent to the respondent for the following address:

E.Narayanagowda

S/o.Eregowda,

Dairy Supervisor,

4th Cross, Barline Road,

K.R.Extension,

TUMAKURU.

E.Narayanagowda,,

S/o.Eregowda,

Dairy Supervisor,

KMF, Chilling Center,

Hiridupura Road,

Madhugiri.

In the cross examination, the respondent has stated that on 15,7.2006 he might have received the notice. But, he does not remember the date. After receipt of the notice he has not met Kaki Mallaiah. He has not replied the notice. The respondent has furnished his residential address in his deposition. It reads as follows:

E.Narayanagowda,

S/o.Eregowda,
Dairy Supervisor,
4th Cross,
Barline Road,
K.R.Extension,
TUMAKURU.

23. It is clear, the notice is sent to the correct address both by registered post and also under certificate of posting. The appellant has deposed that the notice sent under certificate of posting was not returned and notice sent by registered post has been returned with a postal shara 'not claimed'.

24. The learned counsel for the respondent submitted that notice sent by registered post is returned with a postal shara 'not found' and not as 'not claimed'. It is not correct. It is clear from the shara written on the postal cover sent to the residential address that the notice has been returned with a postal shara 'not claimed'. Therefore, the respondent cannot contend that he has not received the notice. In fact, his admission in the cross examination shows that he had received the notice. He has not replied the notice by taking any specific stand. It is only in the evidence the respondent has contended that Ex.PI cheque was not issued to the appellant and it was issued to one Kaki Mallaiah towards the loan taken from him. It is clearly after thought and cannot be accepted. The material on record clearly shows that the respondent had issued cheque Ex.PI towards the discharge of his liability. When the cheque was presented for encashment, it has been returned with an endorsement 'insufficient funds'. Therefore, the appellant has proved that the cheque was issued towards the discharge of liability. Under Section 118 and 139 of the N.I. Act there is a legal presumption in favour of the appellant. When once issuance of cheque is proved, the burden shifts on the respondent-accused to show that no consideration was paid or the cheque was not issued. In the present case, the respondent has taken a specific defence that the cheque was not issued to the appellant but it was issued to one Kaki Mallaiah.

The said Kaki Mallaiah has not been examined. Nothing is produced to show that the cheque was issued to Kaki Mallaiah and it is misused. Therefore, it cannot be said that the respondent has discharged his burden to rebut the presumption available in law.

Therefore, the Appellate Court was not justified in reversing the judgment and order passed by the Trial Court and acquitting the accused. The impugned judgment and order passed by the Appellate Court cannot be sustained in law.

Accordingly, the appeal is allowed and the impugned judgment and order passed by the Appellate Court in CrI.A.No.81/2008 is hereby set aside. The respondent-accused is convicted for the offence punishable under section 138 of the N.I.Act and sentenced to pay a fine of Rs. 1,10,000/- and in default of payment of fine, to undergo S.I. for a period of six months. Out of the fine amount of Rs. 1,10,000/-, a sum of Rs. 1,00,000/- shall be paid to the appellant- complainant.

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