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Court : Karnataka

Decided On : Jan-31-2007

Reported in : 2007(3)KarLJ178; 2007(3)KCCR1855; 2007(3)AIRKarR493

Judge : V.G. Sabhahit, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 200 and 313; Negotiable Instruments Act, 1881 - Sections 138 and 139

Appeal No. : Criminal Appeal No. 223 of 2002

Appellant : Jayamma

Respondent : Lingamma

Advocate for Def. : G.V. Shantharaju, Adv.

Advocate for Pet/Ap. : M. Shivappa, Adv.

Disposition : Appeal allowed

Judgement :

V.G. Sabhahit, J.

1. This appeal by the complainant is dh'eeted against the judgment of acquittal passed by the Court of XVI Additional CMM, Bangalore in C.C. No. 34936 of 1999, dated 3-12-2001 acquitting the respondent of the offence punishable under

Section 138 of the Negotiable Instruments Act, 1881.

2. The essential facts leading upto this appeal with reference to the rank of the parties before the Trial Court are as follows.

The complainant-appellant herein filed a complaint under Section 200 of the Criminal Procedure Code, 1973, before the XVI Additional CMM, Bangalore averring that the accused-respondent had taken a loan of Rs. 60,000/- i.e., Rs. 10,000/- at the first instance and subsequently Rs. 50,000/- during 1998 for the purpose of running Garment Factory near Sunkadakatte Main Road by promising that she would pay the said sum within 2 to 3 months. When the complainant demanded repayment of the said sum, the respondent issued two cheques for Rs. 10,000/- in the first instance and Rs. 50,000/- during October 1998. The accused had requested to postpone the presentation of the cheque. The complainant waited and presented the cheque during the first week of 1998 i.e., on 9-12-1998 through SB Account in Syndicate Bank, Sirsi Road Branch, Bangalore and the same was returned with Bank share 'insufficient funds' on 10-12-1998. The said fact was informed to the accused by issuing a legal notice dated 18-12-1998. The notice was sent through RPAD and Certificate of Posting. Even though the accused received the notice through certificate of posting and inspite of the intimation by the postal authorities, she did not collect the registered post, which has been returned with share 'Intimation delivered and not collected'. The accused has neither complied with the legal notice nor has paid the amount of the cheque and wherefore, the complaint.

3. The learned Additional CMM recorded the sworn statement of the accused and issued summons to the accused. The accused pleaded not guilty and claimed to be tried. On behalf of the complainant, she was examined as P.W. 1 and got marked Exs. P. 1 to P. 4. On behalf of the accused, the accused was examined as D.W. 1 and got marked Exs. D. 1 to D. 3. The statement of the accused was recorded under Section 313 of the Cr. P.C. The defence of the accused was one of denial. The Trial Court after considering the contention of the parties and the material on record held that the complainant has not proved service of notice of dishonour on the respondent and complaint is not got marked and wherefore the

complainant has failed to prove that the respondent has committed the offence punishable under Section 138 of the Negotiable Instruments Act and accordingly acquitted the respondent of having committed the said offence by its judgment dated 3-12-2001. Being aggrieved by the said judgment of acquittal, the complainant has presented this appeal.

4. Learned Counsel appearing for the complainant submitted that both the grounds on which the Trial Court has proceeded to acquit the accused are erroneous. Learned Counsel further submitted that when the notice was sent to the correct address of the respondent and it was not claimed by the respondent and the notice was also sent through certificate of posting, the notice should have been deemed to have been served on the respondent in view of the decision of the Supreme Court in the case of K, Bhaskaran v. Sankaran Vaidhyan Balan and Anr. : 1999 CriLJ4606 Further, since the complaint is not got marked, in view of the decision of this Court in G. Premdas v. Venkatanun 2001 (1) KCCR 437, the accused is entitled to be acquitted as the offence punishable under Section 138 of the Negotiable Instruments Act is not proved. Learned Counsel has relied upon the Division Bench decision of this Court in V. Satyanarayana v. Sandeep Enterprises, Bangalore 2004 (7) Kar. L.J. 541 (DB) : 2004 (4) KCCR 2758 (DB) wherein it has been held that the complaint need not be got marked as a document as it forms part of the record and non-marking is not fatal to the complainant's case. The learned Counsel has also relied upon the decision of the Hon'ble Supreme Court in the case of K.N. Beena v. Muniyappan and Anr. : 2001 CriLJ4745 , wherein the Hon'ble Supreme Court has held that if the notice is issued to the correct address of the respondent and it is not claimed, the notice should be deemed to have been served. Learned Counsel further submitted that in view of the presumption under Section 139 of the Negotiable Instruments Act and the production of any material to rebut the said presumption by the respondent, the Trial Court ought to have convicted the respondent and wherefore the judgment of acquittal is liable to be set aside.

5. On the other hand, the learned Counsel appearing for the respondent submitted that the respondent has taken the defence that she had issued two blank cheques and on 4-2-1998, she had pledged the gold ornaments and obtained Rs. 43,000/-

from Lalchand Premchand Mutha and Company and paid to the complainant and the Pawn ticket is signed by the complainant. The respondent further contends that even after payment of the cheque amount, the complainant did not return the cheques. The accused-respondent had also issued notice on 5-10-1998 as per Ex. D. 2 under certificate of posting for return of the disputed cheques and despite service of notice, the complainant has presented the cheques and therefore, there is non-compliance of the provisions of Section 138 of the Negotiable Instruments Act.

6. Having regard to the contentions urged by the learned Counsel for the parties, the point that arises for consideration in this appeal are:

1. Whether the judgment of acquittal passed by the Trial Court calls for interference in appeal?

2. Whether the complainant has proved that the respondent-accused has committed the offence punishable under Section 138 of the Negotiable Instruments Act?

3. What order?

and I answer the above points as follows. -

(1) in the affirmative;

(2) in the affirmative;

(3) as per the final order for the following reasons:

I have been taken through the oral and documentary evidence adduced by the complainant and the respondent before the Trial Court. It is clear from the perusal of the judgment passed by the Trial Court that the Trial Court has proceeded to hold that the complainant has failed to prove that the respondent has committed the offence punishable under Section 138 of the Negotiable Instruments Act as she has failed to prove that after dishonour of the cheque, notice Ex. P. 3 was served upon the respondent and the complainant has neither produced the letter

issued by the postal authority nor has examined the postal authorities and also, the returned postal cover does not bear the seal or signature of the postal authorities. The other ground upon which the Trial Court has held that the complainant has failed to prove that the respondent has committed the offence punishable under Section 138 of the Negotiable Instruments Act in that the complaint is not got marked and wherefore in view of the decision of this Court rendered by the Single Judge of this Court, the respondent is entitled to be acquitted and both the reasons assigned by the Trial Court are erroneous. The decision relied upon by the Trial Court regarding the marking of the complaint has been overruled by the Division Bench of this Court in V. Scityanarayana's case, wherein, it is clearly held that complaint forms part of the record and it need not be marked and non-marking is not fatal to the complainant's case and wherefore the reasons assigned by the Trial Court that the complaint is not got marked cannot be sustained and the other ground assigned by the Trial Court regarding non-service of notice Ex. P. 3 is also erroneous in view of the decision of the Hon'ble Supreme Court of India in the case of K. Bhaskaran, wherein it has held that though the notice sent by registered post is returned as 'unclaimed', the notice should be presumed to have been served if it is sent to the correct address of the respondent. It is clear from the evidence of D.W. 1 that it is true that she has borrowed money from the complainant and it is also true that she has issued cheque when the complainant demanded the amount. In the circumstances, it is clear that the said facts elicited in the cross-examination of D.W. 1 would clearly rebut the presumption under Section 139 of the Negotiable Instruments Act and no material is produced to rebut the said presumption. The mere fact that she has produced a pawn ticket would not by itself show that the amount was repaid to the complainant as no material is produced in that behalf and so far as notice Ex. D. 2 is concerned, it is clear that the said fact is not suggested to D.W. 1 in her cross-examination nor stated while answering the question framed under Section 313 of the Cr. PC. Under the circumstances, it must be held that all the ingredients of Section 138 of the Negotiable Instruments Act are proved and the complainant has proved that the respondent has committed the offence punishable under Section 138 of the Negotiable Instruments Act Accordingly, I answer points 1 and 2. The offence under Section 138 of the Negotiable Instruments Act is punishable with

imprisonment which may extend to six months with fine which may extend to twice the amount of cheque. Having regard to the circumstances under which the offence has been committed as also the facts and circumstances of the case, the interest of justice would be met by sentencing the respondent-accused to pay a fine of Rs. 53,000/-and out of the fine amount, Rs. 50,000/- shall be paid as compensation by the respondent being the cheque amount to the complainant. Accordingly, I pass the following.-

ORDER

The appeal is allowed. The judgment of acquittal passed by the XVI Additional CMM, Bangalore, dated 3-12-2001 is set aside and the respondent is convicted of having committed the offence punishable under Section 138 of the Negotiable Instruments Act and is sentenced to pay a fine of Rs. 53,000/-, in default of payment of fine, to undergo simple imprisonment for six months out of the fine amount Rs. 50,000/- shall be paid as compensation to the complainant being the cheque amount.

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