

(2009) 03 KAR CK 0065
In the Karnataka High Court
Case No : Criminal Appeal No. 208 of 2005

Shet and Co.

APPELLANT

Vs

Corporation Tiles Works, Ronald Roche and Cracy Maria
Roche, Partner, Corporation Tiles Works

RESPONDENT

Date of Decision : 31-03-2009

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 200, 374 (2), 378 (4)
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2009) 03 KAR CK 0065

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : Nithish Kumar Shetty, for S. Vishwajith Shetty, for the Appellant;
Pundikari Ishwar Bhat. Advocate for R-2 and 3, for the Respondent

Final Decision : Allowed

Judgement

K. Ramanna, J.—This appeal filed by the appellant-complainant u/s 378(4) of Cr.P.C., to set aside the judgment and order of acquittal passed by the 2nd Addl. Sessions Judge, Mangalore, in CrI. A. No. 132/04 dated 21.12.2004 and to confirm the judgment and order of conviction and sentence passed by the JMFC (IV) Court, Mangalore in C.C. No. 229/01 dated 8.4.2004.

2. The case of the appellant is that, he is carrying on the business of money lending by obtaining necessary money tending license from the concerned authorities. The Respondent No. 1 is a partnership firm and Respondents 2 and 3 are the partners. Respondents 2 and 3 are responsible for the affairs and conduct of the business of the R1-firm. For meeting the financial needs of the firm, i.e., Respondent No. 1, Respondents 2 and 3 along with one K. Prakash Basari had borrowed in all Rs. 4,10,000/- by executing on demand promissory note, dated 12.3.99 jointly agreeing and undertaking to repay the same together with interest at 23%. Towards part payment of the amount due to the appellant, Respondent-2 as a managing partner and representing the other respondents,

issued cheque Ex.P2 bearing No. 79135 for 2,85,000/- dated 23.08.01 drawn on Syndicate Bank, Hampanakatta, Mangalore in favour of the appellant assuring that the said cheque will be honoured when presented for encashment, therefore he accepted the said cheque in good faith under bonafide belief. But when it was presented for encashment, through the appellant's banker, namely the Indian Overseas Bank, Hamapanakatta, Mangalore, it came to be dishonoured with endorsement Ex.P-3 dated 24.08.2001 as "Insufficient funds". Therefore the appellant herein got issued demand notice - Ex.P-4 through his Counsel on 27.08.2001 to all the respondents, though notice issued to R-2 & 3 was received by them on 30.08.2001, they neither repaid the amount nor send only reply. Notice sent to R1-Firm returned unserved with an endorsement "intimation delivered - not claimed". Therefore, a private complaint came to be filed before the JMPC (IV Court), Mangalore, u/s 200 Cr.P.C.

3. In order to prove the case, appellant herein examined its proprietor namely G.R. Sheth as PW-1 and one Sajjan Das as PW-2, 22 documents were got marked as Exs.P1 to P22. The respondent No. 2 examined himself as D.W.1 and examined one Ramachandra Ithale as DW-2. Two documents were got marked as Exs.D1 & D2.

4. After considering the arguments as well as the oral and documentary evidence placed on record by the rival parties, the trial Court convicted the respondents 1 to 3 for an offence punishable u/s 138 of the N.I. Act. and respondents 2 and 3 were sentenced to undergo S.I. for 3 months and to pay compensation of Rs. 3,20,000/- to the appellant within two months from the date of judgment. Feeling aggrieved by the said judgment and order of conviction, the respondents 1 to 3 preferred an appeal CrI.A. 132/04 before the 2nd Addl. Sessions Judge, D.K., Mangalore, u/s 374(2) of Cr.P.C. On re-appreciation of the evidence, the learned Addl. Sessions Judge, reversed the judgment of order of conviction and sentence and complaint filed by the appellant was dismissed. Therefore, the appellant being the complainant has come up with this appeal.

5. Heard the arguments of the learned Counsel for the appellant as well as learned Counsel for the respondents.

6. It is argued by learned Counsel for appellant that, though the trial court rightly appreciated oral and documentary evidence placed on record by appellant and convicted respondents for the aforesaid offence, but the lower appellate court without properly appreciating the evidence placed on record come to the conclusion that the cheque - Bx.P2, issued by respondent No. 2 for and on behalf of R1 and R3, was not towards legally enforceable debt. It is argued that as per Ex.P-16, respondents repaid Rs. 1,25,000/-, out of Rs. 4,10,000/- borrowed from the appellant. It is further argued that since the respondent No. 1 is a firm, notice issued to it by RPAD was duly intimated. R-2 & 3 has received the said notice, therefore service of notice on the company as well as the other respondents is in accordance with law. Ex.P6 & P7 are the postal receipts, in order to show that notice was duly served on respondents 2 and 3. Ex.P5 is the

notice issued to respondent No. 1 which was returned unclaimed. Therefore the finding recorded by first appellate Court that there is no valid service of notice on respondent is totally incorrect. Appellant had produced the ledger extracts of the respondents as per Ex.Ps-8 to 12 which clearly indicates that respondents have borrowed the said amount for their business purpose. Therefore, it is submitted that judgment and order of acquittal passed by the learned II Addl.Sessions Judge is perverse, incorrect, illegal and based on improper appreciation of the oral and documentary evidence and it is liable to be set aside. In support of the aforesaid contentions, the learned Counsel for the appellant relied on the decision rendered by the Coordinate bench of this Court in cane of Dinesh Harakchand Sankla Vs. Kurlon Ltd. and Others, , wherein it is held, dishonour of cheque, person accused of offence is partnership firm, complaint prima-facie discloses that petitioner is partner and is involved in day-to-day affairs of business of firm, petitioner can be held guilty of offence.

7. On the other hand, learned Counsel for the respondents submitted that the appellant has not maintained the books of accounts to show that advance of Rs. 4,10,000/- was given and the respondents have repaid part of the amount through three cheques. Appellant might have received the pay order in the Vysya Bank to a tune of Rs. 1,25,000/-. That the trial court has wrongly drawn the presumption in favour of the appellant/complainant u/s 139 of the N.I. Act, but the learned Sessions Judge rightly reversed the finding of the trial court and dismissed the appeal by acquitting the respondents which is in accordance with law. Since the respondents were rebutted the presumption available in favour of the appellant, the burden of proof casts upon the appellant to prove his case. In support of his contention learned Counsel for the respondents relied upon the decision reported in B.P. Venkatesulu Vs. K.P. Mani Nayar, Wherein it has been held that issuance of cheque for actual loan amount and not including amount of interest on loan payable is a strong intrinsic circumstances of suspicious character. Hence it is prayed to dismiss the appeal.

8. Heard the learned Counsel for both the parties and perused the material placed on record. The point that arises for my consideration decision is whether the first appellate Court was justified in reversing the finding recorded by the trial court and acquitting the respondents for an offence punishable u/s 138 of N.I. Act and whether the same is perverse and incorrect, if so, what order?

9. The appellant herein who is the complainant before trial court, has specifically pleaded that respondents had borrowed the amount for their business purpose by executing demand promissory note, the copy of the same is produced at Ex.P-8, the respondents have repaid part of the amount and in all due a sum of Rs. 2,85,000/- for which Ex.P2 is issued. Issuance of Ex.P2, date and the amount mentioned therein has not been seriously disputed by respondents. Since Respondent-1 is a company and respondents 2 and 3 are its partners, therefore Ex.P2 signed by Respondent-2 in the capacity of managing partner for and on behalf of R1 and R3. The trial court has recorded the evidence of both parties

and also recorded the statement of the witnesses. DW-1 Ronald has denied the borrowal of Rs. 4,10,000/- from the appellant, so also the issuance of cheque-Ex. P2 for repayment of the amount due. But according to respondents the cheque issued as security to the appellant has been misused, that he had borrowed amount about 3 1/2 lakh from appellant and repaid the same through cheque. But respondents failed to prove the same. The contents of Ex.P2 are in the handwriting of respondent-2, as such presumption available to the holder of the cheque under the Act has to be drawn in favour of the appellant Further, the respondents failed to give any reason as to, if he really repaid the loan amount to appellant, why he failed to get back the cheque and other papers given to the appellant as security. In spite of service of notice, respondents neither repaid the amount nor sent any reply, but come up with the above defence during the course of trial to suit their convenience and to de-fraud legitimate right of appellant

The trial court after careful scrutiny of the evidence placed on record rightly drawn the presumption in favour of the appellant, but the first appellate Court wrongly without proper appreciation of the evidence placed on record by the parties come to the conclusion that there is not legally recoverable debt under the cheque-Ex.P.2 which is incorrect and illegal. Hence, the appeal is to be allowed by setting aside the judgment and order of the learned Sessions Judge.

10. Accordingly, appeal is allowed. Judgment of the order of acquittal, which is under challenge, passed by the II Addl.Sessions Judge is hereby set aside. The respondents are convicted for the offence punishable u/s 138 of N.I. Act and are sentenced to pay fine of Rs. 3,50,000/- i.d., respondents 2 and 3 to undergo S.I for 3 months.

If the respondents deposit the fine amount the same shall be paid to the appellant as compensation.