

CHRISTOPHER RAJ

A

v.

K VIJAYAKUMAR

(Criminal Appeal Nos. 986-987 of 2019)

JULY 05, 2019

B

[R. BANUMATHI AND A.S. BOPANNA, JJ.]

Negotiable Instruments Act, 1881: s.138 – Insufficiency of funds – Dishonour of cheque – Trial court acquitted the appellant-accused – In appeal by complainant before High Court, there was no representation for the appellant-accused – Upon hearing the complainant, High Court set aside the order of acquittal and convicted appellant-accused under s.138 of the Act – On appeal, held: Admittedly, the appellant-accused did not appear in the criminal appeal before the High Court – When the accused did not enter appearance in the High Court, High Court should have issued second notice to him or taken an assistance of amicus curiae – High Court should not have decided the case on merits, without appointing any counsel as amicus curiae, moreso when the appellant had the benefit of acquittal – Therefore, High Court erred in reversing the acquittal without affording any opportunity to the appellant-accused or by appointing an amicus curiae to argue the matter on his behalf – Matter remitted to High Court for consideration afresh – Natural justice.

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos.986-987 of 2019.

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From the Judgment and Order dated 06.07.2018 and 23.06.2018 of the Madurai Bench of Madras High Court in Crl.A. (MD) No. 608 of 2007

S. Nagamuthu, Sr. Adv., M. P Parthiban, A.S. Vairawan Advs. for the Appellant.

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Col. Pahlad Singh Sharma, Sushil Kumar Sharma, Jagdev Singh Gulliya, Krishna Kant Shukla, Z. U. Khan, Kisalaya Shukla, Advs. for the Respondent.

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A The Order of the Court was passed by

R. BANUMATHI, J.

1. Leave granted.

B 2. The appellant-accused has preferred these appeals challenging the orders passed by the High Court of Madras dated 06.07.2018 and 23.06.2018 in CrI. A (MD) No.608 of 2007, by which the High Court has reversed the acquittal of the appellant-accused and convicted him under Section 138 of the Negotiable Instruments Act and imposed a fine of Rs.60,000/- in default to undergo simple imprisonment for six months.

C 3. Brief facts which led to filing of these appeals are as follows:-

D The appellant-accused and the respondent-complainant are friends. On 12.08.2001, the appellant-accused borrowed a sum of Rs.30,000/- from the respondent-complainant. The appellant-accused has issued a post-dated cheque drawn on Kuzhithurai Canara Bank dated 04.09.2003 of Rs.30,000/-.

E 4. The respondent-complainant presented the cheque in his Co-Operative Bank Account on 16.01.2004 for collection. However, the cheque was returned from the bank on 19.01.2004 due to insufficient funds. The respondent-complainant sent a statutory notice on 12.02.2004 to the appellant-accused. Thereafter, the respondent-complainant filed the complaint before the Judicial Magistrate No.1, Kuzhithurai.

F 5. In the trial court, PW-1 and PW-2 were examined and Exhibits P-1 to P-7 were marked. The appellant-accused has not adduced any evidence. Upon consideration of the evidence, the trial court held that the amount was borrowed in the year 2001 and the cheque was presented for collection after three years of borrowing the loan. The trial court took the view that the cheque was valid for six months and that the cheque was not presented within a period of six months from the date of payment of the amount and issuance of cheque. The trial court held that the charges levelled against the appellant-accused are not proved and G on those findings, the trial court acquitted the appellant-accused.

H 6. Being aggrieved, the respondent-complainant preferred appeal before the High Court. In the appeal so preferred by the respondent before the High Court, there was no representation for the appellant-accused. Upon hearing the respondent-complainant, the High Court held

that the cheque was returned due to “*insufficient funds*” and not “*as time barred cheque*”. The High Court further found that the respondent-complainant has proved the statutory requirements and held that the findings of the trial court is erroneous. The High Court set aside the judgment of the trial court and convicted the appellant-accused under Section 138 of the Negotiable Instruments Act and imposed a fine of Rs.60,000/- in default to undergo simple imprisonment for six months. Being aggrieved, the appellant-accused is before us.

7. We have heard Mr. S. Nagamuthu, learned senior counsel appearing on behalf of the appellant-accused. The learned senior counsel appearing on behalf of the appellant has drawn our attention to the judgment in *K.S. Panduranga vs. State of Karnataka* (2013) 3 SCC 721 and submitted that in the absence of the counsel for the appellant-accused, the High Court should not have decided the appeal on merits and prayed for remitting the matter to the High Court for fresh consideration on merits.

8. The respondent-complainant though served, has not entered appearance in this appeal. The Supreme Court Legal Services Committee has nominated Col. Pahlad Singh Sharma, Advocate to appear and argue on behalf of the respondent. We have heard Col. Pahlad Singh Sharma appearing on behalf of the respondent-complainant and perused the impugned judgment and other materials on record.

9. Admittedly, the appellant-accused did not appear in the criminal appeal before the High Court. When the accused has not entered appearance in the High Court, in our view, the High Court should have issued second notice to the appellant-accused or the High Court Legal Services Committee to appoint an advocate or the High Court could have taken the assistance of *amicus curiae*. When the accused was not represented, without appointing any counsel as *amicus curiae* to defend the accused, the High Court ought not to have decided the criminal appeal on merits; more so, when the appellant-accused had the benefit of the acquittal. The High Court erred in reversing the acquittal without affording any opportunity to the appellant-accused or by appointing an *amicus curiae* to argue the matter on his behalf.

10. In the result, the impugned orders of the High Court in Crl.A.(MD) No. 608 of 2007 dated 06.07.2018 and 23.06.2018 are set aside and these appeals are allowed and the Criminal Appeal (MD) No.

- A 608 of 2007 shall stand restored. The matter is remitted to the Madurai Bench of Madras High Court to consider the matter afresh. The appellant shall appear before the Madurai Bench of the Madras High Court on 26.08.2019. The High Court shall issue notice to the respondent-complainant viz. K. Vijayakumar informing him about the date of hearing.
- B 11. The High Court shall afford sufficient opportunity to both parties and decide the matter afresh in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

Devika Gujral

Appeal allowed.