



Crl.A.No.472 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2024

C O R A M

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

Criminal Appeal No.472 of 2017

L.Subbaiah

.. Appellant /complainant

-Versus-

**K.Sivakumar,
Proprietor/Authorised Signatory,
M/s.Dhanalakshmi Foods,
Mulanoor Road,
Semmadaai,
Karattupalayam Post,
Vellakoil,
Kangayam**

...respondent/accused

Appeal is filed under Section 378 of the Code of Criminal Procedure, 1973 to set aside the judgment passed by the learned V Additional Sessions Judge, Coimbatore in Crl A.No.167 of 2015 dated 01.09.2016, acquitting the respondent herein for the offence under Section 138 of the Negotiable Instruments Act and consequently, to restore the judgment in CC No.271 of 2012 of the learned Trial Judge.



WEB COPY



Crl.A.No.472 of 2017

For Appellant : Mr.R.Diwakaran

For Respondent : Mr.K.Balasubramanian

JUDGMENT

Being aggrieved by the order of acquittal, the complainant has come forward with the present Criminal Appeal seeking to set aside the judgment passed by the learned V Additional Sessions Judge, Coimbatore in Crl A.No.167 of 2015 dated 01.09.2016, acquitting the respondent herein for the offence under Section 138 of the Negotiable Instruments Act and consequently, to restore the judgment passed in CC No.271 of 2012 of the learned Trial Judge.

2. The complainant Subbiah had filed a complaint against the accused under Section 138 of Negotiable Instruments Act, 1881 (in short, 'the Act') in C.C.No.271 of 2012 before the Judicial Magistrate Court-I, Coimbatore.

3. Upon consideration, the trial Court found the respondent/accused guilty under Section 138 of the Act and sentenced him to undergo simple imprisonment for one year and under Section 357(3) of Cr.P.C.,



Crl.A.No.472 of 2017

compensation of Rs.3,00,000/- was ordered to be paid by the respondent/accused to the complainant within two months, failing which, he has to undergo default sentence of three months of simple imprisonment.

4. Against the said judgment, the respondent herein preferred an appeal in C.A.No.167 of 2015 before the V Additional District and Sessions Court, Coimbatore and after hearing both sides arguments, the learned V Additional District and Sessions Judge allowed the appeal and consequently, the judgment passed by the learned Judicial Magistrate -I, Coimbatore in C.C.No.88 of 2012 dated 16.03.2015 was set aside and the appellant stood acquitted.

5. Against the said order of acquittal, passed by the Appellate Court/V Additional District and Sessions Court, Coimbatore, the appellant/complainant has preferred the present Criminal Appeal.

6. Mr.R.Diwakaran, learned counsel appearing for the



Crl.A.No.472 of 2017

appellant/complainant vehemently contended that the complainant and the accused had business transactions and they entered into an agreement viz., Ex.D3, wherein, as per the said agreement, the accused agreed to repay a sum of Rs.32,50,000/- and as per the agreement, he should have issued 6 cheques. But he issued only 3 cheques in favour of one Balamurugan, as per the terms of agreement and through him by way of filing 2 cases, the amounts connected with 3 cheques were settled. It is his further argument that in respect of remaining 3 cheques, after mediation, the debt was quantified and towards debt, the accused issued a cheque dated 27.06.2011 for an amount of Rs.3,00,000/- drawn on M/s.IndusInd Bank Ltd, Karur. The said cheque Ex.P1 was presented to the complainant's Banker on 24.12.2011. The said Ex.P1 Cheque was returned on 26.12.2011 with an endorsement "funds insufficient". Later, a legal notice was caused to be issued to the accused herein on 21.01.2012. The accused responded with the reply notice with untenable details.

7. It is his further argument that the learned trial judge has rightly



Crl.A.No.472 of 2017

raised presumption under Section 139 of the Act in favour of the complainant and concluded that the respondent failed to rebut the presumption. He further contended that thereby, the trial Court found guilty of the accused under 138 of the Act, whereas, the learned Appellate Judge has wrongly placed onus on the complainant that complainant has to prove about the mediation said to have been held and there existed legal liability. One another ground by which the order of acquittal was passed is that the account details were not produced by the complainant.

8. Per contra, Mr.K.Balasubramanian, the learned counsel for the respondent/accused strenuously argued that if really as per the terms of Ex.D3 Agreement, if 6 cheques were not issued by the accused in order to prove the same, the complainant did not choose to examine any witness. Admittedly, there were business transactions between the complainant and the respondent/accused between 2005 and 2007. After the date of Ex.D3 Agreement i.e., after 16.06.2007, virtually there was no business transaction between them. When that be the case, the complainant states that for legally enforceable debt, based on mediation, the accused issued a post-dated



Crl.A.No.472 of 2017

cheque in the year 2011, is fully untenable. He would further contend that it is for the complainant to prove that after the mediation, Ex.P1 Cheque was issued by the accused. It is his further argument that in the legal notice, cheque number, date of cheque and on which date cheque was deposited and returned, etc., are not given. He would further contend that because of want of these particulars, the legal notice issued by the complainant is defective. However, the respondent/accused issued reply notice to the effect that the agreement Ex.D3 was acted upon and from 2007 onwards there is no business transaction whatsoever between the complainant and the accused. As the complaint was filed without any particulars and the account details, the Appellate Court appreciated the same in right perspective and passed the order of acquittal, which needs no interference.

9.The case of the complainant is that he was trading masala products from the year 2005 to 2007 and he had business dealings with the respondent/accused. During the business transactions, the amounts became due to the complainant. There were number of mediations to compromise the dispute between the complainant and the respondent/accused and



Crl.A.No.472 of 2017

ultimately, a sum of Rs.3,00,000/- was arrived as full and final settlement.

Towards the settlement of amounts due, the accused issued a cheque bearing no.482616 in favour of the complainant for a sum of Rs.3,00,000/- dated 27.06.2011 drawn on M/s.IndusInd Bank Limited, Karur towards discharge of legally enforceable liability due to the complainant. Based on the assurance of the accused, the said cheque was presented on 24.12.2011 with his bankers M/s.South Indian Bank Limited, Ganapathy Branch, Coimbatore. The cheque was dis-honoured with an endorsement "funds insufficient" on 26.12.2011. On 21.01.2012, a legal notice was issued to the accused and on receipt of the said notice, he sent a reply dated 16.02.2012, with untenable allegations alleging that the accused deliberately did not arrange for funds in his account and in order to de-fraud the complainant, issued the cheque and his action amounts to offence punishable under Section 138 of the Act.

10.The defence set up by the respondent/accused is that as per the settlement effected in the year 2007, the accused towards full and final settlement, issued 6 cheques drawn on Canara Bank, Vellakoil Branch in



Crl.A.No.472 of 2017

favour of the relative of the complainant one Balamurugan. In the Courts of Tiruchandur, Thoothukudi and before the Madras Courts, cases were filed and the total due amount was settled and all the cases were disposed of. In these circumstances, the accused does not owe any amount to the complainant and the appellant/complainant has misused the cheque when he was in cordial relationship with the accused.

11. According to the respondent, the accounts details have not been properly mentioned and not marked by the complainant and further, non-examining of mediators is fatal to the complainant's case and as the complainant has failed to properly lay the complaint, his complaint is liable to be dismissed.

12. At trial, on the complainant's side, the complainant examined himself as PW1 and 5 documents were marked. Of which, Ex.P1 is the cheque dated 27.06.2011 for Rs.3,00,000/- and Ex.P5 is the reply notice. On the defendant side, 7 documents were marked, of which, Ex.D3 is the copy of the agreement dated 16.06.2007 entered into between the



Crl.A.No.472 of 2017

complainant and the accused.

WEB COPY

13.It is the evidence of PW1/complainant that he had business transactions with the respondent/accused during 2005 to 2007 and the accused owed more than R.3,00,000/- to him. Based on the talk of settlement, finally the accused agreed to re-pay him a sum of Rs.3,00,000/- and he also issued a cheque drawn on IndusInd Bank, Karur Branch bearing no.482616 dated 27.06.2011 for a sum of Rs.3,00,000/-(Ex.P1). It is his further evidence that the said cheque was presented to his Bankers for encashment, but it was returned with an endorsement as "funds insufficient". For the legal notice issued by him, the accused sent a reply notice with false allegations.

14It is relevant to note that in Ex.P3 legal notice, it is mentioned that there is no mentioning about cheque number and the date of presentation of the cheque etc. A bare perusal of evidence of PW1 and the documents marked on both sides, it is inferable that the accused had business



Crl.A.No.472 of 2017

transactions with the complainant. It is also an admitted fact that as on 2007, he owed a sum of Rs.32,50,000/-. The details of agreement entered into between the complainant and the accused towards settlement of debt dated 16.06.2007, is not spelt out either in the legal notice or in the complaint. However, the accused chose to mark the agreement as Ex.D3. Ex.D3 is the agreement, therefore, the terms of the Ex.D3 Agreement are equally binding on both. The terms of agreement are extracted herein:

"2007ம் வருடம் ஜூன் மாதம் 16ம் தேதி (16.06.2007) இதற்கு தமிழ் வருடம் ஸர்வஜித் வருடம் ஆனி மாதம் 02ம் தேதி கோயமுத்தூர் மாவட்டம் கோவை டவுன் கணபதி பாரதியார் வீதி கதவு எண்.47-ல் வசிக்கம் லஜ்மணன் மகன் டசுப்பையா-1.

ஈரோடு மாவட்டம் காங்கயம் வட்டம் வெள்ளகோவில் கிராமம் கரட்டுப் பாளையம் (அஞ்சல்) செம்மடை மூலனூர் ரோடு என்ற முகவரியில் வசிக்கும் N.குமாரசாமி மகன் K.சிவகுமார்-2, ஆகிய நாம் இருவரும் சேர்ந்து தங்களுக்குள் இருக்கும் தொழில்சம்பந்தமான பிரச்சனைகளையும் வரவுசெலவுகளையும் கீழ்க்கண்டவாறு பேசி முழுமனதுடன் சம்மதித்து



Crl.A.No.472 of 2017

எழுதிக்கொண்ட உடன்படிக்கை.

1) இதில் 1நபர் 2நபரின் பரணி மசலா நிறுவனத்தினை 2நபரிடமே இதன் மூலம் விட்டுவிட்டார்

2) மேலும் இதில் 1நபர் 2நபரிடம் மசாலா நிறுவனத்தினை விலைக்கு வாங்குவதாக ஒப்புக்கொண்டு 2நபருக்கு கடந்த 2மாதமாக நிறுவனத்தினை நடத்துவதற்கு மூலப் பொருட்கள் கொடுத்த வகையில் ரூ.32,50,000/- (ரூபாய் முப்பத்தி இரண்டு லட்சத்தி ஐம்பதாயிலம் மட்டும்) 2நபர் 1நபருக்கு கொடுத்துவிடவேண்டியது.

3) மேற்படி தொகைக்கு கீழ்க்கண்டபடி தற்போது காசோலைகள் கொடுத்தும் அந்தந்த தேதிகளில் தவறாமல் வங்கிக்கு தொகை செலுத்தி மேற்படி காசோலைகள் திரும்பாமல் நடைமுறைப்படுத்திக்கொள்ள வேண்டியது.

4) மேற்படி காசோலைகள் வங்கியில் பணம் இல்லாமல் திருப்பப்பட்டால் அதன்மீது 1நபர் 2நபர் மீது தகுந்த சட்டப்படி கிரிமினல் மற்றும் சிவில் நடவடிக்கை எடுத்துக்கொள்ள வேண்டியது.



Crl.A.No.472 of 2017

5) மேலும் இதில் மேற்படி

தொகைகளுக்காக கொடுக்கப்பட்ட
காசோலைகள் அனைத்தையும் இதில் 1நபரின்
வேண்டுகோளின்படி அவரின் உறவினரான
தூத்துக்குடி முத்துகிருஷ்ணபுரம் கதவு
எண்.131-ல் குடியிருக்கும் V.பாலமுருகன்
என்பவர் பெயரில் காசோலைகள் கொடுத்துவிட
வேண்டியது.

6) இதில் 1நபர் 2-வது நபர் மீது தாராபுரம்
சார்பு நீதிமன்றத்தில் எண்.62/2007 மற்றும் 63/
2007 நே.எண்ணுள்ள வழக்குகளையும் மேற்படி
1நபர் வாபஸ் பெற்றுக்கொள்ளவேண்டியது."

15.As per the terms of agreement, the defence of the accused is that he has issued all the 6 cheques and in acceptance of the same, the complainant has signed in the agreement, which was witnessed by two witnesses namely K.Balasubramanian and Babushankar.

16. It is curious to note that in derogation to the terms of the said agreement, the complainant has taken stand that out of the above said 6 cheques, he received only 3 cheques from the accused and for the remaining



Crl.A.No.472 of 2017

amount, on mediation, the accused issued a cheque for Rs.3,00,000/- towards final settlement i.e., Ex.P1. If that be the case, then heavy burden lies on the complainant to plead the said details at the first instance, in his legal notice itself. But contrary to the terms of agreement, without mentioning the details either in the legal notice or in the complaint, the stand taken by the complainant is totally untenable and it is fatal to this case.

17. It is the further case of PW1 that the above said 3 cheques were drawn in favour of his relative Balamurugan, as per the terms of Ex.D3 agreement, which is not in dispute. Thereafter, it is the contention of PW1 that through mediations in respect of other 3 cheques mentioned in the agreement, the accused issued Ex.P1 cheque, which is totally denied by the accused in his reply notice itself. Then he should have explained the details by examining his relative Balamurugan. Failure to examine Balamurugan is fatal to the case of the complainant. The complainant pleads that for the remaining amount, it was settled and the amount due was quantified as Rs.3,00,000/-, for which, there is no pleading or evidence.



Crl.A.No.472 of 2017

18. Admittedly, the complainant had business transactions with the accused from 2005 to 2007. The transaction is business transaction then, the law is settled that the complaint has to be presented along with cash book/account book or ledger account to prove that the respondent/accused owe to the complainant and there is legally enforceable debt.

19. It is relevant to cull out a portion of cross examination of PW1, which is extracted below:

" 2005 முதல் 2007 வரை எனக்கும் எதிரிக்கும் இடையே இருந்த வியாபாரம் சம்மந்தமான வரவு செலவு கணக்கு என்னிடம் உள்ளது. ஆனால் தற்போது நீதிமன்றத்திற்கு கொண்டு வரவில்லை. 1 கோடி ரூபாய்க்கு மேலாக நான் வியாபாரம் செய்வதற்கு வரவு செலவு கணக்கு எதுவும் நான் நீதிமன்றத்தில் தாக்கல் செய்யவில்லை. 3 இலட்சம் ரூபாய் நான் கொடுக்கவேண்டும் என்று பஞ்சாயத்து செய்து பஞ்சாயத்தார்களை நான் சாட்சியாக விசாரிக்கவில்லை. 16.06.2007 அன்று எனக்கும் எதிரிக்கும் இடையே ஒரு உடன் படிக்கை ஏற்பட்டது. அந்த உடன்படிக்கை படி எதிரி



Crl.A.No.472 of 2017

எனக்கு 35 இலட்சம் ரூபாய் கொடுக்கவேண்டும் என்று முடிவு செய்யப்பட்டது என்றால் சரிதான். அதற்காக எதிரி எனக்கு 6 காசோலை கொடுத்தார் என்றால் சரியல்ல. 3 காசோலைகள்தான் கொடுத்தார். உடன் படிக்கையின் அசல் என்னிடம் உள்ளது. அதன் நகல்தான் என்னிடம் காட்டப்படும் நகல் ஆகும். அது எக்சிபிட் டி3. எக்சிபிட் டி3ல் நட்பைத் தவிர வேறு எதுவும் இல்லை என்று சொல்லப்பட்டுள்ளது என்றால் சரிதான். உடன் படிக்கையில் எதிரி எனக்கு 6 காசோலை கொடுத்தார் என்று உடன்படிக்கையில் உள்ளது என்றால் சரிதான். 3 காசோலைகள்தான் கொடுத்தார். 2007க்கு பிறகு எங்களுக்குள் வியாபாரம் நடக்கவில்லை என்றால் சரிதான்."



Crl.A.No.472 of 2017

20. It is made very clear that there is no business transaction between the complainant and the accused after 2007. Contrary to his evidence, the complaint reiterates that on mediation, Ex.P1 cheque for Rs.3,00,000/- was issued by the accused as a debt, and it is to be construed as a legally enforceable debt.

21. For the legal notice issued to the accused, the accused in turn has issued a reply notice by denying the contents of legal notice. When that be the case and the transaction being the business transaction between the complainant and the accused, the complainant ought to have stated the details by way of producing account books in support of his claim. As per Section 138 of the Act, the cheque should have been issued for the discharge, in whole or in part of any debt or other liability.

22. The respondent/accused has washed off his hands by filing Ex.D3 Agreement. The accused has made clear that he does not owe any money to the complainant and the said facts were appreciated by the Appellate Court in proper perspective by holding that as contended by the complainant,



Crl.A.No.472 of 2017

mediation details were not proved and the payment details were not mentioned in the statutory notice as well as in the complaint and ultimately, chosen to allow the appeal.

23. When the signature in the cheque is not denied by the accused, then presumption under Section 139 of the Act arise in favour of the complainant. It is relevant to refer a judgment of Hon'ble Supreme Court in **“Krishna Janardhan Bhat Vs. Dattatraya G. Hegde”** (2008) 4 SCC 54, wherein, it has been held as under in para 45:

“45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately



balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.”

and in the case of **“Rangappa Vs. Sri Mohan”** in Crl A No.1o20 of 2010 dated 07.05.2010, it has been observed by the Hon'ble Supreme Court that :

22. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.”



Crl.A.No.472 of 2017

WEB COPY

24. Therefore, once the signature found in Ex.P1 is that of the accused, then the presumption under Section 139 arise in favour of the complainant. It is rebuttal presumption that the accused may rebut the said presumption through oral or documentary evidence or even through cross examination of complainant's side witness.

25. Reverting back to the facts of this case, the accused has raised his defence stating that on the date of Ex.D3 itself, he issued 6 cheques, for the total debt he owed to the complainant and thereafter, he has no money transaction or debt. This fact is also clearly admitted by PW1 during his cross examination. Therefore, this Court is of the considered view that the defence that is putforth by the accused is probable one which creates a huge doubt about the existence of legally enforceable debt on liability. Therefore, the complainant's case fails.

26. In fine, this Court does not find any valid reason to interfere with



Crl.A.No.472 of 2017

the judgement of the Appellate Court dated 01.09.2016, acquitting the respondent/accused.

27. In the result, based on the aforesaid discussions, the Criminal Appeal stands dismissed and the judgement of the learned V Additional District and Sessions Judge, Coimbatore in Crl .A.167 of 2015, stands confirmed. No costs.

26 .02.2024

Index : yes / no
Speaking order : yes / no
Neutral Citation : yes / no

dn

To

- 1.The V Additional Sessions Judge, Coimbatore .
- 2.The Public Prosecutor, High Court, Madras.



WEB COPY



Crl.A.No.472 of 2017

R.KALAIMATHI, J,

dn

Crl.A.No.472 of 2017

26.02.2024

Page 21 of 21