

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.03.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Cr1.A.Nos.801 and 802 of 2011

Date of Reserving the Judgment 25.02.2015	Date of Pronouncing the Judgment 06.03.2015
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S.Mukanchand Bothra Appellant/Complainant
in both the appeals

Vs.

P.Mani Respondent/Accused
in both the appeals

Prayer:

Criminal Appeals filed under Section 378 of Cr.P.C., against the judgment of acquittal dated 07.10.2011 in C.C.Nos.6788 and 6787 of 2002 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai.

For Appellant : Mr.S.Mukanchand Bothra
(party-in-person)

For Respondent : Mr.K.Ramani

C O M M O N J U D G M E N T

The Criminal Appeals arise out of the judgment of acquittal dated 07.10.2011 in C.C.Nos.6788 and 6787 of 2002 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai.

2.The facts of the case are as follows:

Cr1.A.No.801 of 2011 (C.C.No.6788 of 2002):

(i) The appellant herein as a complainant preferred a private

complaint stating that the respondent/accused had borrowed loan from the complainant and to discharge the said liability, he had given Ex.P1 cheque dated 09.09.2002 for Rs.6,00,000/-. When the appellant presented the cheque for encashment on 09.09.2002, it was returned as "insufficient funds" on 11.09.2002 vide Ex.P2 return memo. Even though the appellant issued Ex.P3 statutory notice to the respondent to his correct address on 14.09.2002, the same was returned undelivered on 30.09.2002 with an endorsement "party out of station not claimed" as per Ex.P4/return cover. Therefore, the appellant preferred a private complaint against the respondent/accused under Section 138 of the Negotiable Instruments Act.

Cr1.A.No.802 of 2011 (C.C.No.6787 of 2002):

(ii) The appellant herein as a complainant preferred a private complaint stating that the respondent/accused had borrowed loan from the complainant and to discharge the said liability, he had given Ex.P1 cheque dated 04.09.2002 for Rs.50,000/-. When the appellant presented the cheque for encashment on 04.09.2002, it was returned as "insufficient funds" on 05.09.2002 vide Ex.P2 return memo. Even though the appellant issued Ex.P3 statutory notice to the respondent to his correct address on 14.09.2002, the same was returned undelivered on 30.09.2002 with an endorsement "party out of station not claimed" as per Ex.P4/return cover. Therefore, the appellant preferred a private complaint against the respondent/accused under Section 138 of the Negotiable Instruments Act.

3.The trial Court has taken cognizance of an offence, after following the procedure and recording sworn statement. Since the accused pleaded not guilty, the trial Court examined P.W.1 and marked Exs.P1 to P4 on the side of the complainant. No oral and documentary evidence were let in on the side of the respondent. The trial Court after considering the oral and documentary evidence, acquitted the accused for the offence under Section 138 of the Negotiable Instruments Act by holding that the complainant has not proved that the cheque was issued by the accused for discharging legally subsisting liability. सत्यमेव जयते

4. Challenging the judgment of acquittal passed by the trial Court, the party-in-person/appellant/complainant has submitted that once issuance of cheque was admitted by the accused, the complainant is entitled to invoke presumption under Sections 118 and 139 of the Negotiable Instruments Act that the cheque was issued for discharging legally subsisting liability and the presumption is rebuttable one. But the respondent/accused has not rebutted the presumption by preponderance of probabilities. Whereas the trial Court has wrongly

held that burden is shifted upon the complainant to prove that the cheque is issued for discharging legally subsisting liability. It is further submitted that the trial Court has held that the complainant has not obtained licence for money lending business, which is against law and the income tax returns shows that the debt of the accused was not mentioned in the liability column. But it will not come under the liability column. Since it is an asset, it was mentioned in the assets column. The trial Court without considering the above aspects, has erroneously acquitted the respondent/accused. To substantiate his arguments, the party-in-person relied upon the following decisions:

(i) CrI.A.No.1020 of 2010, dated 07.05.2010 (Rangappa v. Sri Mohan);

(ii) CrI.A.Nos.807 of 2005 and 556 of 2006, dated 29.04.2011 (S.Swarna v. S.Mukanchand Bothra);

(iii) S.A.Nos.280 to 285 of 1998, dated 30.06.2011 (Kuppayammal v. A.Sitheswaran);

5. Resisting the same, the learned counsel for the respondent would submit that the appellant has not proved that the cheque has been issued for discharging the legally subsisting liability. The said cheques were given only as security at the time of borrowal of money, which was subsequently repaid. Further, any amount of money exceeding Rs.20,000/- has to be paid only by way of cheque. However, it was not followed in the instant case. Furthermore, the non-filing of the Income Tax return is also fatal to the case of the prosecution. The Trial Court has considered all the aspects in proper perspective and came to a correct conclusion. Hence, the learned counsel for the respondent prayed for dismissal of the appeal. To substantiate his argument, the learned counsel for the respondent relied upon the following decisions:

(i) 2012 (2) MWN (CrI.) (DCC) 141 (Madras) (T.R.Palanisamy v.Hariharan);

(ii) CDJ 2008 MHC 4594 (Mad.) (Kalavally v. Parthasarathy);

(iii) 2014 (8) Scale 669 (Ramdas v. Krishnanand);

(iv) (2008) 4 Supreme Court Cases 54, Krishna Janardhan Bhat v. Dattatraya G.Hegde.

6. Considered the rival submissions made by both sides and perused the typed set of papers.

7. Once the issuance of the cheque has been admitted, the appellant/complainant is entitled to invoke presumption under Section 118 and 139 of the Negotiable Instruments Act that the cheque has been issued for discharging the legally subsisting liability. The

said presumption is a rebuttable one and so, the burden is upon the respondent/accused to prove that the cheque was not issued for discharging the legally subsisting liability but only as a security.

8. Now this Court has to decide whether the respondent has rebutted the presumption?

Here, the respondent has neither sent any reply nor he had let in any evidence. It is true that as per the dictum of the Hon'ble Apex Court reported in 2010 (2) MWN (Cr.) DCC 5 (SC) (Rangappa v. Sri Mohan), the accused must prove his defence not only by examination of fresh witness, however he may place reliance on the prosecution evidence. Before advertng to the facts of the case, it would be appropriate to consider the decision relied on by both sides.

9. The Party-in-Person relied on the following decisions:

9.1. In the decision of the Hon'ble Apex Court made in Criminal Appeal No.1020 of 2010, Rangappa v. Sri Mohan, it was held that the bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.

9.2. In the decision of this Court dated 29.04.2011 made in CrI.R.C.No.807 of 2005 and 556 of 2006, S.Swarna v. S.Mukanchand Bothra, it was held that once they plead discharge, the person who pleads discharge must prove the same. The respondent herein has proved that he discharged the same. But, he has not filed any documents to prove the discharge. It is appropriate to incorporate paragraph 12 of the said decision:

"12. At this juncture, it is appropriate on the part of this Court to consider the evidence of P.W.1 and P.W.2/Complainant and Exs.P-1 to P-10, which have clearly proved that the cheque has been issued only for discharging the existing liability. Exs.P-4 to 7 clearly proved that she has borrowed money and for discharging the same, she has not filed any document."

9.3. In the decision of this Court dated 30.06.2011 made in S.A.Nos.280 to 285 of 1998, Kuppayammal v. A.Sitheswaran and Others, it was held that having regard to the fact that the

respondents/defendants have failed to discharge the initial burden that they only put their signatures in blank promissory notes and having regard to sections 2(12) and 2(14) of the Indian Stamp Act and Section 20 of the N.I. Act, it has to be presumed that the document was executed by the defendants and therefore, under Section 118 of the Negotiable Instruments Act, presumption shall be drawn in favour of the plaintiff that the document was executed for consideration and the defendants have not discharged their burden that no consideration was passed under the document.

10. On the other hand, the learned counsel for the respondent relied on the following decisions:

10.1. In the decision reported in 2012 (2) MWN (Cr.) (DCC) 141 (Mad.), T.R.Palanisamy v. Hariharan, it was held that non-filing of I.T returns is fatal. It is appropriate to incorporate paragraphs 4 [d] and 4[e] of the said decision:

"4[d] Much was said about the presence of entry in the accounts maintained by the appellant for the purpose of income tax with regard to the cheque loan. In this regard, PW1, the complainant would depose that in the statement of account ending with 31.03.2000, he has given the particulars with regard to the loan to his Auditor. Again he reiterated the same evidence in his cross examination. But he has not produced the income tax return to the Court. It is observed by the learned Judicial Magistrate in the judgment that the complainant has produced a copy of the income tax account in which he has stated that during the financial year 1999 2000, he has received Rs.42,100/- from the house property and from the business and from other sources, he did not derive any income and in this context, it is unbelievable that he was running money lending business and textile business. The observation is proper.

4[e] It is admitted that the appellant is income tax assessee. It is his evidence that he has included the loan in his income tax account. In this context, in the absence of production of income tax returns, it is to be held that the loan transaction should not have been shown in the account. As per the settled position of law, when the income tax assessee fails to produce income tax returns containing the loan transaction, it should have been observed that the alleged loan transaction is an illegal one. Further, he has not disputed the genuineness of Exs.D1 to D3 and the evidence of PW2 with regard to these documents."

10.2. In the decision reported in (2008) 4 Supreme Court Cases 54, Krishna Janardhan Bhat v. Dattatraya G.Hegde, it was held that other principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by S.139 should be delicately balanced. Such balancing acts would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same. Further, it was held that as per Section 269-SS, Income Tax Act, any advance taken by way of loan of more than Rs.20,000 had to be made by an account payee cheque.

10.3. The decision reported in 2014 (8) SCALE 669, Ramdas S/o Khelunaik v. Krishnanand S/o Vishnu Naik does not apply to the facts of the present case because it was held therein that the case has been filed as if it was for borrowal of money. In paragraph 9 of the said decision, it was stated as follows:

"9. ... We find from the record that admittedly, the accused appellant deals with sale and purchase of landed properties and the respondent-complainant works as a Lorry Driver under him with a salary of Rs.2,500/- p.m. and Rs.20/- per day towards miscellaneous expenses (bhatta). Admittedly, the cheque in question was for Rs.5,00,000/- and all the way the stand of the complainant was that he had given a hand loan of Rs.1,75,000/- to the accused-appellant. We find no material on record in support of the claim of the complainant giving hand loan to the accused-appellant. There was also no calculation of account or stipulation of any interest on the alleged loan amount to show as to how the amount of Rs.5,00,000/- was figured, in return of a hand loan of Rs.1,75,000/- if at all taken by the appellant from the complainant. It is also not on record whether there was sufficient balance amount or not in the bank account of the accused when the cheque was dishonoured by the Bank. The Complainant himself stated in the cross-examination that after the Cheque was returned without payment, he has not made any enquiry with the Bank as to whether sufficient funds were available or not in the account of the accused."

In the abovesaid case, there was a sale agreement for purchase of 3 acres of land between the parties to the proceedings and the appellant paid Rs.30,000/- as advance and handed over a Cheque for Rs.5,00,000/-. That has been rebutted by way of examination of evidence of D.W.2 and D.W.6. However, in the instant case no rebuttable evidence has been let in. Hence, the above citation is not

applicable.

10.4. In the decision reported in CDJ 2008 MHC 4594, Kalavally v. Parthasarathy, it was held that once presumption under Section 139 has been rebutted, the onus is shifted to the complainant to prove that the cheque has been issued for discharge. It is appropriate to incorporate paragraph 44 of the said decision:

"44. In this case, the evidence on record makes it abundantly clear that the accused has proved the defence taken by her by preponderance of probabilities. Inference of preponderance of probabilities can be drawn only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies. In this case, the accused has elicited vital admissions during the course of cross examination of P.W.1. From the evidence of D.Ws.1 and 2, which in the considered view of this court, has not been discredited, coupled with the fact that the complainant had not produced any account books to show that he was carrying on quarrying business as claimed by him and no documentary proof has been produced to prove his means it should be held that the complainant has failed to prove that the cheque was given in discharge of a legally recoverable liability. When the defence taken by the accused is that the complainant was a man of no means, it is the bounden duty of the complainant to prove by acceptable evidence that he had the means on the date on which he is alleged to have advanced the loan to the accused. In this case, admittedly, the accused had not given any receipt or executed any instrument in favour of the complainant evidencing the payment of the loan amount said to have been advanced by the complainant to the accused. When a huge amount of Rs.3,00,000/- is said to have been paid, normally, a prudent man would have obtained a document evidencing such payment. But the complainant had failed to get such document. The complainant had not explained as to why such document was not obtained from the accused."

11. Considering the citations submitted by both sides, now this Court has to consider the facts of the present case. It is admitted that the respondent has borrowed Rs.35 lakhs and that amount was also shown in the Income Tax returns. Further, when a suggestion was posted to the appellant that at the time of borrowal of money, blank cheques were issued which was subsequently filled up and complaint

has been filed was denied by him.

12. It is also pertinent to note that the respondent herein has given a complaint against this appellant. In the said case, the appellant was arrested and remanded to judicial custody. Thereafter, the appellant herein filed Crl.O.P.Nos.6806 and 6807 of 2007 to quash the said FIR and that has been quashed. Thus, it would reveal that the respondent herein has admitted the issuance of the Cheque. So, this Court ought to have invoked the presumption under Section 118 and 139 of the Negotiable Instruments Act that the cheque has been issued for discharging the legally subsisting liability. Now, it is the duty of the respondent/accused to rebut the presumption that he had borrowed the money and repaid the same and that the cheque has been issued only as a security. However, except the denial made by P.W.1, no other evidence is available. The respondent herein has not filed any document to show that the amount has been repaid. As per the decision of the Hon'ble Apex Court, it is the duty of the respondent/person who plead discharge must prove the same. But the respondent herein has not let in any oral evidence or any scrap of papers to show that he had repaid the amount. Per contra, he preferred a complaint against the appellant and the said complaint was subsequently quashed. In such circumstances, as per the decision of the Hon'ble Apex Court made in Criminal Appeal No.1020 of 2010, Rangappa v. Sri Mohan, the bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. However, in the instant case, to prove that he had repaid the money, the respondent has not let in any evidence. Hence, I am of the view that the respondent herein has not rebutted the presumption invoked under Section 139 of the Negotiable Instruments Act. Further, he has not probalised his defence. Hence, the onus does not shift to the complainant.

13. Besides this, the Trial Court has held that the appellant is doing money lending business without obtaining any licence and so, it is illegal. But the above finding of the Trial Court is not correct. If money lending business has been done without any licence, he ought to have been prosecuted in accordance with law and it cannot be a ground for acquittal under Section 138 of the Negotiable Instruments Act.

14. It is also pertinent to note that the Trial Court in paragraph 14 of its judgment has stated that the amount lent to the respondent/accused has not been shown in the liability column in the

Income Tax return. The party-in-person would submit that the said amount was shown in the assets column and not in the liability column. However, the Trial Court has not considered the same. It is also true that the Income Tax return has not been marked. However, as per the application filed under Section 91 Cr.P.C, the said document was produced before the Trial Court. When the said document was called for from the Trial Court and perused, it is seen that a sum of Rs.6,70,000/- has been mentioned against Mani & Others in the Assets column. In such circumstances, I am of the considered view that the Trial Court without considering the assets has considered the liabilities and given such a finding which is unsustainable.

15. Considering all the above aspects, I am of the view that once the issuance of the cheque has been admitted, the appellant is entitled to invoke presumption under Section 118 and 139 of the Negotiable Instruments Act that the cheque has been issued for discharging the legally subsisting liability, which is a rebuttable presumption. However, the presumption has not been rebutted by this respondent/accused. He has not probabilised his defence by preponderance of probabilities. Hence, I am of the view that the cheque has been issued for discharging the legally enforceable debt. When the cheque was presented for encashment, it was returned as 'insufficient funds' on 11.09.2002. Hence, statutory notice has been issued to the respondent on 14.09.2002. However, the same was returned as could be evidenced by the return cover and postal receipt. Since the respondent/accused neither repaid the amount nor sent any reply, the appellant herein had preferred a complaint. In such circumstances, I am of the view that the appellant herein has proved the guilt of the accused under Section 138 of the Negotiable Instruments Act.

16. It is true that as per the dictum of the Hon'ble Apex Court relied on by the learned counsel for the respondent reported in (2008) 4 Supreme Court Cases 54, Krishna Janardhan Bhat v. Dattatraya G.Hegde, the other principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by S.139 should be delicately balanced and such balancing acts would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same. Even though it is a judgment of acquittal, the same should not be interfered with unless it is found to be perverse.

17. Considering the judgment of the Trial Court in the light of the above decisions, the Trial Court has not considered the basic

principle that once the signature and the issuance of the cheque is admitted by the respondent/accused, it must invoke the presumption under Section 118 and 139 of the Negotiable Instruments Act that Ex.P.1/Cheque has been issued for discharging the legally subsisting liability. Furthermore, the Trial Court in paragraph 14 of its judgment has stated that the amount has not been mentioned in the liability column of the Income Tax return. However, since the appellant has lent the amount to the respondent, the same was shown in the assets column. So, I am of the view that the Trial Court has not considered the legal preposition and committed material irregularity. Hence, the judgment of the Trial Court suffers perversity and the same is liable to be set aside.

18. In fine,

(a) The Criminal Appeals are allowed.

(b) The judgment of acquittal dated 07.10.2011 made in C.C.Nos.6788 and 6787 of 2002 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai is hereby set aside.

(c) The respondent/accused is convicted for the offence under Section 138 of the Negotiable Instruments Act.

(d) For questioning of sentence, post the matter on 19.03.2015.

06.03.2015

This matter having been listed under the caption for "Questioning of Sentence" on today i.e., 19.03.2015 pursuant to the order of this court dated 06.03.2015 and made herein, in the presence of the above said counsels on either side, the court made the following order:

Today, the respondent/accused is present before this Court. Since he is guilty for the offence under Section 138 of Negotiable Instruments Act, he is questioned about the question of sentence and at that time, he prayed for leniency in imposing the sentence.

2.Considering the representation made by the respondent/accused, instead of imposing sentence to the accused to undergo imprisonment, this Court is inclined to impose a fine of Rs.6,05,000/- in CrI.A.No.801 of 2011 and Rs.55,000/- in CrI.A.No.802 of 2011 and the same has to be paid within a period of two months from today, in default in payment, the respondent/accused shall undergo three months simple imprisonment. Out of the fine amount of Rs.6,05,000/- in CrI.A.No.801 of 2011 and Rs.55,000/- in CrI.A.No.802 of 2011, a sum of Rs.6,00,000/- and Rs.50,000/- respectively are ordered to be paid

as compensation to the appellant/complainant.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

kj/pgp

To

1. VIII Metropolitan Magistrate, George Town, Chennai.
2. -do- Trough The chief Metropolitan Magistrate, Egmore, Chennai-8.
3. The Record Keeper, Criminal Section,
High Court, Chennai.

+3cc's to Mr.S.Mukanchand Bothra, Advocate, S.R.No.12863, 12864.

2CCs to Mr.S.Mukandchand Bothra, Advocate SR 15447

2CCS to Mr.K. Ramani, Advocate SR 15538

2CCs to Mr.K.Raman, Advocate SR 15539

CrI.A.Nos.801 and 802 of 2011

NM(CO)
CA(16/03/2015)

MG [CO]
PSI 24.03.2015

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