IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.485 of 2008

M/s.Sri Vari Balaji Financiers,
a Partnership Firm represented by,
its Authorised Power Agent S.K.Aravindakshan,
D.No.157, NSR Road,
Saibaba Colony, Coimbatore-641011. .. Appellant/Complainant

vs.

R.Subbulakshmi .. Respondent/Accused

Prayer: Criminal appeal filed under Section 378 Cr.P.C., against the judgment of acquittal dated 28.05.2008 made in S.T.C.No.130 of 2007 on the file of the Judicial Magistrate No.7, Coimbatore.

For Appellant : Mr.W.Camyles Gandhi
for Mr.P.Saravana Sowmiyan
For Respondent : Mrs.S.Geetha
for M/s.Rajnish Pathiyil

J U D G M E N T

The complainant as an appellant challenging the judgment of acquittal passed by the learned Judicial Magistrate No.7, Coimbatore in S.T.C.No.130 of 2007 on 28.05.2008 acquitting the respondent/accused from charges under Section 138 of Negotiable Instruments Act, 1881 has preferred the present appeal.

2.The learned counsel for the appellant/complainant would submit that the the respondent/accused had borrowed a sum of Rs.1,40,000/- from the complainant on 06.05.2005 and executed a promissory note to repay the same with an interest at the rate of 24% per annum. On 27.10.2006, the respondent/accused issued a cheque/Ex.p.2 for a sum of Rs.1,90,400/- drawn on Syndicate Bank, Kuviyamuthur Branch. When the cheque/Ex.P.2 was presented before the South Indian Bank, Saibaba Colony Branch, Coimbatore, it was returned as “Insufficient Funds” which was evidenced by Ex.P.3/Return memo, dated 30.12.2008. Ex.P.4 is the Debit advise. Hence, statutory notice has been issued under Ex.P.5 on 14.11.2008, which was evidenced by Acknowledgment Card/Ex.P.6. But the respondent neither sent any reply nor repaid the amount. Hence, the appellant/complainant preferred a police complaint under Section 138 of the Negotiable Instruments Act against the respondent/accused.

3.The Trial Court after considering the oral and documentary evidence of P.W.1, Exs.P.1 to P.6, acquitted the accused stating that there is no evidence to show that Ex.P.2/Cheque was issued by the accused for discharging legally subsisting liability. Against which, the present appeal has been preferred.

4.Challenging the judgment of acquittal under Section 138 of Negotiable Instruments Act the learned counsel appearing for the appellant would submit that since the issuance of cheque and signature in the cheque has been admitted, the appellant is entitled to invoke presumption under Section s118 and 139 of Negotiable Instruments Act and the presumption has been rebutted by the respondent/accused and that factum has not been considered by the Trial Court. Hence, he prayed for setting aside the judgment of acquittal. To substantiate his arguments, he relied upon the decision reported in 2010 (11) SCC 441 (Rangappa vs. Sri Mohan)

5.Resisting the same, the learned counsel appearing for the respondent would submit that the Trial Court in paragraph No.9 of the judgment has correctly held that non-production of promissory note is fatal to the case of the complainant and accepted the defence raised by the respondent/accused that presumption under Section 139 of Negotiable Instruments Act has been rebutted by the respondent by way of cross-examining P.W.1. He would further submit that the Appellate Court shall not set aside the judgment of acquittal unless it is perverse. Hence, he prayed for dismissal of the appeal.

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

7.The appellant herein as the complainant preferred a complaint stating that the respondent/accused has borrowed a sum of Rs.1,40,000/- on 06.05.2005 and executed a promissory note and agreed to repay the same with interest at the rate of Rs.24% per annum and to discharge the same, she issued a cheque on 27.10.2006 for Rs.1,90,400/- as per Ex.P.2 and when it was presented for encashment, it was returned as “Insufficient Funds” as per Ex.P.3. Ex.P.4 is the Debit Advice. Hence, the appellant issued a statutory notice under Section 1389b) of Negotiable Instruments Act under Ex.P.5 and acknowledgment Card is Ex.P.6. Even though the respondent received the statutory notice, neither she repaid the money nor sent any reply. Hence, the appellant was constrained to file a complaint under Section 138 of Negotiable Instruments Act. The Trial Court after following the procedure and considering the oral evidence of P.W.1 and Ex.P.1 to Ex.P.6, has acquitted the accused stating that the defence raised by the respondent has been probablised.

8.Now, the point to be decided is whether the respondent herein has probablised his defence? It is pertinent to note that as per Sections 118 and 139 of Negotiable Instruments Act, the holder have the right to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque has been issued for discharging legally subsisting liability. The presumption under the provision is rebuttable presumption. The respondent/accused ought to have rebutted the presumption either by way of examining independent witness or by cross examining the P.W.1 by preponderance of probabilities. Here, the defence raised by the respondent is that the cheque has been issued only as rent. Since she is running ladies hostel where the appellant is one of the partner of the firm, the cheque has been issued for rental purpose and that been utilised now.

9.The learned counsel appearing for the appellant also relied upon the decision reported in 2010 (11) SCC (Crl.) 441, wherein it was held that once the issuance of cheque has been admitted the presumption under Section 118 and 139 of Negotiable Instruments Act is that the cheque has been issued for discharging legally subsisting liability. In paragraph Nos.19 and 20, it was stated as follows:

> 10.It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused.
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> 20.The Counsel appearing for the appellant- accused has relied on a decision given by a division bench of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde, the operative observations from which are reproduced below (S.B.Sinha, J. at SCC pp, 61-63, paras 29-32 and 34):
>
> > "29.Section 138 of the Act has three ingredients viz.:
> > (i) that there is a legally enforceable debt
> > (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30.The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31.The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32.An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is `preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."

(emphasis supplied)

10.It is an admitted fact that the respondent/accused has not get into the box and she has not filed any documents. But whereas she cross examined P.W.1., wherein a question was posed to the appellant that since this respondent/accused is running a ladies hostel where the appellant is one of the partner and the cheque/Ex.P.2 has been give for rental purpose. Even though, it was denied by the appellant but he has not filed any document to show that the cheque has been issued for discharging legally subsisting liability. It is also appropriate to consider the evidence of P.W.1, wherein he has stated that he the respondent borrowed a sum of Rs.1,40,000/- on 06.05.2005 and executed a promissory note, but he has not filed the document. Furthermore, he has stated that the cheque has been issued for the amount borrowed including the interest amount. But the interest is only Rs.47,600/-, whereas in the cheque it has been mentioned as Rs.1,90,400/-. So, there is a discrepancy in the amount. In such circumstances, the Trial Court has came to the correct conclusion that the respondent/accused has probablised her defence stating that the blank cheque has been given for rental purpose and that has been utilized and the appellant himself has filled up the same and hence the alleged principal amount and interest has not been tallied. Therefore, I am of the view that the findings of the Trial Court does not suffer from any perversity. Hence, the judgment of acquittal passed by the Trial Court is hereby confirmed.

11. In fine,

(i) The Criminal Appeal is dismissed.

(ii) The judgment of acquittal dated 28.05.2008 made in S.T.C.No.130 of 2007 on the file of the learned Judicial Magistrate No.7, Coimbatore is hereby confirmed.

Sd/-
Assistant Registrar
Dated:11.3.15

True Copy

Sub Assistant Registrar

To

1. The Judicial Magistrate No.7,
Coimbatore

2. The Public Prosecutor,
High Court of Madras

3. Record Keeper, Criminal Section,
High Court of Madras

+1 cc to M/s.Rajnish Pathiyil, Advocate,sR.10551.

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krd 12/3