

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Cr1.A.No.657 of 2012

Judgment reserved on: 16.02.2015

Judgment pronounced on: 18.02.2015

N.Ravi .. Appellant/Complainant

Vs.

Pradeep Srinivasan .. Respondent/Accused

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., against the judgment of acquittal dated 04.09.2012 made in C.C.No.32 of 2011 on the file of the learned Judicial Magistrate No.I, Kancheepuram.

For Appellant : Mr. Y.Jyothish Chandra

For Respondent : Mr. Mr.A.Natarajan,
Senior Counsel
for M/s.A.Madhumathi
Mr.C.P.Palnichamy

J U D G M E N T

This Criminal Appeal arises out of the judgment of acquittal dated 04.09.2012 made in C.C.No.32 of 2011 on the file of the learned Judicial Magistrate No.I, Kanchipuram.

2.The appellant as a complainant preferred a private complaint under Section 138 of Negotiable Instruments Act stating that the respondent/accused and the appellant/complainant entered into a lease agreement and fixed the lease amount as Rs.15,40,000/- and on 13.01.2009, they entered a memorandum of understanding. The complainant has paid the lease amount on various dates and the respondent/accused had also given the receipt for the same. When the appellant/complainant prepared to carry on the business, he came to know that there were no fundamental amenities required for BPO available in the premises. Hence, he cancelled the agreement and asked for the repayment of the same. Only after repeated demands, the respondent/accused along with the letter dated 22.12.2009, which is marked as Ex.P.2 acknowledging his subsisting liability to repay the lease amount, gave three cheques drawn on the State Bank of India, Anna Nagar, Chennai, bearing different dates for different

amounts i.e. 05.01.2010 for Rs.50,000/-, another one dated 10.02.2012 for Rs.50,000/- and other one dated 30.06.2010 for Rs.7,00,000/-. The first two cheques were encashed and when the third cheque/Ex.P.3, bearing No.715406 dated 30.06.2010 was presented for encashment by the appellant before Karur Vysya Bank Limited, Kancheepuram, but it was returned as "insufficient funds" as per return memo Ex.P.4. So the appellant/complainant on 19.01.2011 issued Ex.P.5 statutory notice to the respondent under Section 138 of Negotiable Instruments Act, but the respondent/accused evaded the service of notice and he manoeuvred and returned the notice on 25.01.2011. Therefore, the appellant/complainant was constrained to file a private complaint against the respondent/accused under Section 138 of Negotiable Instruments Act.

3.The trial Court has taken cognizance of an offence, after recording the sworn statement and after following the procedure, he framed necessary charges. Since the accused pleaded not guilty, the trial Court examined P.W.1 and Exs.P1 to P7 on the side of the complainant and on the side of the respondent, D.W.1 was examined and Exs.D1 and D2 were marked. The trial Court after considering the oral and documentary evidence, acquitted the accused for the offence under Section 138 of Negotiable Instruments Act.

4.Challenging the judgment of acquittal passed by the trial Court, learned counsel for the appellant/complainant submitted that the appellant is a tenant and the respondent/accused is the landlord. They have entered into a lease agreement and even though, the lease amount was fixed as Rs.15,40,000/-, the appellant/complainant paid Rs.8,00,000/-. Since the premises of the respondent does not fulfill the requirements of the appellant, they cancelled the memorandum of understanding. For repaying the amount, the respondent/accused issued three cheques, viz. 05.01.2010 for Rs.50,000/-, another one dated 10.02.2012 for Rs.50,000/- and other one dated 30.06.2010 for Rs.7,00,000/-. Out of the three cheques, two cheques were honoured and the appellant/complainant recovered Rs.1,00,000/-. When the appellant/complainant presented the third cheque/Ex.P.3 for encashment, the same has been returned as insufficient funds and hence, he issued a notice and that has been returned. He would further submit that even though the respondent/accused has raised a point that there is no notice under Section 138(b) of Negotiable Instrument Act, the Trial Court has rightly held that notice has been sent to the correct address and so it is deemed that service is correct. He would further submit that the Trial Court has held that since the lease period is more than 11 months, the document should be an registered document but Ex.D.1/lease agreement is an unregistered document, so the Cheque was not given for discharging legally subsisting liability and on that basis, the Trial Court has acquitted the respondent/accused. He would further submit that Ex.D.1/lease agreement is an unregistered document and that can be used for collateral purpose. The respondent/accused issued a letter/Ex.P.2

dated 22.12.2009 and in that, it was specifically mentioned that Rs.8 lakhs has been given by way of three cheques. So, the Trial Court has failed to consider the same. He also relied upon the decision reported in 2010 (11) SCC 441 (Rangappa vs. Sri Mohan), wherein it is stated that once the issuance of cheque is admitted, the presumption is that it was issued for discharging legally subsisting liability under Section 118 and 139 of Negotiable Instruments Act, which is a rebuttable presumption and here, the respondent has not rebutted the presumption. So, the Trial Court has not considered all the aspects in proper perspective. He would also relied upon Section 35 of Indian Stamps act, wherein it is stated that instruments not duly stamped inadmissible in evidence provided that nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a criminal court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 and submits that no one raised this plea. So, the Trial Court has wrongly without considering the provision of law has acquitted the respondent/accused. Hence, he prayed for convicting the respondent/accused.

5. Refuting the same, the learned senior counsel appearing for the respondent would submit that the cheque was taken by force and no notice has been given under Section 138(b) of Negotiable Instruments Act. He also relied upon the decision reported in 2008 (1) SCC (Cri.) 200 (K.Prakashan vs. P.K.Surenderan), wherein it is stated that when two views are possible, the Appellant Court should not reverse the judgment of acquittal merely because the other view was possible. When the judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non-consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified. 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 admitted fact is that the appellant and the respondent have entered into a lease agreement as per Ex.D.1 on 13.01.2009. It is true that it is an unregistered document and the lease period was for 18 months. It is appropriate to incorporate Clause 10 in the lease agreement, which reads as follows:

10. The Lessee shall pay the Lessor for the facility services of Rs.4,000/- per seater per month for 1.5 years in a phased manner as specified in total of 25,20,000/- which is refundable after 1.5 years.

- (A) Initial payment of Rs.4,00,000/- (Rupees Four Lacs) in the month of January 2009
- (B) 15th February 2009 6,00,000/-
- (C) 15th March 2009 6,00,000/-

(D) 15th April 2009 6,00,000/-

(E) 15th May 2009 3,20,000/-

8.The Trial Court in paragraph No.8 of the judgment has discussed in respect of lease agreement/Ex.D.1. It is pertinent to note that Section 17(d) of the Registration Act deals with lease of immovable property from year to year or for any term exceeding one year or reversing earlier rental document was to be registered. But admittedly the document is not a registered one. It is also appropriate to incorporate Section 35(d) of Indian Stamp Act.

"35(d). nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a criminal court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1989."

9.It is true that the document was not properly stamped and not registered. Any person wants to rely upon the document for enforcing right in the document, then the document has to be registered. Any unregistered document has been admissible evidence for collateral purpose. But here, they are not claiming any right over the property. But it was filed by the respondent/accused. In such circumstances, the Trial Court has wrongly rejected the document and also held that the amount received as an advance mentioned in Ex.D.1 cannot be relied upon. But de hors, Ex.D.1/lease agreement. But the Trial Court has not considered Ex.P.2/letter given by the respondent/accused on 22.12.2009, wherein the respondent has stated that he has given three cheques and the details of cheques were given as follows:

- 1.Amt-50,000/- dt. 05/01/2010 Bank - SBI Anna Nagar, Chennai.
- 2.Amt-50,000/- dt. 10/02/2010 Bank - SBI Anna Nagar, Chennai.
- 3.Amt-7,00,000/- dt. 30/06/2010 Bank - SBI Anna Nagar, Chennai.

10.The respondent/accused has issued a Ex.D.2/receipt for the amount of Rs.8 lakhs. So, the receipt of Rs.8 lakhs has been proved by way of filing Ex.D.2 dated 25.03.2009. The issuance of cheque has been spoken by the respondent under Ex.P.2/letter dated 22.12.2009. Out of the three cheques, two cheques for a sum of Rs.50,000/- each has been encashed by the appellant herein and the third cheque for a sum of Rs.7 lakhs has been returned. So, to discharge the amount mentioned in Ex.P.2, the cheque has been issued. The Trial Court has failed to consider the same. The respondent has not disputing the issuance of cheque. He was examined as D.W.1. and in his evidence, he has fairly conceded that the complainant has paid Rs.8 Lakhs upto March 2009 and he also submitted that he has given a receipt Ex.D.2. In his cross-examination, his candid admission is that Ex.P.3 cheque has been given by him and the signature also belongs to him. He also stated that Ex.P.2/letter dated 22.12.2009 contained his signature and he fairly conceded that he has not given any complaint for

cheques having been obtained by force. He further conceded that the appellant has paid Rs.8 lakhs. Even though he raised a plea that the cheques were given under coercion and force, he has fairly conceded that he has not taken any steps either by way of complaint or by issuing notice. In such circumstances, the Trial Court has rightly held that the issuance of cheque has been proved. By invoking presumption under Section 118 and 139 of Negotiable Instruments Act, the cheque/Ex.P.3 has been issued for discharging legally subsisting liability. But, however, the Trial Court has stated that the cheque has been issued for unregistered document and hence, it is illegal. The above finding is not correct and illegal, because once D.W.1, in his cross-examination has admitted that the cheque has been issued and also admitted his signature, even though he has stated that it was obtained by coercion and force, the Trial Court has not accepted the same, the Trial Court ought to have invoked presumption under Section 118 and 139 of Negotiable Instruments Act. It is appropriate to consider the decision relied upon the learned counsel appearing for the appellant reported in 2010 (11) SCC 441, wherein it was held as follows:

20.

"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)

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22.....

23. The respondent-claimant has also referred to the decision reported as Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors. 2008 (8) SCALE 680, wherein it was observed: (SCC p. 660, para 17)

"17. Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal."

11. Now, this Court has to decide whether the respondent/accused has rebutted the presumption. But here the respondent himself has admitted the issuance of cheque and also admitted the signature contained. He also fairly conceded that he received Rs.8 lakhs and issued a receipt/Ex.D.2 and also admitted that signature contained in Ex.P.2 also belongs to him. That factum was not considered by the Trial Court. So, the Trial Court ought to have held that the appellant herein has proved that the cheque has been issued for discharging legally subsisting liability. The presumption was not rebutted by the respondent/accused.

12. The learned senior counsel appearing for the respondent/accused also relied upon the decision 2008 (1) SCC (Cri.) 200, wherein it was held as follows:

"19. We, therefore, are of the opinion that keeping in view the peculiar fact situation obtaining in the present case it cannot be said that the judgment passed by the learned Trial Judge was perverse or suffered from any legal infirmity. It was not a case where the learned Trial Judge failed to consider the evidences brought on record and/or misappreciated the same."

13. There is no quarrel over the proposition laid, but the above citation is not applicable to the facts of the present case because

the Trial Court has disbelieved the defence raised by the respondent/accused stating that the cheque was obtained by force. Further, the Trial Court has disbelieved the statement that no notice under Section 138(b) of Negotiable Instruments Act. But the Trial Court on the basis of evidence of P.W.1 and D.W.1 has correctly held that the respondent/accused has wantonly evaded the notice and the notice has been sent to the correct address, as per Section 27 of General Clause Act, wherein it is stated that when notice has been sent to the correct address and it was returned, it is deemed to be a proper service and burden to rebut the presumption lies on the party challenging the factum of service of notice. But perusing the Ex.P.6/Return cover, shows that address mentioned in the Voter ID/Ex.P.7 of the respondent/accused has been mentioned. So, notice has been sent to the correct address and hence, it is presumed to be deemed service. D.W.1, in his evidence, has further stated that he was residing at No.167-B8, Jain Eiffel Tower, Plot Nos.89 and 90, Arcot Road, Vadapalani, Chennai. So, the Trial Court has held that notice has been issued under Section 138(b) of Negotiable Instruments Act. But the Trial Court has failed to consider the material document, i.e. Ex.D.2/receipt and Ex.P.2/letter dated 22.12.2009. Under Ex.D.2 the respondent/accused has stated that he received a sum of Rs.8,00,000/- from the appellant/complainant and under Ex.P.2/letter, the respondent/accused has stated about the issuance of cheques. In such circumstances, the material evidence has not been considered by the Trial Court and the Trial Court has erroneously held that Ex.D.1/Lease agreement is an unregistered document and the amount mentioned therein is not legally subsisting liability. So, the Judgement of the Trial Court is perverse and hence, it is liable to be set aside.

14.Considering the facts and circumstances of the case along with the submissions made on either side, I am of the view, the judgment of the Trial Court is perverse for not considering the material evidences, namely, Ex.P.2 and Ex.D.2 and also cross-examination of D.W.1/the respondent herein. The respondent has admitted the issuance of cheque for Rs.7 lakhs, which was presented for encashment and the same was returned as insufficient funds and notice under Section 138(b) of Negotiable Instruments Act has been issued. Hence, the ingredients of Section 138 of Negotiable Instruments Act has been made out. So the appellant has proved the respondent/accused is guilty for the offence under Section 138 of Negotiable Instruments Act beyond reasonable doubt. Therefore, the judgment of acquittal passed by the trial Court is hereby set aside.

15.In fine,

- This Criminal Appeal is allowed, setting aside the judgment of acquittal dated 04.09.2012 made in C.C.No.32 of 2011 on the file of the learned Judicial Magistrate No.I, Kancheepuram.

- The respondent/accused is found to be guilty under Section 138 of Negotiable Instruments Act and hence, convicted under Section 138 of Negotiable Instruments Act.
- For appearance of the respondent/accused before this Court for questioning of sentence, post this appeal on 27.02.15.

cse

18/02/2015

This matter having been posted for question of sentence on Friday, the 13th day of March 2015 in the presence of Mr.Y. Jyothish Chandra, Advocate for the petitioner and of M/s. A. Madhumathi, Advocate for the respondent 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 pleaded that he want to settle the matter.

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.

3.At that time, it was represented by the learned counsel appearing for the appellant/complainant that the appellant/complainant has already received a sum of Rs.9,00,000/-. So, the respondent/accused is directed to pay the fine amount of Rs.5,000/-, in default in payment, the respondent/accused shall undergo one month simple imprisonment.

cse

dt.13/03/2015

Sd/-
Assistant Registrar
Dated:24.2.15

True Copy

Sub Assistant Registrar

To

- 1.The Judicial Magistrate No.III,
Kancheepuram.
- 2.do thro The Chief Judicial Magistrate,
Kanchipuram.
3. The record keeper, Crl. Section ,
High Court, Madras.

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