IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE **M.VENUGOPAL**

Crl.A.No.65 of 2014

P.Thilagavathy ..Appellant / Complainant

Vs.

B.Somasundaram ..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., to set aside the order of acquittal dated 08.06.2011 in C.C.No.921 of 2009 on the file of the Learned Judicial Magistrate No.2, Coimbatore

For Appellant : Mr.R.Babu for
Mr.B.Vijayakumar

For Respondent : Mr.M.R.Thangavel

J U D G M E N T

The Appellant / Complainant has focused the present Appeal before this Court as against the Judgment of Acquittal dated 08.06.2011 in C.C.No.921 of 2009 passed by the Learned Judicial Magistrate No.2, Coimbatore.

2. The Learned Judicial Magistrate No.2, Coimbatore while passing the Judgment in C.C.No.921 of 2009 on 08.06.2011 at Paragraph No.16 had categorically observed that the Complainant (Appellant) from the year 2004 till date had not shown the Income Tax and also opined that the Ex.P.8 to Ex.P.11, documents do not reflect about her requisite means and also she had not produced any documents to show that she was receiving an income from rent and resultantly came to the conclusion that it was unbelievable that a sum of Rs.5,00,000/- was given as loan and found the Respondent / Accused not guilty and acquitted him under Section 255(1) of Cr.P.C.

3.Being dissatisfied with the Judgment of the trial court in C.C.No.921 of 2009 dated 08.06.2011, the Appellant / Complainant has challenged the same in the present Appeal by taking a plea that the trial court had failed to appreciate that there was no mention about the stealing of cheque in Ex.P.6, Reply Notice dated 10.09.2007 of the Respondent / Accused.

4. Advancing his arguments, the Learned Counsel for the Appellant

vehemently projects an argument that the Respondent / Accused had not denied the execution of case cheque viz., Ex.P.1 and moreover the Respondent had not denied his signature in the said cheque and failure to take into the account of the same had resulted in miscarriage of justice.

5. The Learned Counsel for the Appellant brings it to the notice of this Court that the trial court should have drawn an inference against the Accused to the effect that the cheque was issued by the Respondent / Accused knowing fully well that there was insufficient funds in his account and added further, the said account was not operated by him. Unfortunately, these vital aspects were not looked into by the trial court in a proper and real perspective at the time of passing the Impugned Judgment in C.C.No.921 of 2009 dated 08.06.2011.

6. Repelling the contentions of the Learned Counsel for the Appellant / Complainant, the Learned Counsel for the Respondent / Accused advances a legal plea that the Appellant / Complainant as P.W.1 had clearly admitted in her evidence that she had not shown the Income Tax from the year 2004 and also that even though she had deposed in her evidence that she was receiving rental income, yet, she had not filed the necessary documents in this regard and also that the Appellant being a

house wife, was not in a position to establish before the trial court that she had the requisite means to advance a sum of Rs.5,00,000/- to the Respondent / Accused. Further it is represented on behalf of the Appellant / Complainant that only after taking into consideration of the entire gamut of the available oral and documentary evidence on record, the trial court rendered a finding that the Respondent / Accused was not guilty in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 and resultantly acquitted under Section 255 (1) of Cr.P.C., which may not be dislodged by this Court in the present Appeal.

7. At this stage, this Court on a careful perusal of the complaint in C.C.No.921 of 2009 filed by the Appellant / Complainant before the trial court finds that the Appellant / Complainant had averred that the Accused (Respondent) is well known to her and that he borrowed a sum of Rs.5,00,000/- only on 06.05.2008 for his urgent needs promising to repay the same within one month and on the same day, issued a post dated cheque bearing no.082377 dated 06.07.2008 drawn on Central Bank of India, R.S.Puram Branch, Coimbatore, drawn in favour of the Complainant (Appellant) for a sum of Rs.5,00,000/-.

8. Also, the Appellant / Complainant had averred at Paragraph No.2

of the complaint that when the cheque in question was presented as per request of the Respondent / Accused for collection on 06.12.2008 through her banker, Lakshmi Vilas Bank Ltd., Ganapathy, Coimbatore, but due to the shock and surprise the cheque was dishonoured on 17.12.2008 based on the reason in Bank's Memo 'Insufficient Funds' in the Respondent / Accused Account. Moreover, the Appellant / Complainant had issued a Legal Notice dated 09.01.2009 (Ex.P.4) demanding the Respondent / Accused to pay the amount covered under the dishonoured cheque within 15 days from the date of receipt of the notice. In fact, the said notice was issued on 10.01.2009. However, the Respondent / Accused came out with a frivolous reply dated 27.01.2009 (Ex.P.6) containing false averments. Viewed in this background, the Appellant / Complainant had filed the complaint before the trial court against the Respondent / Accused in respect of an offence punishable under Section 138 of Negotiable Instruments Act.

9. For a better and fuller appreciation of factual matrix of the case, this Court makes a useful reference to the evidence of P.W.1 and D.W1 to promote substantial cause of justice.

10. P.W.1 (Appellant / Complainant in her cross-examination) had

deposed that she is house wife and not doing any particular business and that she is paying the income tax for 6 or 7 years and her husband is looking after her 'Revenue and Expenditure Accounts' and she directly knows about the income tax accounts paid by her and for the loans advanced by her, she would not show the same in the accounts.

11. It is the further evidence of P.W.1 that through rent she derives an income of Rs.40,000/- per month and to show the same, she could file the documents and that she does not know that the Respondent / Accused is running his business near the workshop of her husband and only at the nearby place, he is running the real estate business by plotting out the grounds and further added that she does not know about the same in this regard.

12. It is to be noted that P.W.1 (Appellant / Complainant) (in her cross-examination) had clearly stated that in her chief examination, she had not stated about the date on which the loan was given to the Respondent / Accused and further stated that it was correct to state that in the complaint she had mentioned that the Respondent / Accused would return the loan within one month but in the in her Lawyer's notice she had mentioned that the Respondent would return the said loan within two

months.

13. The Respondent / Accused (as D.W.1) had deposed that soon after the receipt of the Lawyer's Notice, on the next day, he had lodged a complaint before the B9 Police Station that the cheque was wrongly misused but the police had not registered a case and they advised him to take recourse to the Court since the reply was issued in his favour. However, he had stated in his evidence that based on his complaint, the Appellant / Complainant (P.W.1) was examined in the police station and that Ex.D2 was the Income Tax Return Verification Form and as per Ex.D2 he had paid a sum of Rs.9,96,000/- towards income tax and further he has stated that he does not know as to how the cheque came into possession of the Appellant / Complainant and that he had not given the cheque to her. Also he had stated that he does not know the Respondent / Accused and that he is carrying out the real estate business.

14. Ordinarily, when the signature of the Respondent / Accused is found in a case cheque, the presumption is that he had issued the cheque to and in favour of the Complainant. But that presumption in Law is not automatic, it is a rebuttable one. Furthermore, if the signature is found in a Negotiable Instruments / Bill of Exchange, as the case may be, of an

accused, the presumption in Law is that the Accused had issued / given the cheque to and in favour of the Payee / Appellant / Complainant. Also the amount mentioned in the cheque can only be construed for consideration purpose only. As a matter of fact, the Respondent / Accused can maintain silence in our constitutional scheme of things. In case, the initial burden is established by the Appellant / Complainant, then the burden shifts on the side of the Respondent / Accused. Moreover, the presumption specified under Section 139 of Negotiable Instruments Act, 1881 is not automatic.

15. It is to be pointed out that Section 138 of Negotiable Instruments Act is a penal provision and to attract the same, the dishonoured cheque should have been issued in discharge wholly or in part of any debt or other liability of the drawer to payee. Section 139 of Negotiable Instruments Act would apply only if a 'Cheque' was established to be of a character mentioned in Section 138 of N.I.Act. As a matter of fact, there is no obligation on the part of an accused to separately let in evidence or to enter the witness box if he can collect materials from the evidence of the complainant which would sufficiently disprove the presumptive factors.

16. The exclusion of 'guilty mind' as an essential ingredient of an

offence under Section 138 of N.I.Act is clear and explicit only in public interest, the term 'mensrea' is excluded to curb tendency of dishonour of cheques Undoubtedly, the complainant has to discharge the initial onus that the cheque was given to him by an accused in discharging of a 'Legally Enforceable Debt'.

17. Barring the above, it is to be remembered that the 'Standard of Proof' on the accused and that of the prosecution in a criminal case is quite different. If the liability is admitted by the Respondent / Accused and for which the cheque was issued and the same was dishonoured, then, an offence under Section 138 Act is made out. Also this Court points out that a statutory presumption has an evidenciary value the issue whether presumption stood rebutted or not, therefore would be decided keeping in view of other available evidence on record.

18. It cannot be brushed aside that although the Negotiable Instrument Act speaks of a Civil Liability, yet the dishonour of cheque due to ' insufficient funds' etc., would clothe a fastening of Criminal Liability only with a view to prevent the dishonest persons from cheating the honest persons / givers. Indeed, the Negotiable Instruments Act was amended and now the aspect 'Dishonour of Cheque' is a criminal offence.

19. It is the duty of the Complainant when he launches a criminal prosecution against the Respondent / Accused, to establish his / her case against the Accused beyond all reasonable doubt. It is always open to the Respondent / Accused to raise some probable defence to displace the case of the Complainant by bringing to the notice of a court of Law in regard to the evidence of the prosecution witness etc.,

20. It is needless for this Court to make a significant mention that if the Complainant fails to prove his/her case in respect of an offence under Section 138 of Negotiable Instrument Act, the Offender / Deviant / Accused cannot be found guilty and only his acquittal would follow as a logical corollary.

21. As far as the present case is concerned, it is the admission of Appellant / Complainant, as P.W.1 that she had not produced any documents on her behalf before the trial court to show that she had the requisite rental income. Moreover, when she is a house wife and when she is paying an Income Tax for six or seven years she had not shown the

lending sum of Rs.5,00,000/- to the Respondent / Accused in her Income Tax Return. In fact, she had also proceeded to state in evidence that the Respondent / Accused was not her family friend and that her father does not know him.

22. In a criminal case, the element of 'Legally Enforceable Debt' is to be established by the Complainant concerned. In the present case on hand, P.W.1 had admitted in her evidence that the Respondent / Accused had agreed to repay the amount within two months. However, in her Lawyer's notice, viz., Ex.P.4 dated 09.01.2009 she had only mentioned that within one month the Respondent / Accused had agreed to return the same. Even though the Respondent / Accused in his Reply Notice dated 27.01.2009, Ex.P.6 had not mentioned about the fact of stealing of the cheque by the Appellant / Complainant's husband, yet this Court is of the considered view that the Appellant / Complainant when she happens to be a house wife had not established to the subjective satisfaction of this Court that she had the requisite wherewithal or means to advance such a high / heavy sum of Rs.5,00,000/- to the Respondent / Accused. Also that she had not shown the said loan amount of Rs.5,00,000/- in her Income Tax returns. Moreover, she had deposed in her evidence (in cross-examination) that the Respondent / Accused doing the business of real

estate and that she does not know whether his office is near their Grill Workshop etc., would create unfavourable circumstances in her favour. She had also stated in her evidence that she does not know whether the Respondent / Accused is doing real estate business at Coimbatore.

23. To put it precisely, in the instant case, the Ex.P.8 to Ex.P.11 documents (Income Tax permanent account photocopy, court affidavit in LAOP No.244 of 1991, Partition Deed, Memo of compromise) do not in any way heighten the case of the Appellant. Moreover, in the Bank Account Ex.P.7 (Receipt and Expenditure report) at any point of time, there was no amount of Rs.1,00,000/- lying thereto. Continuing further, in the report for the period from 2007-2009, only once during 12/08 a sum of Rs.1,04,017.77/- was standing as balance sum. But a sum of Rupees One Lakh was withdrawn on the next day. In short, the Appellant / Complainant had not established that Ex.P.1, Cheque was issued by the Respondent / Accused towards a 'Legally Enforceable Debt'. Consequently, the finding of the trial court that the Respondent / Accused was not guilty had ultimately ended in the 'Judgment of Acquittal' in C.C.No.921 of 2009 dated 08.06.2011 does not suffer from any legal lacunae, material irregularities or

patent illegalities in the eye of Law. Suffice it for this Court to point out that this Court is in complete agreement with the view taken by the trial court in finding the Respondent / Accused not guilty under Section 138 of Negotiable Instrument Act and acquitting him under Section 255(1) of Cr.P.C., viewed in that perspective, the present Criminal Appeal sans merits.

In fine the criminal appeal is dismissed. The Judgment of acquittal dated 08.06.2011 in C.C No.921 of 2009 passed by the Learned Judicial Magistrate No.2, Coimbatore is affirmed by this Court for the reasons assigned in this Appeal.

30.11.2016

Index: Yes/No

Internet: Yes/No

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M.VENUGOPAL,J.,

ssd

To

1. Judicial Magistrate No.2, Coimbatore
2. The Public Prosecutor, High Court, Madras.

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