

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2016

(Judgment reserved on 23.09.2016)

CORAM:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

CrI.A.No.100 of 2010

Samiyappan

..Appellant / Complainant

Vs.

S.Sarmila Banu

..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., to call for the records and set aside the order of acquitting the Respondent / Accused passed in S.T.C.No.1633 of 2008 dated 16.07.2009 on the file of the Learned Judicial Magistrate No.I, Mayiladuthurai and allow the Criminal Appeal.

For Appellant : Mr.R.Shivakumar

For Respondent : Mr.N.A.Nissar Ahmed

J U D G M E N T

The Appellant / Complainant has filed the present Criminal Appeal before this Court as against the Judgment dated 16.07.2009 in STC No.1633 of 2008 passed by the Learned Judicial Magistrate No.I, Mayiladuthurai.

2. The Learned Judicial Magistrate No.I, Mayiladuthurai while passing the impugned Judgment in STC No.1633 of 2008 (filed by the Appellant / Complainant) at Paragraph No.17 had interalia observed the following:

...17..... It is well established that where the burden of an issue lies upon the accused, she is not required to discharge that burden by leading evidence to prove her case beyond a reasonable doubt. The evidences adduced by the parties before this court lead to one conclusion that the accused has been able to discharge her initial burden. The burden thereafter shifted to the complainant to prove his case. But, he failed to do so. Thus, the complainant has failed to prove his case beyond all reasonable doubts.

and resultantly found the Respondent / Accused not guilty under Section 138 r/w 142 of Negotiable Instruments Act, 1881 and acquitted her.

3. Being dissatisfied with the Judgment dated 16.07.2009 in STC No.1633 of 2009 passed by the Learned Judicial Magistrate No.I, Mayiladuthrai, the Appellant has preferred the instant Appeal before this Court basically contending that when the Respondent / Accused had admitted that he issued a cheque, then, under Section 138 of N.I.Act, there is a presumption that the cheque was issued for a 'Debt' or 'Liability'.

4. The Learned Counsel for the Appellant proceeds to take a stand that the trial court had travelled beyond the ambit of Section 138 of N.I.Act by observing that no one can sell their property below the market value and on that basis came to the conclusion that there was a cash transaction between the Accused and the Complainant.

5. According to the Learned Counsel for the Appellant / Complainant, the trial court had committed an error in accepting the plea that an execution of sale agreement with the Respondent / Accused mother would discharge the 'Daughter's Liability'.

6. The Learned Counsel for the Appellant vehemently projects an argument that the trial court without any evidence held that there was no money transaction and that the cheque was given as security. Also it is represented on behalf of the Appellant / Complainant that the Respondent / Accused had not denied the surety of statutory notice to her before the trial court, in main case STC No.1633 of 2008.

7. The Learned Counsel for the Appellant cites the Judgment between B.Ramachandra Reddy V. Abid Ali and Another dated 24.10.2006 (vide India Kanoon - Equivalent Citation 2007 Cr1.L.J at Page 641 whereby and whereunder at Paragraph Nos.11 and 12, it is observed as under:-

11. The Delhi High Court in Pratab Singh Yadav V. Atal Behari Pandey 2003 Cr1.L.J 705 held as under

(Para 8):

In the instant case, petitioner No.1 has not drawn any cheque in favour of the respondent. It is petitioner No.2 who had drawn the cheque for Rs.1,05,000/- at his own bank account for discharging

the liability, payment of debt of his father, petitioner No.2 whose cheque was bounced by the bank on which it was drawn for insufficiency of funds in the account of petitioner no.2 (to be precise closure of account) and his subsequent failure to make the payment. It is a criminal offence. Only petitioner No.2 can be said to have committed the offence covered by Section 138. How will petitioner no.1 be guilty of an offence under Section 138 of the Act has not been explained. He cannot have vicarious liability for offence by implication or otherwise as certain persons have by application of Section 141 of the Act.

12. For the reasons aforementioned and in view of the decisions cited supra, once 1<sup>st</sup> respondent herein (A.2) issued the cheque with the intention that it should cover the liability of his father (A1), he cannot escape from his liability for dishonour of Ex.P.1 Cheque issued by him because it was issued to cover the legal liability incurred by his father. In my considered view, the trial Court has rightly convicted him for the offence and the finding recorded by the lower appellate Court that the liability cannot be legally enforceable against the 1<sup>st</sup> respondent-A2 is erroneous and cannot be sustained.

8. The Learned Counsel for the Appellant relies on the Judgment between Noble T.Francis V. Seleena Jos dated 16.08.2004 Equivalent Citation 2005(1) ALD CRI 36 whereby and whereunder at Paragraph No.6, it is observed as follows:-

"6. The Court below had very categorically found that the complainant was successful in proving, on the strength of the evidence of P.W.1 and Ext.P.1, that a cheque has been issued in discharge of an amount of Rs.80,000/- due as loan availed of by the accused. It was further proved that the cheque has been presented in time and there was a demand to pay the amount, consequent on bouncing of the cheque. In such circumstances, in the absence of any other evidence in rebuttal of the presumptions available in favour of the complainant, the acquittal, on the ground that proof of Ext.P.1 does not include the proof of the contents of Ext.P.1 is totally unjustified. In this aspect, it has to be borne in mind that the case of the accused herself was that she had issued the cheque as a security in respect of the transaction between her husband and the complainant. Now, on the strength of a recent decision of the Supreme Court reported in

I.C.D.S. Ltd. V. Beena Shabeer 2002 (3) KLT 218: (2002 Cri LJ 3935) it is contended that even a cheque issued by the wife as a guarantee for the due payment of the instalments in respect of a vehicle loan was found to be duly supported by consideration. Hence going by the case of the accused, an offence under Section 138 of the Act is made out.

9. The Learned Counsel for the Appellant relies on the Judgment of the Hon'ble Supreme Court dated 19.09.2016 in CrI.Appeal No.867 of 2016 (arising out of S.L.P.(CrI.) No.5410 of 2014 between Sampelly Satyanarayana Rao V. Indian Renewable Energy Development Agency Limited) whereby and whereunder at Paragraph Nos.16 to 19, it is observed as under:-

"16. We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P.7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint)

17. As is clear from the above observations of this Court, it is well settled that while dealing with the quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In Rangappa Versus Sri Mohan (9 (2010) 11 SCC 441), this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment ((2003) 3 SCC 232.

19. Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section

138 of the Act, as rightly held by the High Court.

10. The Learned Counsel for the Appellant cites the Judgment of the Hon'ble Supreme Court in Appeal (Crl.) 797 of 2002 between I.C.D.S. Limited V. Beena Shabeer & Another dated 12.08.2002 (vide Indian Kanoon) wherein it is observed as follows:-

"The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do

not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents.

It is to be noted, however, that both the parties, during the course of arguments have made elaborate submissions on Sections 126 and 128 of the Contract Act, but in our view, by reason of the specific language used by the legislature, question of consideration of the matter from the point of view of another Statute would not arise, neither we would like to express any view since that may have some effect as regards the merits."

11. Conversely, it is the submission of the Learned Counsel for the Respondent / Accused that the trial court at Paragraph No.14 of the Judgment in STC No.1633 of 2008 dated 16.07.2009 had clearly observed as under:

"14..... When he is interested in getting his money back, which was denied by Nageebunnisa, there is no possibility to grant a loan of Rs.2,00,000/- by P.W.1 to the accused, while a dispute is pending between the complainant and mother of the accused. Thus, this Court concluded that the accused did not borrow any amount from P.W.1 and there is no legally enforceable debt. The said presumption raised by P.W.1 under Section 118 (a) of N.I.Act has been rebutted by the accused."

and ultimately came to the conclusion that the Appellant / Complainant had failed to establish the case beyond all reasonable doubt and acquitted the Respondent / Accused since he was not found guilty. Further, it is represented on behalf of the Respondent / Accused that the Judgment of the trial court does not suffer from any legal infirmities and the same may not be dislodged by this Court at this distance point of time.

12. The Learned Counsel for the Respondent / Accused cites the decision of Hon'ble Supreme Court between M.S.Narayana Menon alias Mani and State of Kerala and Another reported in AIR 2006 SC at Page 3366 (1) and at Spl. Page 3376 wherein at Paragraph 57, it is observed as follows:-

"57. We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has been proved. The Appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act."

13. Also the Learned Counsel for the Respondent refers to the decision of this Court reported in 1999(1) CTC at Page 6 between Balaji Seafoods Exports (India) Ltd., rep. By its Director, Chalapathy and another and Mas Industries Ltd., S.Pichalah, Managing Director, 153, Mount Road, Madras 15, rep. By its Authorised Person U.Vijayakumar whereby and whereunder at Paragraph Nos.8 to 10 it is observed as follows:-

"8. Therefore, on the date when the cheque was handed over, there was no legally enforceable debt or other liability. An undated cheque for Rs.35 lakhs was handed over as a security for the purpose of the contract. It was not handed over with the intention of making it as an instrument of immediate negotiation to discharge a subsisting liability or debt. Thus, this is a case where one of the parties to the contract had obtained a signed undated cheque for Rs. 35 lakhs as a security. As dispute arose between the parties, the cheque is now utilised by the complainant to resort to Sections 138 of the Act by filing in a date convenient to him.

9. There is yet another flaw in this matter. The agreement refers to the fact that a cheque for Rs. 35 lakhs shall be given as security for the advance received. Therefore, the cheque was issued for Rs. 35 lakhs. But the claim made in the notice was for Rs.39,43,508. Therefore, I am of the view that this is a case where the provisions under Section 138 of the act will not apply. A reading of the agreements between the parties does not lend support to such a view. Of

course, the learned counsel for the respondent referred to the later part of Clause 5. The later part shows that MI shall be at liberty to encash such cheques in settlement of the amounts due from the processor. That cheque was given in pursuance of an earlier agreement and not the latter agreement. Therefore, obviously, it does not refer to the cheque received for Rs. 35 lakhs. It refer to cheques and not the cheque. The clause provides the parties or the 1st party to initiate further proceedings including action under Section 138 of the Act in respect of cheques handed over and that too with not to later agreement.

10. Therefore, I am of the considered view that as an undated cheque having been given only as security, the provision of Section 138 of the Negotiable Instruments Act are not at all attracted and hence, the complaint against the accused under Section 138 of the Negotiable Instruments Act cannot be maintained at all."

14. On behalf of the Appellant / Prosecution witness P.W.1 was examined and Exs.P.1 to P.4 were marked. On the side of the Respondent / Accused no one was examined as a Defence witness. However, Ex.D1 was marked.

15. At this stage, for a fuller and better appreciation of the main case in STC No.1633 of 2008 on the file of trial court, it is useful for this Court to refer to the evidence of P.W.1.

16. It is the evidence of P.W.1 (Appellant / Complainant) that he is a real estate broker for the past 10 years and engaged in the business of advancing money on loan and that it is correct to state that in respect of money transaction 10 cases are pending and the total loan amount comes to Rs.10,00,000/- (Rupees Ten Lakhs only) and that he is not paying the income tax.

17. P.W.1 proceeds to add in his evidence that without drawing money from the bank he had lent loan in his private capacity and he had not advanced money on mortgage loan, he had not lent money on the basis of a sale agreement, and also that he had not lent sum also based on a registered document.

18. Continuing further, it is the evidence of P.W.1 that he used to advance loan to the known persons without obtaining any document in writing and for the past 5 years, he had known the Respondent / Accused and during the month of September 2007 she came to his house situated at Pattamangala Araya Street, and

asked for a loan and through Abdul Pathak only the Respondent / Accused had asked for a loan from him and that he knew the Respondent / Accused through the said Pathak and he advanced loan to the Respondent / Accused as informed by said Pathak.

19. P.W.1 in his evidence had categorically stated that he had not drawn the sum of Rs.2,00,000/- (Rupees Two Lakhs only) from the bank and that he gave money which was in his possession and that on 28.09.2007, he had lent money. Furthermore, the said Abdul Pathak is his friend for the past 5 or 6 years and that he had not enquired about the resources of Respondent / Accused and since the said Pathak informed him that the Respondent / Accused is a trusted person, he had lent money. Added further, it is the evidence of P.W.1 that he had not advanced loan to the Respondent / Accused on the strength of a house and the house is in the name of the Respondent / Accused mother Najibhunissa and he had not lent money to the said Najibhunissa and in respect of the aforesaid house, he had entered into a sale agreement with Najibhunissa (Respondent / Accused Mother) and that the sale agreement dated is 19.07.2005 and based on agreement he had paid a sum of Rs.2,00,000/- (Rupees Two Lakhs only) for the sale consideration of Rs.2,10,000/- . (Rupees Two Lakhs and Ten thousand only) P.W.1 had also deposed in his evidence that within 11 months, the transaction was to be completed and that the sale agreement was a registered one and that till date he had not executed the sale agreement and also that since he is doing real estate business he had not written the sale deed in his name and had decided to sell to a different person. Moreover, P.W.1 had stated in his evidence that it was correct to state that Najibhunissa had agreed to sell the property for Rs.2,10,000/- (Rupees Two Lakhs Ten and Thousand only) when the value of the house property was Rs.10,00,000/- (Rupees Ten Lakhs only).

20. P.W.1 had also stated in his evidence that Ex.D.1 is a certified copy of Sale Agreement in which the Respondent / Accused had signed as one witness and based on the agreement only he had advanced a sum of Rs.2,00,000/- (Rupees Two Lakhs only) and that he not advanced the loan amount of Rs.2,00,000/- based on the sale agreement to be held as security and it was not correct to state on the same day he had obtained three cheques from Najibhunissa. Also P.W.1 had deposed that it was not correct to state that since the sale agreement became time barred, the Respondent / Accused cheque was filled up with a view to collect Rs.2,00,000/- (Rupees Two Lakhs only) for extorting money he had filed the present case.

21. At this stage, this Court significantly points that the onus is ordinarily on the prosecution side to establish the

guilt of an accused. However, if at least a semblance of material is brought on record consisting an innocence of accused which may reasonably be a true one, although the same is not positively established to be a true one, even though an accused is entitled to an acquittal, as opined by this Court.

22. It is to be borne in mind that the well accepted principle in Law is that if the cheque is issued as security for performance of certain contract or an agreement and not towards discharge of an 'Debt or other Liability', an offence under Section 138 of N.I.Act is not made out. Admittedly, the important element for an offence under Section 138 of N.I.Act is that the cheque in question should have been issued towards the discharge of whole or in part of any debt or other liability. However, if the cheque is not issued for the discharge of any debt or other liability, then, the ingredients of Section 138 of N.I. Act cannot be attracted, in the considered opinion of this Court.

23. It is to be noted that the strict liability under Section 138 of Negotiable Instruments Act, 1881 could be enforced only when the cheque was issued in discharge of any 'Legally Enforceable Debt' or other 'Liability' either in part or as a whole. It is the prime duty of the complainant to show that only for a subsisting Debt or Liability the cheques were drawn by the accused. An accused is to rebut the presumption specified under Section 139 of N.I.Act by eliciting answers in cross-examination of the evidence of witness, also through circumstances and preponderance of probabilities of the case, as opined by this Court.

24. Further, it is not obligatory on the part of the Respondent / Accused to separately let in evidence or to enter into the witness box if he can successfully gather materials from the evidence of the Appellant / Complainant which would amply disprove the presumptive facts, especially in relation to the pre-existence of legal liability upon the 'Debt' for discharge of which the cheque was issued.

25. However, if no 'Debt' or 'Liability' was found subsisting and the cheque was also not found to have been issued for discharging the 'Debt' or 'Liability' then, person cannot be convicted.

26. As far as the present case is concerned, when admittedly there existed a controversy / dispute between the Respondent's mother and the Appellant / Complainant from 19.05.2005 onwards, it passes beyond one's comprehension as how the Appellant / Complainant can advance a higher sum of Rs.2,00,000/- (Rupees Two Lakhs only) as loan to the Respondent / Accused (Daughter of Najibhunissa) on 28.09.2007 and Ex.P.1 Cheque was issued on 28.02.2008.

27. It may not be out of place for this Court to point out that P.W.1 (Appellant / Complainant) (in his cross-examination) had clearly deposed in his evidence that he had paid an advance of Rs.80,000/- (Rupees Eighty Thousand) for a property of Ezhilarasi for which the sale consideration was arrived at Rs.90,000/- (Rupees Ninety Thousand only) and registered a sale agreement. Likewise he had also stated that he had paid an advance of Rs.1,00,000/- (Rupees One lakh only) in respect of a property with Samsul Magariba of Needur. Therefore, from the conduct of the P.W.1 (Appellant / Complainant), it is crystal clear that he is in the habit of obtaining an sale agreement before lending money. Also that in the year 2005, P.W.1 in his evidence had stated that in his bank account a sum of Rs.500/- (Rupees Five hundred only) or Rs.1,000/- (Rupees One Thousand only) only was available.

28. Moreover P.W.1 had tacitly in his evidence had admitted that the Respondent's mother Najibunissa had agreed to sell the property worth Rs.10,00,000/- for a sum of Rs.2,00,000/- Ordinarily, no sensible or prudent / reasonable person would accord consent or agree to sell his / her property for a very lesser sum than its real worth, viz., market value. Admittedly, the Respondent / Accused is the daughter of Najibhunissa. Also that the Appellant / Complainant had not advanced any sum as loan to the Respondent / Accused (Daughter of Najibhunissa) Although the Respondent / Accused had signed in Ex.P.1, Cheque dated 28.02.2008 and the fact of the matter is in the present case Ex.D.1 certified copy of Sale Agreement dated 19.07.2005 was not repudiated by P.W.1 (Appellant / Complainant) and in the instant case, the Appellant / Complainant had not established that the Ex.P.1, Cheque was issued by Respondent / Accused (Daughter of Najibhunissa) towards the 'Legally Enforceable Debt' or other liability as the case may be, when such be the case, this Court comes to a consequent conclusion that the offence Under Section 138 of the N.I.Act, 1881 is not made out on the side of the Appellant / Complainant. Also that the defence taken on behalf of the Respondent / Accused that Ex.P.2 cheque was issued as security is quite probable one and therefore it can safely be concluded that Ex.P.1, Cheque was not issued in 'Discharge of a Debt'.

29. In the light of the foregoing and detailed discussions as mentioned supra, this Court holds that the finding of the trial court that the Respondent / Accused was not guilty under Section 138 read with 142 of N.I.Act consequently acquitting him under Section 255(1) of Cr.P.C., in the considered opinion of this Court does not suffer from any legal infirmities or material irregularities in the eye of Law. Resultantly the present Criminal Appeal is devoid of merits.

In the result the Criminal Appeal No.100 of 2010 is dismissed. The Judgment dated 16.07.2009 of the trial court in STC No. 1633 of 2008 is hereby affirmed by this Court for the reasons assigned in this Appeal.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Judicial Magistrate No.I, Mayiladuthurai

+1 cc to Mr.R.Shivakumar Advocate sr 57145/16

Crl.A.No.100 of 2010

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