

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :14.11.2016

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.509 of 2015

M/s.Shree Sakthi Modern Rice & Oil Mill,
Partnership Firm, Rep. By its Partner,
R.Chinnusamy, S/o.Ramasamy,
Mettupalayam, Elumathur Post,
Erode District - 638 104. ... Appellant/Complainant

Vs

R.Kalaimani,
S/o.T.H.Ramachandran, Proprietor,
M.R.K. Rice Corporation,
111, Ganesh Garden,
Bharathi Nagar Bus Stop,
Sathy Road, Ganapathy,
Coimbatore - 641 006. ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) Cr.P.C., as against the order of acquittal made in S.T.C.NO.147 of 2012 on the file of the Court of the Judicial Magistrate Court, Fast Track Court No.2, Erode dated 27.05.2015.

For Appellant : Mr.J.Ramakrishnan

For Respondent : Mr.N.Vignesh

For M/s.B.Nedunchezhiyan

JUDGMENT

The Appellant/Complainant has preferred the instant Criminal Appeal (as an aggrieved person) as against the Judgment dated 27.05.2015 in S.T.C.No.147 of 2012 passed by the Learned Judicial Magistrate, (Fast Track Court No.2), Erode.

2.The Learned Judicial Magistrate, Erode, while passing the impugned order on 27.05.2015 in S.T.C.No.147 of 2012 (filed by the Appellant/Complainant) at paragraph 17, had, inter alia, observed that '... further, Ex.P.1 - Case Cheque was not to be presumed to be one given in favour of the Appellant/Complainant and also the presumption under Sections 118 and 138 of the Negotiable Instruments Act, 1881 could not be presumed in his

favour based on the circumstance of the case and since the Appellant/Complainant's side had failed to establish through examined witnesses and documents beyond fair reasonable doubt and also the presumption was rebutted by the Respondent/ Accused through the cross examination P.W.1 and also by means of evidence of D.W.1, D.W.2 and Exs.D.1 to D.4, the Complainant had failed to establish his case beyond fair reasonable doubt and resultantly, found the Respondent not guilty under Section 138 of the Negotiable Instruments Act, 1881' and consequently, acquitted him in terms of Section 255 (1) Cr.P.C.

3.Challenging the Judgment of Acquittal dated 27.05.2015 in S.T.C.No.147 of 2012 passed by the trial Court, the Learned Counsel for the Appellant/Mill (Complainant) primarily takes a plea that the trial Court had failed to take note of a very important fact that all the monetary and procedural requirements envisaged under Section 138 of the Negotiable Instruments Act were complied with and in reality, should have convicted the Respondent/Accused when the case against him was established in accordance with Law.

4.The Learned Counsel for the Appellant proceeds to take a plea that the trial Court failed to appreciate that the Respondent/Accused had not denied the issuance of subject matter of Ex.P.1 - Cheque and when the Respondent/Accused himself had admitted the said document, the logical corollary would be the conviction of the Respondent/Accused by the trial Court. Unfortunately, such a course was not resorted to by the trial Court.

5.The Learned Counsel for the Appellant brings it to the notice of this Court that the trial Court had ignored the oral testimonies of witnesses P.W.1 and P.W.2 (including the Exs.P.1 to P.16 especially Exs.P.7 to P.10 and P.13).

6.The Learned Counsel for the Appellant urges before this Court that the Respondent/Accused had failed to substantiate his alleged defence that the subject matter of cheque was given in security and that the Appellant/Complainant had represented that it was misplaced as alleged.

7.It is represented on behalf of the Appellant that the trial Court had totally misconstrued the Exs.D.1 to D.4 and furthermore, these documents would not in any way advance the alleged defence theory and therefore, the adverse findings rendered against the Appellant/ Complainant are clearly unsustainable in the eye of Law.

8.At this stage, the Learned Counsel for the Appellant invites the attention of this Court to the fact that the Respondent/Accused had issued a 'Letter of Stop Payment' through

Court summons from the concerned Bank especially when the onus was on the side of the Respondent/Accused to displace the statutory presumptions operating against him.

9.The Learned Counsel for the Appellant submits that in the instant case on hand, there is no substantive evidence on the part of the Respondent/Accused to prove that the cheque was issued towards a security as alleged and in any event, the Exs.D.1 to D.4 were not enough to Discharge/Rebut the presumption under Law.

10.It is the plea of the Appellant that the trial Court had committed a grave error in ignoring the vital admissions on the part of the Respondent/Accused, in the evidence of D.W.2.

11.While rounding up the Learned Counsel for the Appellant takes a legal stand that just because in Exs.P.7 to P.10 and Ex.P.13, the concern name was mentioned as 'R.Kalaimani Rice Mandi', it cannot be concluded that 'R.Kalaimani Rice Mandi' and 'M.R.K. Rice Corporation' are not one and the same especially the TIN number is one and the same in all the documents under Exs.P.7 to P.10, Ex.P.13 (including the document marked by the Accused viz., Ex.D.3). Therefore, it is strenuously contended that the dismissal of the complaint by the trial Court by rendering adverse findings against the Appellant is incorrect and an invalid one.

12.The Learned Counsel for the Appellant contends that the Respondent/Accused in a given case had withheld the letter/communication 'Stop Payment' and since he had not taken steps to produce the same even from the concerned bank, then, certainly an adverse inference can be drawn against the Respondent/Accused under the Indian Evidence Act. To fortify this contention, he relies on the decision of the Hon'ble Supreme Court in Gopal Krishnaji Ketkar V. Mohamed Haji Latif and others, AIR 1968 Supreme Court 1413, wherein it is observed that 'A party in possession of best evidence which would throw light on the issue in controversy if he withholds the same, then, the Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him'.

13.The core contention projected on the side of the Appellant/ Complainant is that when the Respondent/Accused had special knowledge about the issuance of Stop Payment communication addressed to his bank/banker, then, he should have produced before the trial Court in normal course. Unfortunately, such a procedure was not either adhered to or resorted to by the Respondent/Accused.

14.Conversely, it is the submission of the Learned Counsel for the Respondent/Accused that before the trial Court, on

behalf of the Appellant/Complainant, witnesses P.W.1 and P.W.2 were examined and Exs.P.1 to P.16 were marked and on the side of the Respondent/ Accused, D.W.1 and D.W.2 were examined and Exs.D.1 to D.4 were marked and only after analysing the entire oral and documentary evidence available on record, the trial Court came to the right conclusion that the Appellant/Complainant had not established his case beyond reasonable doubt that the Respondent/Accused had committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the ultimate finding of not guilty arriving at and acquitting the Respondent/Accused under Section 255(1) Cr.P.C. do not suffer from serious material irregularities or patent illegalities in the eye of Law.

15. In this connection, this Court pertinently points out that in the complaint (filed under Section 200 Cr.P.C. by the Appellant/ Complainant before the trial Court) at paragraphs 2 and 3, it is averred as follows:

"II The accused is a Proprietorship concern represented by its proprietor. The accused is a business customer of the complainant's firm and doing rice selling business in retail and the accused have purchased rice bags from complainant's firm on credit basis for the past several years and in order to discharge of accused concern business liabilities for Rs.8,62,550/- to the complainant firm; On 08.08.2011 the accused issued a cheque post dated 21.08.2011 bearing No.041104 for Rs.8,60,000/- drawn on Karur Vysya Bank Ltd., Ganapathy branch on behalf of his concern in favour of complainant firm. The copy of credit bills (4 Nos) and statement of account are produced with this complaint. The accused had promised the complainant that the said cheque would be duly honoured on the date of its presentation.

III On 29-12-2011, the complainant presented the said Cheque for collection through IDBI Bank Ltd, Erode branch, in which it is having account. To the shock and surprise the said Cheque was dishonoured on 29.12.2011 for the reason of "payment stopped by the drawer" in the accused bank account. The complainant's bank returned the said dishonoured cheque with return memo dated 30.12.2011 to the complainant."

16. The categorical case of the Appellant/Complainant is

that he issued a legal notice Ex.P.3 on 21.01.2012 and called upon the Respondent/Accused to pay the cheque amount of Rs.8,60,000/- within 15 days from the date of receipt of notice and that the said notice was received by the Respondent/Accused on 24.01.2012 at his residential address and on 25.01.2012 at his business address. For the said Ex.P.3-Legal Notice, a Reply Notice - Ex.P.6 was issued by the Respondent/Accused containing false allegations.

17.Before the trial Court, the Respondent/Accused had taken a clear-cut stand that the Appellant/Complainant had not established his case through proper documents and in fact, through Exs.D.1 to D.4, the Respondent/Accused had established his version/case and viewed in that perspective, the 'Judgment of Acquittal' finally rendered in the subject matter in issue may not be dislodged by this Court to secure the ends of Justice.

18.For a fuller and better appreciation of the entire subject matter in issue, this Court to advert to the evidence of P.W.1, P.W.2, D.W.1 and D.W.2.

19.It is the evidence of P.W.1 (Appellant/Complainant) that the Appellant/Complainant's Firm and the Respondent/Accused Company which carrying on business from the year 2005 and the Respondent/ Accused concern name is 'M.R.K. Rice Corporation' and indeed, the Respondent/Accused had paid all the amounts due to be paid to him and it was correct to state that as per Exs.P.7 to P.10-Bills, the outstanding amount of Rs.8,62,550/- was to be paid by the Respondent/Accused and Exs.D.1 & D.2 Bills - i.e. 20.06.2009 and 27.06.2009 were the bills for which the Respondent/Accused had paid the amount mentioned therein.

20.To a suggestion put forward on the side of the Respondent/ Accused, it is the further evidence of P.W.1 that the signature found in Ex.P.1- Cheque was written in one ink and the other letters/writings were written in different ink and the Respondent/Accused had only wrote an Ex.P.1-Cheque and handed over to him and the said cheque was given for 'M.R.K. Rice Mill Corporation'. Moreover, as per Ex.P.3, Lawyer's notice was issued to the Respondent/Accused (in independent capacity) and another notice was issued in the capacity as owner of 'M.R.K. Rice Corporation'. Added further, P.W.1 had admitted that in Exs.P.7 to P.10 - Bills, the same TIN number was mentioned and further, it was correct to state that in Exs.D.1 and D.2, the Respondent /Accused TIN number was mentioned as '33172205681'. P.W.1 also proceeded to state in his evidence that it was correct to state that in Ex.P.13 - Auditor's Statement, it was mentioned as 'Kalaimani Rice Mandi' and it was admitted by P.W.1 tacitly that in the address mentioned in Exs.P.7 to P.10, there was no 'Rice Mandi' and in the said address, the house of

Respondent/Accused was there.

21. Besides the above, P.W.1 in his evidence had stated that in Exs.D.1 and D.2 the address of the Respondent/Accused was mentioned and it was not correct to state that in the dates mentioned in Exs.P.7 to P.10 he had not sent the goods/articles to the Respondent/Accused. P.W.1 had also added in his evidence that from the beginning, he had supplied rice to the Respondent/Accused to his residential address and he does not know about 'M.R.K. Rice Corporation' and in the re-examination, P.W.1 had stated that 'M.R.K.' means it refers to the Respondent/Accused name, but in his re-cross examination, he had stated that he had not filed documents to point out that 'M.R.K.' refers to 'Kalaimani'.

22. P.W.2 (Manager of Karur Vysya Bank), in his evidence, had stated that the Respondent/Accused in his bank is keeping the current account in the name of 'M.R.K. Rice Corporation' and the opening form for the said account is Ex.P.15 and Ex.P.16 is the Statement of Account (for the period from 01.08.2011 to 31.03.2012) and in Ex.P.15, the owner of 'M.R.K. Rice Corporation' (Sole Proprietor) was mentioned as 'R.Kalaimani'. Furthermore, it is the evidence of P.W.2 that the afore-stated bank account was opened for the 'Rice Mandi Business' and on 29.12.2011 in the aforesaid account there was only a balance of Rs.25,371.73 paise and the same was there in the said bank account on 30.12.2011 and in Ex.P.16 (the bank account statement for 8 months from August 2011 to March 2012). In the bank account, maximum there was a sum of Rs.1,98,042.17 on 13.12.2011 and as per Ex.P.16, on different dates during the aforesaid period, it was correct to state that 7 cheques were returned for which the Respondent/Accused had remitted the fine amount.

23. P.W.2 (in his cross examination) had deposed that as per Document, the Cheque No.41104 of Sri Sakthi Modern Rice Mill was returned on 30.12.2011 (for the amount of Rs.8,60,000/-) and Ex.P.2 was the Return Memo issued by their bank and in that, the reason assigned was 'Payment Stopped' by Drawer.

24. It is the evidence of D.W.1 (Assistant Commissioner of Commercial Tax) that the owner of the 'M.R.K. Rice Corporation' was R.Kalaimani and its TIN number is '33172205681' and till date viz., 24.03.2009, for the said concern, the same TIN number prevails and the registration true copy of the concern was Ex.D.3 and that the M.R.K. Rice Corporation as per their documents from 24.03.2009 till date, its functioning at 53B Sivanantha Puram, 3rd Street Saravanampatti Post, Coimbatore 35. In the cross examination, D.W.1 had deposed that it was correct to state that owner of M.R.K. Rice Corporation's name is R.Kalaimani and also it is correct to state that the said concern is functioning from the afore-stated address.

25.It is the evidence of D.W.2 (Respondent/Accused) that he is running the M.R.K. Rice Corporation concern (by selling rice) at the address 53B 3rd Street Sivanantha Puram, Saravanampatti Post, Coimbatore - 35 and he knew the Appellant/Complainant for the past 3 or 4 years through rice business and while carrying out business with him, for security purpose, he had mentioned the Appellant/ Complainant's name or without mentioning any date, he had affixed his signature in the cheque and handed over the same to the Appellant/Complainant and was carrying out the rice business and on 09.03.2011, for the purpose of 'business security' he had affixed his signature and given the cheque to the Appellant/Complainant and that after 3 days later, the Appellant/Complainant gave a message/ information to him that the said cheque was missing and later on, he gave two cheques to the Appellant/Complainant (without mentioning the amount) by affixing signature and that on 22.03.2011 out of two cheques, in one cheque the Appellant/Complainant had filled up the same in favour of one Magesh and deposited the same before the Bank and it withdrawn a sum of Rs.1,00,000/- and on 19.04.2011, the Appellant/Complainant had filled up another cheque given by him in the name of Sri Sakthi Modern Rice and Oil Mill withdrew a sum of Rs.1,00,000/- from his bank account and on 19.04.2011 he had settled all his accounts with the Appellant/Complainant's firm.

26.D.W.2 had also deposed in his evidence that he had introduced one 'Jaba Store' concern to the Appellant/Complainant and thereafter, they were indulging in receipt and account transactions and because of the difference of opinion that arose between them, the Appellant/Firm informed that on the basis of loan, no goods would be supplied to him and therefore, from 19.04.2011 with the Appellant/Complainant's firm he was not having any Revenue and Expenditure transactions.

27.Apart from that, it is the evidence of D.W.2 that the Appellant /Complainant had demanded from the Respondent/Accused about the outstanding amount due to be paid by Jaba Store for which he replied that they would not be undertake the said liability and for that, the Appellant/Complainant informed him that he would fill up the missing cheque and would take the amount due to be paid by Jaba Store and also the Appellant/Complainant proceeded to inform him that he would create fake bills and later on, he issued the Advocate Notice to him and after receipt of the same, he issued a Reply Notice through his Lawyer and that Ex.P.6 was his Reply Notice and in Exs.P.1 to P.4 Receipts, it was mentioned as 'Kalaimani Rice Mandi' and in that said name, there was no Rice Mandi to him and that there was no connection between him and the aforesaid Receipts and till date, there was no amount due between the Appellant/Complainant and himself and Ex.D.4 was the statement

of account for the period from 01.12.2010 till 03.06.2011 kept by him in the name of M.R.K. Rice Corporation at Karur Vysya Bank.

28.D.W.2 in his evidence had also stated that in Exs.D.1 and D.2 were Receipts and not bills and in the said documents, the signatures found were that of his. In the lorry receipt dated 27.06.2009 there was a signature and in the said receipt, it was correct to state that there was a mention as M.R.K. Kalaimani Rice Mandi, meaning "Mr Kalaimani Rice Mandi" and he had not filed documents subsequent to Exs.D.1 and D.2.

29.It is to be noted that the purpose of ushering in Section 138 of the Negotiable Instruments Act is to impart faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Undoubtedly, the ingredients of Section 138 of the Negotiable Instruments Act have created a contractual breach as an offence. It is true that the offence under Section 138 of the Negotiable Instruments Act is a civil liability but fastens criminal liability and strictly speaking, Section 138 of the Negotiable Instruments Act is only a few civil liability. To provide necessary safeguards in the Negotiable Instruments Act that too to protect honest drawers from unnecessary harassment, the relevant provisions in the Negotiable Instruments Act were introduced.

30.It cannot be forgotten that there is a presumption under Section 139 of the Negotiable Instruments Act in favour of the Holder and it is to be remembered that the tenor and spirit of 138 and 139 of the Negotiable Instruments Act are clearly in consonance with the definition specified in Section 4 of the Indian Evidence Act, 1881. Moreover, in a complaint under Section 138 of the Negotiable Instruments Act, a Court of Law is to presume that the cheque in question was issued for 'Debt or Liability'. The presumption is clearly a rebuttable one. The onus squarely rests on the shoulders of the Respondent/Accused that a cheque was not issued for a debt or liability and of course, the Drawer has to prove in the trial by leading cogent evidence. By now it is well settled that it is not necessary for a Complainant in his complaint to aver the details of entire original transactions, but he is to mention only the fact that the issuance of the cheque was in discharge of the entire/whole, or in part, any Debt or other legal liability. No wonder, Section 138 of the Negotiable Instruments Act, not only speaks of 'Debt' but also other 'Liability'. If a cheque is issued as regards of a Debt or Liability which is not legally enforceable one, then, the ingredients of Section 138 of the Negotiable Instruments Act would not apply. To put it precisely, to attract the Section 138 of the Negotiable Instruments Act, the Debt or Liability towards which the cheque was issued, ought to be a 'Legally Enforceable Debt or Liability'.

31.It is to be pointed out that by a Notification of the term proved under Section 3 of the Indian Evidence Act, 1872 (as regards Section 118 and 139 of the Negotiable Instruments Act), it is clear that in a trial of a main case, a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of a debt or liability, when the execution of 'Negotiable Instrument' is either established or proved in the manner known to Law. Furthermore, when the Complainant discharges his onus to prove that the instrument was executed by an Accused, then, the presumptions of 118 and 139 of the Act would come to his aid and to shift the burden on the side of an Accused. After all, the Hon'ble Supreme Court, in the decision Kumar Exports V. Sharma Carpets, AIR 2009 Supreme Court 1518, had observed that 'A presumption is not in itself evidence but it only makes a prima facie case for a party whose benefit it exists'.

32.At this juncture, a mere running of the eye over the contents of Section 138 of the Negotiable Instruments Act unerringly points out that a mere execution of the cheque is not sufficient to constitute an offence punishable under the Act. Unless it is established that the Debt or other Liability in question is a Legally Enforceable one, in the considered opinion of this Court. In short, the explanation to Section 138 of the Act clearly mentions that for the purpose of 'Debt' or 'Liability' means a 'Legally Enforceable Debt' or other 'Liability'. As a logical corollary, only a claim based on an Enforceable Debt or other Liability would constitute an offence under Section 138 of the Negotiable Instruments Act.

33.It cannot be gainsaid that as per Section 139 of the Negotiable Instruments Act, there is a presumption that the 'Holder of a Cheque' had received it for the 'Discharge of Debt or other Liability'. In reality, the existence of Debt is not the subject matter of presumption under Section 139 of the Negotiable Instruments Act. Any Debt would cover the liability of another individual also, in the considered opinion of this Court.

34.Be that as it may, in the upshot of detailed qualitative and quantitative discussions and also this Court bearing in mind an important fact that in the present case, the onus is on the Appellant/ Complainant to establish his case beyond reasonable doubt and also this Court taking note of the surrounding facts and circumstances of the present case in an integral fashion, comes to an inevitable conclusion that the Appellant/Complainant had not established to the subjective satisfaction of this court that the M.R.K. Rice Corporation had purchased the rice bags from the Appellant/Complainant and in fact, a mere glance of Exs.P.7 to P.10 only refers to 'R.Kalaimani Rice Mandi' and even

in Ex.P.13, the mention was made as 'R.Kalaimani Rice Mandi' and in fact, in Exs.P.7 to P.10, TIN number of R.Kalaimani Aarisi Mandi was mentioned as 33172205681, but the said TIN number belonged to the M.R.K. Rice Corporation, which was established by the evidence of D.W.1 through Ex.D.3. Therefore, considering the entire conspectus of the attendant facts and circumstances of the present case, this Court holds that the presumption under Sections 118 and 139 of the Negotiable Instruments Act, relied on the side of the Appellant/Complainant, could not be taken into account. However, on the side of the Respondent/Accused, it was shown before this Court by means of probable defence viz., the preponderance of probabilities that the case of the Appellant/Complainant was rebutted by D.W.1 and D.W.2 as well as through Exs.D.1 to D.4. Looking at from any angle, the Appellant/Complainant had not established his case viz., that the Respondent/Accused had committed an offence under Section 138 of the Negotiable Instruments Act. As such, this Court opines that there is no flaw in the Judgment of the Acquittal passed by the trial Court in S.T.C.No.147 of 2012 dated 27.05.2015.

35.In the result, the Criminal Appeal is dismissed. The Judgment of Acquittal passed by the trial Court in S.T.C.No.147 of 2012 dated 27.05.2015 is affirmed by this Court for the reasons assigned by this Court in this Appeal.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

Sgl

To

The Judicial Magistrate,
Fast Track Court No.2,
Erode.

+1cc to M/s P.Sivakumar, Advocate sr.65922

Cr1.A.No.509 of 2015

SR(CO)
RVR 19/01/2017