

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.10.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Crl.A.No.630 of 2015

Thangaraj ..Appellant / Complainant

Vs.

Byrappa ..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., to call for the records relating to the order dated 07.08.2015 passed in STC No.233 of 2014 on the file of the Judicial Magistrate Court (Fast Track Court), Hosur and set aside the same and convict the accused for the offence under Section 138 of the Negotiable Instruments Act.

For Appellant : Mr.P.Mani

For Respondent : Mr.A.Balamurugan

J U D G M E N T

Heard both sides.

2. The Appellant / Complainant has preferred the instant Criminal Appeal before this Court as against the Judgment dated 07.08.2015 in STC No.233 of 2014 passed by the Learned Judicial Magistrate, (Fast Track Court) Hosur.

3. The Learned Counsel for the Petitioner while passing the Impugned Judgment in STC No.233 of 2014 dated 07.08.2015 at Paragraph No.14 had interalia observed that "on perusal of the case cheque it comes to be known that the signature of the Respondent / Accused was in one colour ink and the Complainant's name and Amount were in different ink and if the cheque was written by the Respondent / Accused in two different colour ink pens and given by him, there was no possibility to do like that and that the complainant had not established that the Respondent had committed an offence under Section 138 of the Negotiable Instruments Act" and ultimately found not guilty under Section 138 of the Negotiable Instruments Act and convicted him under Section 255(1) of Cr.P.C.,

4. Assailing the validity, legality and correctness of the Judgment of acquittal dated 07.08.2015 in STC No.233 of 2014 passed by the trial court, the Appellant / Complainant, as an aggrieved person has preferred the present Criminal Appeal primarily contending that the trial court had committed an error in disbelieving the case of the Appellant / Complainant because of the fact that the Appellant / Complainant as P.W.1 in his evidence has deposed that he was not aware of the full particulars of the Respondent / Accused such as his wife's name, date of marriage, place of marriage, children name etc., without taking note of the very essential fact that these particulars / details are very much irrelevant under Section 138 of the Negotiable Instruments Act, 1881.

5. The Learned Counsel for the Appellant submits that the trial court ought to have drawn presumption under Section 118 of the N.I.Act in regard to the passing of consideration when the Respondent / Accused had not disputed his signature nor took any step to obtain expert opinion nor examined any witnesses to refute the said presumption.

6. The Learned Counsel for the Appellant proceeds to take a plea that the trial court ought to have accepted the evidence of P.Ws.2 and 3 and held that the Respondent / Accused received the amount as mentioned by the Appellant / Complainant by ignoring the minor discrepancies in their depositions.

7. The Learned Counsel for the Appellant takes an emphatic plea that the trial court should not have disbelieved the case of the Appellant / Complainant just because the cheque was issued on the due date in April 2014 with post dated 07.07.2014, when in Law, there is no prohibition for issuing post dated cheque.

8. The Learned Counsel for the Appellant strenuously contends that the trial court ought not to have been made an observation in the Judgment that the Appellant / Complainant could have given such a huge sum of Rs.14,20,000/- (Rupees Fourteen Lakhs Twenty Thousand only) without any document.

9. Further, it is represented on behalf of the Appellant that the Respondent / Accused is known to the Appellant / Complainant as a friend and only at his request, the Appellant gave a cheque amount for business of the Respondent / Accused, based on his promise to repay the sum within three months. In fact the said practice is usual in the business circle.

10. The Learned Counsel for the Petitioner comes out with a stand that the trial had committed an error in disbelieving the loan amount given by the Appellant / Complainant to the Respondent / Accused merely because he had not produced any

documentary evidence to establish his oral evidence that he pledged the Jewels for Rs.4,20,000/- and gave it to the Respondent / Accused by adding a sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) which was held by him in cash.

11. Per contra, it is the submission of the Learned Counsel for the Respondent that the trial court on an appreciation of entire oral documentary evidence available on record and also by looking into the evidence of P.W.1 had ultimately come to the conclusion that the Appellant had not established that the Respondent / Accused had committed an offence under Section 138 of Negotiable Instruments Act and as a result found him not guilty and acquitted under Section 255(1) of Cr.P.C.,

12. In order to appreciate the rival contentions and also for a fuller and better understanding of the entire case, this Court opines that it is just and necessary to refer to the evidence of P.Ws.1 to 5 and the evidence of D.W.1 and the Exhibits P.1 to P.12 and Exhibits D.1 and D.2.

13. At the outset this Court very relevantly points out that P.W.1 the Appellant / Complainant in his evidence had deposed that on 07.07.2014, the Ex.P.1, Cheque was returned with a note. Ex.P.2 and Ex.P.3 was the note of the return of the cheque on 09.09.2014 and Ex.P.4 was a notice dated 15.09.2014 and Ex.P.7 dated 26.09.2014 was a reply issued on behalf of the Respondent / Accused. It is the further evidence of P.W.1 (Appellant - in Cross-examination) that he is doing real estate and sale and purchase of cars business and he had not received loan from one Suresh and that he does not know about the full details of Respondent / Accused. But to a certain extent he knows about him.

14. Apart from above, P.W.1 adds in his evidence that on 15.12.2013, the Respondent / Accused had asked for money from him and on 05.01.2014 he gave the money and he gave Rs.10,00,000/- which was in his possession / hand and he also lent a sum of Rs.4,20,000/- after pledging his jewels with Manapuram Gold and Axis Bank but he has some receipts and does not have some receipts.

15. P.W.1, in his evidence had stated that he had given money to the Respondent / Accused in front of the Respondent / Accused's house while he was in scorpio vehicle and the said vehicle belongs to his friend and he does not have Registration Number of the said vehicle. P.W.1 (in his Cross-Examination) had denied the suggestion made on the side of the Respondent / Accused that he had no means to lend the sum of Rs.14,20,000/- (Rupees Fourteen Lakhs and Twenty Thousand only) to the Respondent / Accused.

16. P.W.2 in his evidence had deposed that the Respondent / Accused had sent a letter for stop payment, since he had lost the cheque.

17. P.W.3 in his evidence had stated that the Appellant / Complainant gave the money by putting the same in a cover and that he does not know what the cover contained and at Mooventhar Nagar, the money was given. In this connection, this Court makes a significant mention that P.W.3 (in his cross-examination) had categorically stated that the place namely, "Basthi" is different and Mooventhar Nagar is a different place and the money was given before at Mooventhar Nagar in front of the house of Respondent / Accused and that after making payment, they returned and he does not know on what date the money was given.

18. P.W.4 in his evidence had stated that in front of the Basthi house the money was paid / given and the money was given inside the car and at that time it was evening 5.30, 6.00 p.m. and he had seen the person who received money on that date and till date he had not seen him and he had seen him in Court today. Moreover, it is the evidence of P.W.4 that he does not know for what reason the money was given and after paying the amount they have returned.

19. Also, P.W.4 had proceeded to state in his evidence that he does not know how much money was inside and what type of currencies were inside the cover.

20. It is evidence of P.W.5 (Bank Manager) that if money was to be paid even after issuance of stop payment if the customer gives in writing, then, they would pay the money. D.W.1 (Yes Bank, Hosur Branch, Branch Manager) in his evidence had stated that the Respondent had issued stop payment on the ground that the cheque was lost and after receipt of the letter to effect stop payment, if a letter was given to issue the cheque amount, the cheque amount would be paid if there was money in the account.

21. The Appellant / Complainant in the complaint dated 29.10.2014 at Paragraph Nos.2 to 4 has averred the following:-

"2. The complainant further states that on 05.01.2014 the complainant was managed to arrange only an amount of Rs.14,20,000/- and paid the said amount to the accused and the accused promised to repay the amount within a maximum period of three months i.e, the accused promised to repay the amount in the month of April 2014 and when the complainant approached the accused in the month of April 2014 and the accused issued a cheque of YES Bank for a sum of Rs.14,20,000/- (Rupees Fourteen Lakhs Twenty Thousand only) bearing

No.863876 dated 07.07.2014 and requested the complainant to present the cheque for collection on the date mentioned in the cheque.

3. The complainant further submits that as per the instructions of the accused the complainant presented the same for collection through his bankers Axis Bank, Hosur Branch and the same was returned by the accused bankers with remarks "PAYMENT STOPPED BY THE DRAWER" on 07.07.2014 and the same was informed to the complainant by his bankers.

4. The complainant further states that after dishonor of the cheque the complainant intimated regarding the dishonour of the cheque and the accused assured to the complainant that the accused will arrange funds in his account on 1st week of September 2014 and also promised that the accused will maintain with sufficient amount in his account and honor the cheque and also the accused requested the complainant to re-present the same and as per request of the accused, the complainant again represented the above said cheque for collection and again the said cheque was returned by the accused banker for the reasons "PAYMENT STOPPED BY THE DRAWER" on 09.09.2014. After the dishonor of the Cheque, the complainant was surprised and shocked inspite of the accused request and assurance the said cheque returned for the same reason and the accused not kept his promise and assurance to the complainant and the complainant tried to contact the accused but the accused is evading the complainant."

22. In fact the Respondent / Complainant had issued a Reply Notice dated 26.09.2014 addressed to the Appellant / Complainant's Counsel among other things mentioning that in the beginning of 2012 between the Respondent / Accused and one Suresh Babu s/o K.Murugan, who was doing the money lending business on interest and at that time for security in regard to the amount received by the Respondent / Accused from the said Suresh Babu, in Hosur City Union Bank Accout no.147109000126401, seven unfilled cheques and Hosur Yes Bank, five unfilled cheques, in blank stamp papers, in blank papers and unfilled pro-notes, the Respondent's signature was obtained etc., Further, the Respondent / Accused had paid the entire due amount to M.Suresh Babu but the unfilled signed cheques, blank stamp papers, blank papers, blank pro-notes, wherein the Respondent / Accused had signed was said to be kept in the office files and that the Respondent / Accused was informed that it would be

given to him after tracing out the same and that the Respondent / Accused believing the said M.Suresh Babu in entirety had left home.

23. In fact Ex.P.7, Reply Notice, the Respondent / Accused had taken a clear cut stand that the Respondent / Accused had not received any amount from the Appellant / Complainant and also not issued any cheque in his favour.

24. It is to be pointed out that Section 138 of N.I.Act speaks of 'Dishonour of Cheque' for insufficiency, etc., of funds in the account. Section 139 of the Act speaks of 'Presumption in favour of holder' and indeed, Section 118 of the Negotiable Instruments refers to 'Presumptions as to Negotiable Instruments'. In reality, the Negotiable Instruments Act is meant to codify the Law relating to dealings concerning N.I.Act and the presumptions that can be raised under Section 118 of the N.I.Act set out Special Rules of evidence relating to the Negotiable Instruments.

25. There is no two opinion of an essential fact that it is not necessary for a party to lead evidence to prove that he is the 'Holder in due course'.

26. As far as the present case is concerned, it cannot be denied that P.W.3 in his evidence (In cross-examination) had stated that at Mooventhur Nagar in front of the house of the Respondent / Accused the money was given and after paying the money they returned cheque and further that the place Basthi is different and Mooventhur Nagar is a different area/ one. In fact P.W.4 (In his cross-examination) had deposed that at the time when money was given it was around 5.30 p.m., 6.30 p.m. and he does not know the reason for the payment of money and the money was paid inside the car and the money was given at Basthi in front of the house of the Respondent / Accused.

27. In view of the aforesaid evidence of P.W.3 that money was paid at Moovendar Nagar in front of the house of the Respondent / Accused. In the teeth of evidence of P.W.4 that money was given at Basthi in front of the house, it is latently and patently quite clear that there is variation / contradiction / discrepancies in between the evidences of P.W.3 and P.W.4 as to the place where money was paid to the Respondent / Accused. Although the proceedings under N.I.Act is a civil liability coupled with fastening of criminal liability by virtue of the relevant provisions of the N.I.Act, 1881, yet this Court is of the earnest view that it is the primordial duty of the Appellant / Complainant to establish his case prima facie that the Respondent had committed an offence in respect of an offence under Section 138 of the N.I.Act. Furthermore, undoubtedly a sum of Rs.14,20,000/- (Rupees Fourteen Lakhs and Twenty Thousand

only) is a very huge amount and for lending of such a large/ huge sum admittedly no document like pro-note in writing was obtained from the Respondent / Accused, as opined by this Court.

28. Dealing with the aspect of the plea taken on behalf of the Appellant / Complainant that the Respondent / Accused had informed him that within three months, the sum of Rs.14,20,000/- (Rupees Fourteen Lakhs and Twenty Thousand only) would be repaid to him (as stated in the complaint), it is the evidence of P.W.1 that the cheque was given when approached during April, 2015. At this stage, it cannot be forgotten that the cheque was dated 07.07.2014. As a matter of fact the cheque was stopped for payment and when it was deposited for collection on 09.09.2014 by the Appellant / Complainant, a Legal Notice dated 15.09.2014, Ex.P.4 was issued to the Respondent / Accused by the Appellant / Complainant's side.

29. So far as the remaining sum of Rs.4,20,000/- the reason ascribed on behalf of the Appellant is that the said sum was given to the Respondent / Accused from and out of the jewel loan amount secured by the Appellant. In respect of the sum of Rs.10,00,000/- (Rupees Ten Lakhs only) purportedly lent to the Respondent / Accused, it is the case of the Appellant that he was in possession of Rs.10,00,000/- (Rupees Ten Lakhs only)

30. At this juncture, a mere running of the eye over the Ex.P.1 cheque dated 07.07.2014 issued by the Respondent / Accused it is quite evident that the Respondent / Accused had affixed his signature in English in a different ink. Admittedly the Date, Month and Year mentioned in the back area were in different ink. Even the name of the Respondent / Accused in the cheque and the amount in words as well as in numerical term namely, Rs.14,20,000/- (Rupees Fourteen Lakhs were in different ink. Just because Ex.P.1, Cheque contains the signature of the Respondent / Accused in a different ink and the other details mentioned in the cheque were filled up with different ink, on that ground alone, it cannot be said in Law that Ex.P.1, Cheque is an invalid and an Inchoate Instrument.

31. It is reiterated by this Court that it is the duty of the Appellant / Complainant to establish before a Court of Law that the Respondent / Accused had issued Ex.P.1 cheque in the instant case towards a subsisting liability / Debt or towards a 'Legally Enforceable Debt'.

32. At this stage, this Court aptly points out the decision of Hon'ble Supreme Court K.N.Beena V.Muniyappan and Another reported in 2002 Supreme Court Cases (Cri) page 14 at Spl.Page 15 wherein at Paragraph Nos.6 and 7, it is observed as under:-

" 6. In our view the impugned judgment cannot be sustained at all. The judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonoured cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the negotiable instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the court has to presume, unless the contrary was proved, that the holder of the cheque had been issued for a debt or liability. This presumption is rebuttable. However the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of Hiten P. Dalal V. Bratindranath Banerjee (1 (2001) 6 SCC 16 has also taken an identical view.

7. In this case admittedly the 1st respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials / averments in his reply dated 21.05.1993 were sufficient to shift the burden of proof on to the appellant complainant to prove that the cheque was issued for debt or liability. This is an entirely erroneous approach. The 1st respondent had to prove in the trial by lending cogent evidence, that there was no debt or liability. The 1st respondent not having led my evidence could not be said to have discharged the burden cast on him. The 1st respondent not having discharged the burden cast on him. The 1st respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

33. Also this Court cites the decision of P. Venugopal V. Madan P. Sarathi reported in AIR 2009 Supreme Court 568, wherein it is held as follows:-

"The presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant. In a case of this nature, however, it is essentially a question of fact.

34. Suffice it for this Court to point out that on behalf of the Appellant / Complainant while letting in legal evidence, the averments in the complaint are to be proved on his side in the manner known to law and in accordance with Law. However, this Court taking into account of the evidence of P.W.1 to P.W.5 and

Exs.P.1 to P.12, and evidence of D.W.1 and Exs.D1 and D.2 and also considering the facts and circumstances of the present case in an integral manner comes to an inevitable conclusion that the Appellant / Complainant had not established his case that the Respondent / Accused had committed an offence under Section 138 of N.I.Act to the subjective conscience of this Court. Viewed in that perspective, the ultimate conclusion arrived at by the trial court in Judgment in STC No.233 of 2014 dated 07.08.2015 that the Respondent / Accused was not found guilty in respect of an offence under Section 138 of N.I.Act and the resultant acquittal under Section 255(1) of Cr.P.C., in the considered opinion of this Court are free from any legal flaw. Consequently, the Criminal Appeal is dismissed.

In fine, the Judgment dated 07.08.2015 in STC No. 233 of 2014 passed by the Learned Judicial Magistrate, (Fast Track Court) Hosur is affirmed by this Court for the reasons assigned in this Appeal.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate Court
(Fast Track Court), Hosur.
2. The Public Prosecutor,
High Court, Madras.
3. The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to M/S.P.Mani, Advocate SR.57119

Cr1.A.No.630 of 2015

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srg 07/11/2016