IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25.10.2016

JUDGMENT PRONOUNCED ON: 30.11.2016

CORAM:

THE HON'BLE MR. JUSTICE P. VELMURUGAN

Crl.A.No.406 of 2010

K.Selvaraj ... Appellant / Complainant

-vs-

S.Venkataraman ... Respondent / Accused

This Criminal Revision is filed under Section 378 (4) of Cr.P.C. seeking to set aside the Judgment of Acquittal made on 19.04.2010 in Crl.A.No.172 of 2009 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.I, Coimbatore. Which reversed the judgment dated 01/12/2009 made in C.C.NO.700/2007 on the file of Judicial Magistrate No.2, Coimbatore and set aside the same and convict the Respondent/Accused and order Suitable compensation to the Appellant.

For Appellant : Mr.P.M.Duraiswamy

For Respondent : Mr.K.V.Sridharan

JUDGMENT

The Criminal Appeal arises against the Judgment of acquittal dated 19.04.2010 passed by the Additional District and Sessions Court, Fast Track Court - II Coimbatore, in C.A.No.172 of 2009 and to confirm the judgment of conviction and sentence passed by the learned Judicial Magistrate No.II, Coimbatore in C.C.No.700 of 2007 dated 01.12.2009.

2. The appellant herein was the respondent in the lower appellate court on the file of the Additional District and Sessions Court, Fast Track Court - II Coimbatore, in Crl.A.No.172/2009 and complainant in C.C.No.700 of 2007 on the file of the learned Judicial Magistrate-II, Coimbatore.

3. The case of the appellant is that on 28.03.2005, the respondent herein borrowed a sum of Rs.6,00,000/- from the appellant herein for the business purpose, that on receiving the loan amount, the respondent has executed a promissory note for a

sum of Rs.6,00,000/- in favour of the appellant and promised to pay the interest at the rate of 18% on demand. But the respondent evaded to repay the amount and on 29.03.2009 respondent issued the cheque bearing No.653241 drawn on Lakshmi Vilas Bank Limited, Uppilipalayam, Coimbatore, in favour of the appellant / complainant to discharge the said amount, that the above said cheque was presented for collection on 29.09.2007 through the Syndicate Bank, Tatabad Branch, Coimbatore, and the same was dishonoured for the reason ''funds insufficient'' on 30.03.2007, that on 10.04.2007, the statutory notice was issued to the respondent calling upon him to pay the cheque amount within 15 days on the receipt of the said statutory notice, that having received the statutory notice, respondent neither replied for the said statutory notice, nor paid the cheque amount to the appellant / complainant and that the respondent knowing fully well that he has no sufficient funds in his account, he issued the cheque with an intention to cheat and defraud the appellant / complainant. Hence, the appellant / complainant filed private complaint against the respondent / accused before the jurisdictional Magistrate under Section 138 of Negotiable Instruments Act and the same was taken on file in C.C.No.700 of 2007. After enquiry, the learned Judicial Magistrate No.II, Coimbatore came to the conclusion that the appellant / accused committed the offence punishable under Section 138 of Negotiable Instruments Act and convicted and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs.500/- in default to undergo simple imprisonment for three months.

4. Aggrieved by the said judgment of conviction and sentence, the respondent / accused herein preferred the appeal before the Principal District Judge, Coimbatore, in Crl.A.No.172 of 2009 and the same was made over to Additional District and Sessions Judge, Coimbatore. The first appellate Court, after hearing the appeal, came to the conclusion that the judgment of conviction and sentence passed by the trial Court is liable to be set aside. Accordingly, he set aside the order of conviction and sentence passed by the trial Court and allowed the appeal and acquitted the respondent. Aggrieved with the said judgment of acquittal passed by the first appellate Court in Crl.A.No.172 of 2009 on the file of the Additional District and Sessions Judge, Coimbatore, the appellant / complainant has preferred the present appeal before this Court.

5. The case of the complainant in brief is that the accused having Film Distribution Company by name Vijayalakshmi Films is engaged in Film Distribution Business in Coimbatore and accused is known to the complainant and the accused has borrowed a sum of Rs.6,00,000/- from the complainant on 28.03.2005 for his business purpose and on the same day in consideration of receiving the loan amount the accused had executed a demand promissory note for

Rs.6,00,000/- in favour of the complainant and promised to pay interest at the rate of 18% on the loan amount of Rs.6,00,000/- and the complainant demanded the loan amount together with interest from the accused to discharge part of his legal liability. The accused has issued a cheque bearing No.653241 dated 29.03.2007 for Rs.6,00,000/- in favour of the complainant, drawn on Lakshmi Vilas Bank Limited, Uppilipalayam Branch, Coimbatore. The complainant presented the above cheque for collection on 29.03.2007 through his banker, Syndicate Bank, Tatabad Branch, Coimbatore. The said cheque was returned by the banker Lakshmi Vilas Bank, Uppilipalayam, Coimbatore for the reasons ''funds insufficient'' vide their return memo dated 30.03.2007. The factum of dishonour was informed to the complainant by his banker vide their memo dated 30.03.2007. Therefore, the complainant issued a statutory notice dated 10.04.2007 called upon the accused to pay the cheque amount within 15 days from the receipt of the said notice. The copy of the notice was also sent to his office address. The accused received the notice, but neither replied to the statutory notice nor paid the cheque amount to the complainant. Hence, the complainant filed the private complaint against the accused before the jurisdictional Magistrate, Coimbatore and the same was taken on file in C.C.No.700 of 2007.

6. In order to prove the case of the complainant, on the side of the complainant, he has been examined as PW.1 and seven documents have been marked. On the side of the accused, three witnesses have been examined and four documents have been marked.

7. The learned trial Judge, relied on the admission made by the respondent / accused that the signatures found in Exs.P1 and P2 are that of the accused and relied on Section139 of the Negotiable Instruments Act, drawn presumption against the respondent and convicted the accused. Against which, the aggrieved respondent herein filed appeal before the Additional District and Sessions Judge, Coimbatore.

8. The first appellate Court as a fact finding court held that the judgment passed by the trial court was not proper and the trial court has not appreciated the evidence properly and found that the complainant has proved the execution of promissory note (Ex.P1) and cheque (Ex.P2). Further the trial court has not considered the fact that respondent/accused herein rebutted the presumption by adducing oral evidence and producing the documentary evidence. The trial court had not appreciated the evidence let in by the respondent/accused herein. Therefore, the conviction and sentence passed by the trial court against the accused has been set aside by the first appellate Court.

9. On perusal of the complaint filed by the appellant/complainant before the learned Judicial Magistrate, oral and documentary evidence produced before the trial court, the

judgment of the trial court, grounds of appeal filed by the respondent/accused herein before the first appellate Court, judgment passed by the first appellate Court in Crl.A.No.172 of 2009 on the file of the Additional District and Sessions Judge, FTC No.I, Coimbatore, and the grounds of appeal raised by the appellant/complainant herein before this Court and submissions put forth by both the learned counsel in this appeal, it is seen that since the first appellate Court as a fact finding court, has discussed the entire facts and evidences and found that the trial court had not appreciated the evidence placed by the respondent/accused herein before the trial court. Further on perusal of the Judgment passed by the trial court, the trial court mainly relied upon the admission made by the accused during the evidence as DW2, who had admitted the signatures found in Ex.P1 - promissory note and Ex.P2 - Cheque respectively belongs to the him, had drawn the presumption u/s.139 of the Negotiable Instruments Act and convicted the accused. The said conviction was based upon the sole ground of admission made by the respondent/accused and the said judgment was challenged before the First Appellate court. The First Appellate court, after analysing the evidence of both the parties, appreciating the evidence, considering the legal position, has set aside the Judgment of conviction and sentence passed by the trial court.

10. In this regard, it is worthwhile to refer paragraphs 11 to 14 of the judgment of the First Appellate Court in Crl.A.No.172/2009 on the file of the learned Additional District and Sessions Court, FTC No.I, Coimbatore.

11. Considering the facts and circumstances of the case, now the point for consideration before this court is whether the judgment passed by the First Appellate court in Crl.A.No.172/2009 on the file of the Additional District and Sessions Court, FTC No.I, Coimbatore dated 19.04.2010 is liable to be set aside.

12. On perusal of the evidence let in both the parties before the trial Court and the evidence foreseen discussed by the first appellate Court in paragraphs-11 to 13, the first appellate Court as a fact finding Court after elaborately discussing the evidence of both the parties, has came to the conclusion that the respondent / accused had rebutted the presumption by producing oral and documentary evidence. In paragraph-14 of the Judgment, the first appellate Court has discussed the legal position involved in this case and also appreciated the evidence produced by both parties before the trial Court and has come to the conclusion that the accused had rebutted the presumption and therefore, set aside the judgment of the trial Court and acquitted the respondent/accused.

13. In this regard, the appellant/complainant has raised grounds of appeal before this court, in which, it is stated that the first appellate court has failed to consider the fact that the accused had failed to rebut the presumption and had failed to explain the possession of cheque by the appellant / complainant and that in the absence of any positive evidence from the side of the respondent / accused, that without any evidence that the signed blank cheque was misused by the complainant and the loan received by the accused from the complainant is only Rs.60,000/- and not that of Rs.6,00,000/-, and the loan amount was also discharged; that the signature of the accused found in the acknowledgment card Ex.P7 was not totally denied by the accused and only pointing out the missing of two dots (..) under the signature, the first appellate Court has come to the conclusion without proper scrutiny of evidence, there is no legally enforceable debt, which necessitated for issuance of cheque dishonoured. The lower appellate Court in reversing the judgment of the trial Court and acquitting the accused are not sound and proper.

14. The main contention of the appellant is that once the accused admitted the signatures found in the promissory note and cheque, it is the duty of the accused to rebut the presumption that he has no obligation to pay the amount mentioned in the cheque, whereas in this case, he has not rebutted the presumption and the lower appellate Court has wrongly come to the conclusion that the accused has rebutted the presumption. Therefore, the judgment of the first appellate Court is liable to be set aside and the judgment of the trial Court is to be confirmed.

15. In this regard, as already stated, the First Appellate Court as a fact finding court has elaborately discussed the oral and documentary evidence produced before the trial court and has come to the conclusion from the available evidence that the accused/respondent herein has rebutted the statutory presumption by leading cogent and convincing evidence and proved the preponderance of probability. In paragraph-15 of the Judgment, the first Appellate Court has given reason for appreciating the case of the respondent and disbelieving the case of the appellant/complainant and wherein, it is observed as follows:-

> "..... the appellant has established the preponderance of probabilities that the accused issued the blank cheque in favour of the complainant at the time of Rs.60,000/- borrowed, which was also discharged as alleged and that the blank cheque was misused for filing such a

criminal case against the appellant and the accused did not issue the cheque with an intention to defraud the complainant and that the evidence as alleged has not proved and established for the offence u/s. 138 of N.I. Act and the appellant is entitled to the acquittal. Accordingly, Point No.1 is answered in negative."

Therefore, the contention of the learned counsel for the appellant that the accused has not rebutted the statutory presumption, is not acceptable one, because though the accused during the examination as DW.2 has admitted the signatures found in Ex.P1- promissory note and Ex.P6 - cheque are that of him, he has categorically denied the alleged transaction with the complainant. On a careful analysis of the evidence adduced by both the parties, it is the case of the appellant that the respondent has borrowed a sum of Rs.6,00,000/- on 28.03.2005 for his business purpose and that on the same day in consideration of receiving the loan amount, the accused has executed a demand promissory note for Rs.6,00,000/- in favour of the complainant and promised to pay interest at the rate of 18% on the loan amount for Rs.6,00,000/-. When the complainant demanded the said amount together with interest from the accused to discharge part of his legal liability, the accused has issued a cheque bearing No.653241 on 29.03.2007 for Rs.6,00,000/- in favour of the complainant and drawn on Lakshmi Vilas Bank Limited, Uppilipalayam Branch, Coimbatore, and when the complainant presented the above said cheque for collection on the same day through his banker and the same was returned on the next day for the reasons ''insufficient funds''. The complainant had stated in the complaint and evidence that inspite of several demands, the accused did not pay any amount, but he had stated that to discharge part of his legal liability, the accused had issued a cheque on 29.03.2007 for Rs.6,00,000/- in favour of the complainant and the same was presented by the complainant on the same day. It is not the case of the appellant that he borrowed the amount on 29.03.2007 for which the accused had issued a cheque for Rs.6,00,000/-. As stated earlier, the cheque was issued only to discharge part of his liability, which was borrowed on 28.03.2005 for which he already obtained promissory note. The appellant has not stated what was the amount balance as on date of issuing the cheque, for discharging part of his legal liability. Further, he has not stated anywhere either in the statutory notice or in the complaint or in the evidence, whether the accused had paid any amount towards interest or principal, what is the balance as on 29.03.2007, when the cheque was issued in favour of the complainant. In this aspect, the first appellate Court elaborately discussed the evidence let in by both the parties before the trial Court. When appellant got a cheque from the accused for the amount covered in the promissory note, he should have immediately returned the promissory note to the accused, but, he has not returned the promissory note. He has marked only a copy of the said promissory note as Ex.P1. Further, the written statement filed by the accused as the defendant in the civil suit, which was already filed by the appellant against this accused before the Civil Court in O.S.No.579 of 2008, shows that this appellant / complainant already filed the suit for the very same promissory note against the very same respondent / accused before the District Judge, Coimbatore. In that written statement itself, the respondent / accused had stated about this promissory note and cheque. All these aspects have been elaborately discussed and considered by the first appellate Court as fact finding Court and therefore, this Court need not go into deep in these aspects and need not re-appreciate the evidence elaborately when the discussion made by the first appellate Court is in right perspective. Further when the accused had not repaid the amount even after repeated demands, why the appellant / complainant had got the cheque from the accused and deposited the cheque on the same day itself, is also not clear, which also creates suspicion about the character of the complainant. Further, the accused has examined DW.1 and also DW.3, in order to prove the non-service of statutory notice. Presumption under Section 114 of the Evidence Act and Section 12 of General Classes Act is rebuttable presumption. The contention of the appellant is not acceptable one as the reason is in order to rebut the presumption, the accused has examined himself as DW.2 and produced the oral and documentary evidence in this regard and rebutted the presumption. The appellant / complainant also has admitted that the signatures found in the acknowledgment cards differ. Under the said circumstances, the citation referred by the appellant reported in (2007) 3 SCC (Crl.) 236 will not help to the case of the appellant.

16. Having come to the said conclusion, now the only question is as to whether statutory presumption u/s.139 of the Negotiable Instruments Act has been rebutted by the accused/respondent has to be decided by this court.

17. As discussed earlier, the signatures found in the Ex.P1 - promissory note and Ex.P2 - cheque are admitted. It is well settled proposition of law that when once the drawer of cheque or promissory note admits his signature in the promissory note or the cheque, the presumption is that the promissory note has been properly executed by the person signing the promissory note or the cheque for valid and good consideration, unless the presumption is validly tilted otherwise. Further the presumption under Sections 118 and 139 of the Negotiable Instruments Act also rebuttable presumption. Now the question is whether the presumption has been rebutted by the respondent/accused by leading cogent and convincing evidence i.e., direct evidence or by preponderance of probabilities. As discussed above, the reason as stated by the first appellate Court, the accused has rebutted the presumption by producing oral and documentary evidence. Therefore, this court

finds that the judgment passed by the first appellate Court in Crl.A.No.172 of 2009 on the file of the Additional District and Sessions Judge, FTC No.I, Coimbatore was right in allowing the first appeal and acquitting the accused.

18. It is settled law that even if there are two views which are equally possible, the first appellate Court as a fact finding Court, appreciating the evidence and examining the correctness of the judgment of the trial court and acquitting the accused, this court cannot substitute its view in the place of the view taken by the first appellate court, unless the view taken by the first appellate court is apparently erroneous and perverse. In this case, this court concur with the view of the first appellate Court. In my considered view, though the appellant/complainant has proved the execution of Ex.P1 - promissory note and Ex.P2 - cheque respectively and respondent herein also admitted the signatures found in Exs.P1 and P2 are that of him, but he has validly rebutted the statutory presumption and has established the preponderance of probabilities by producing oral and documentary evidence. Therefore, it is held that the first appellate Court was right in allowing the first appeal and acquitting the accused, in which, this court do not find any infirmity warranting interference at the hands of this Court. Thus, I do not find any merit in this Criminal Appeal.

19. In the result, the Criminal Appeal No. 406 of 2010 is dismissed. The Judgment of Acquittal made on 19.04.2010 in Crl.A.No.172 of 2009 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.I, Coimbatore, is hereby confirmed. The judgment of conviction and sentence passed by the learned Judicial Magistrate No.II, Coimbatore in C.C.No.700 of 2007 dated 01.12.2009 is hereby set aside.

Mra

Sd/-
Assistant Registrar (J)

/TRUE COPY/

Sub-Assistant Registrar

TO,

1.THE JUDICIAL MAGISTRATE NO.II,
COIMBATORE.

2. THE CHIEF JUDICIAL MAGISTRATE,
COIMBATORE.

3.THE ADDITIONAL DISTRICT AND
SESSIONS JUDGE,
FAST TRACK COURT NO.I, COIMBATORE.

4.THE PRINCIPAL DISTRICT JUDGE,
COIMBATORE.

5.THE SECTION OFFICER,
CRIMINAL SECTION,
HIGH COURT, MADRAS.

+1CC to MR.P.M.DURAISWAMY Advocate SR.NO.70830
+1CC to MR.K.V.SRIDHARAN Advocate SR.NO.71505

Judgment
in

Crl.A.No.406 of 2010

KGK[CO]
MK:02/01/2017