

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.03.2017

Pronounced on : 23.03.2017

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.A.No.152 of 2017

K.Dhanabakkiyam ... Appellant/Complainant

V.

1.Ms.Thirumala Wall Decors &
Suncontrols Represented by its Partner,
Mr.V.Anbazhagan,
S/o. Vaithiyalingam,
Old No.306, New No.36,
Palanimalai Lane, 2nd Street,
Sakthi Road, Erode - 638 001.

2.V.Anbazhagan ... Respondents/Accused

Prayer: Appeal filed under Section 378 of the Criminal Procedure Code, praying to set aside the acquittal of accused by learned Judicial Magistrate No.I, (Fast Track) Erode in S.T.C.No.12/2015 by Judgment dated 01.08.2016 and convict the Respondents/Accused under Sections 138, 141 and 142 of the Negotiable Instruments Act.

For Appellant : Mr.P.Gopiraja

For Respondents : Mr.C.S.Saravanan

JUDGMENT

The Appellant/Complainant has filed the present Criminal Appeal before this Court [as a dissatisfied person] as against the Judgment dated 01.08.2016 in S.T.C.No.12 of 2015 passed by the Learned Judicial Magistrate No.I, (Fast Track Court), Erode.

2.The trial Court, while passing the impugned Judgment in S.T.C.No.12 of 2015 on 01.08.2016, at paragraph 20, had, among other things, observed that the Complainant (Appellant) had not established that the case cheque amount was the one which would come as a 'Legally Enforceable Debt' and further that, it was

observed that the Complainant (Appellant) had not established beyond reasonable doubt that the case cheque was issued by the Respondent/Accused for the loan obtained by him from the Complainant (Appellant) and ultimately held that the Respondents/A1 & A2 were not guilty in respect of an offence under Section 138 of the Negotiable Instruments Act and acquitted them under Section 255(1) Cr.P.C.

3.The Appellant/Complainant has challenged the trial Court's Judgment in S.T.C.No.12 of 2015 dated 01.08.2016 by preferring the instant Appeal by taking a plea that the trial Court had failed to appreciate that the 2nd Respondent/A2 had admitted the receipt of amount and execution of cheque.

4.The Learned Counsel for the Appellant/Complainant urges before this Court that the trial Court should have seen that the Respondents/Accused had failed to deny the existence of 'Legally Recoverable Debt' after receipt of intimation of notice under Section 138 of the Negotiable Instruments Act.

5.The Learned Counsel for the Appellant/Complainant takes a plea that the trial Court ought to have consider the evidence of D.W.1 in and by which she had deposed that the Appellant/Complainant gave Rs.4,00,000/- to the 2nd Respondent/A2 in her presence and that the 2nd Respondent/A2 issued a cheque in favour of the Complainant agreeing to repay the amount within one month.

6.According to he Learned Counsel for the Appellant/Complainant, the trial Court should have taken into account that D.W.3 /A2 in his evidence had stated that he used to borrow money from the Son-in-Law of the Appellant/Complainant viz., D.W.2 and issued cheque towards discharge of the said money. In fact, D.W.3 (during cross examination) had feigned ignorance in regard to his failure to establish the said claim by examining D.W.2.

7.The Learned Counsel for the Appellant/Complainant takes a stand that D.W.3/A2 (in his cross examination) had admitted the suggestion regarding the value of the property sold by the Appellant/ Complainant's husband through Ex.D2 - Sale Deed and indeed, this proves the fact that the Appellant/ Complainant gave money to the 2nd Respondent/A2 which she was given her (through sale of property by her husband).

8.The Learned Counsel for the Appellant brings it to the notice of this Court that the trial Court should have considered the evidence of D.W.2, who had stated that he knew the borrowal of money by the 2nd Respondent/A2 from his Mother-in-Law viz., the Appellant/ Complainant and the same was not returned by him.

9.Lastly, it is the contention of the Learned Counsel for the Appellant/Complainant that the trial Court had committed an error in disbelieving the stand of the Appellant/Complainant (during cross examination) that a sum of Rs.4,00,000/- was given to her by her husband after selling the property.

10.Conversely, it is the submission of the Learned Counsel for the Respondents/Accused that before the trial Court, the Appellant/ Complainant had not established with sufficient witness and documents that she lent a sum of Rs.4,00,000/- to the Accused and therefore, the trial Court came to the conclusion that there was no 'Legally Enforceable Debt' and finally, held that the Appellant/Complainant had not established her charge against the Respondents/Accused in respect of an offence under Section 138 of the Negotiable Instruments Act and found them not guilty and acquitted them. It is also represented that on behalf of the Respondents that the conclusions arrived at by the trial Court are free from legal infirmities.

11.Before we embark upon the aspect of the evidence adduced by the witnesses concerned, this Court pertinently points out that in the Complaint in S.T.C.No.12 of 2015 on the file of the trial Court, the Appellant/Complainant had averred that the 1st Respondent/A1 is a Partnership Firm and that the 2nd Respondent/A2 is the Managing Partner, who look after the day to day affairs of the 1st RespondentA1. Further, the Appellant/Complainant had come out with a categorical case that on 05.10.2014 at her residence the 2nd Respondent/A2 had borrowed a sum of Rs.4,00,000/- on behalf of the 1st Respondent/A1 for the purpose of Business as 'hand loan' and to discharge the said liability, the 2nd Respondent/A2 issued a post dated cheque on behalf of the 1st Respondent/A1 bearing No.727673 drawn on Indian Bank, Erode Branch dated 05.11.2014 for Rs.4,00,000/- in favour of the Complainant (Appellant).

12.It comes to be known that the cheque in question was presented for collection on 05.11.2014 through his Banker IOB, Moolapalayam Branch, Erode and the cheque got returned on 06.11.2014 with a Memo 'Funds Insufficiency' in the Accused name.

13.The Appellant/Complainant before the trial Court had projected a case that Legal Notice - Ex.P4 dated 17.11.2014 was issued (on behalf of the Appellant/Complainant) to the Accused calling upon them to pay the cheque amount of Rs.4,00,000/- within 15 days from the date of receipt of notice. As a matter of fact, both the Accused although received the intimation on 18.11.2014 had deliberately returned the notice and had not paid the cheque amount and further not issued any reply. Hence, the

Appellant/Complainant was forced to file a Complaint before the trial Court which was taken on file in S.T.C.No.12 of 2015.

14.In order to appreciate the points of controversy between the respective parties, it is just and necessary for this Court to make a useful reference to the evidence of relevant witnesses in the case.

15.P.W.1 (Appellant/Complainant) (Mother-in-Law of D.W.2), in her evidence, had deposed that she is not going for a job and also not doing any business and that she is staying along with her daughter and that 15, 16 years had elapsed from the date of death of her husband and while her husband was alive, he had income through Power Loom and after the death of her husband, she is not doing any work and during his lifetime, they carried out the work of Power Loom only and through Power Loom, she received income of Rs.2,000/- per month and per week she received Rs.700/- and that she had not studied and that she had sold the own house and at present, she is not having any property.

16.P.W.1 adds in her evidence that during her husband's lifetime, he sold the house and gave the sale money of her and that she knew the 2nd Respondent/ A2 for well over 30 years because of the reason she is very near her place and that the 2nd Respondent/A2 is doing the business of putting screen cloth to the window grills.

17.P.W.1, in her evidence, deposed that the 2nd Respondent/A2 had demanded money from her on 05.10.2014 and she gave Rs.4,000/- to him who informed that he would return the same within a month and only after the 2nd Respondent/A2 had asked for money for three times she had given the same and at the time of herself giving money to the 2nd Respondent/A2 in her house her Son-in-Law and daughter were there and they knew about the details of money being given to the 2nd Respondent/A2.

18.P.W.1 had deposed that the money that she had lent to the 2nd Respondent/A2 was given by her to her daughter and she received the said money from a daughter and gave it to the 2nd Respondent/A2 and that the 2nd Respondent/A2 had issued a cheque and immediately she gave the same to her Son-in-Law (D.W.2).

19.That apart, it is the evidence of P.W.1 that her husband during his life time had sold the house to Rajamanickam but she does not know that what price he sold the property, but he gave Rs.4,00,000/- to her and that the said place was sold for Rs.11,700/-.

20.D.W.1, in her evidence, had deposed that her sister for the past 20 years is living with him and that her father had sold the property 20 years before, she does not know in whose name the property was standing and her father would have sold the property for about Rs.6, 7 lakhs and her mother had received a sum of Rs.5,00,000/- from the sale proceeds of the property and that her husband was in the house when money was given to the 2nd Respondent/A2.

21.D.W.2 in his evidence had deposed that P.W.1 is his Mother-in-Law and she is not doing any Business and presently for the past 15 years she has no income and that he knows the 2nd Respondent/A2 and that he had given evidence in O.S.No.85 of 2015 on the file of the Learned Principal Sub Judge Court and that the said suit was filed by one Rajamanickam against the 2nd Respondent/A2 and his deposition was Ex.D1.

22.D.W.3 (2nd Respondent/A2), in his evidence, had deposed that the Appellant/Complainant's Son-in-Law Periyasamy (D.W.2) had worked as Junior Engineer in the Highways Department and for his Business needs quite often he used to borrow money and issued a cheque and handed over the cheque without affixing his signature to him and that the Appellant/Complainant had no capacity/source to advance a huge sum and Ex.D2 was the Sale Deed in favour of one Rajamanickam and since the D.W.2 is working in the Government Job, he had filed a case through his Mother-in-Law (P.W.1) and that the case cheque was not given for valuable consideration.

23.D.W.3 (in his cross examination) had deposed that the suit cheque belonged to him and the signature found therein also belongs to him and that in one way the Appellant/Complainant is his relative and he had seen her once in 35 years.

24.At this stage, it is to be borne in mind that Section 118 of the Negotiable Instruments Act is mandatory in character, although it deals with 'Presumption'. It is to be remembered that the presumption under Section 118 of the Negotiable Instruments Act is a rebuttable one and that a Debtor could press into service the facts and circumstances disclosed by the Complainant/Plaintiff's evidence as the case may be.

25.It cannot be gainsaid that only when a due execution is proved, the presumption under Section 118(a) of the Negotiable Instruments Act could be raised. If the fact of execution itself is in dispute, then, a Complainant/Plaintiff is to prove not only due 'Execution' but also the 'Passing of Consideration'.

26. In this connection, this Court aptly points out that a statutory presumption continues until it is rebutted and the only way, it can be rebutted is by establishing the contrary viz., that the Negotiable Instruments were issued without consideration. Indeed, the strict liability under Section 138 of the Negotiable Instruments Act can be enforced only when the cheque was issued in discharge of any legally enforceable debt or other liability either in part or in entirety. Further, it is the burden of the Complainant to prove that the cheque was signed by the Drawer in discharge of a Legally Enforceable Debt.

27. Moreover, the presumption under Section 118(a) of the Negotiable Instruments Act is against the Maker or Drawer or Endorser and not a presumption specially in favour of a Payee, the Holder or the Holder in Due Course. An existence of 'Legally Enforceable Debt' is not a matter of presumption under Section 139 of the Negotiable Instruments Act.

28. At this juncture, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in M/s. Modi Cements Limited V. Shri Kuchil Kumar Nandi, JT 1998 (2) SC 198 at page 199, wherein it is observed as under:

"Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the Bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. Section 138 is attracted, when cheque is dishonoured.

The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial.

Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course."

29.Indeed, it is not obligatory of an Accused separately/ independently to adduce evidence or to enter into the witness box. However, if he can successfully collect materials from the evidence of the Complainant which would sufficiently disprove the presumptive facts in relation to the pre-existence of legal liability, then, the same can be accepted by a Court of Law, if it satisfies his judicial conscience. It is to be remembered that under Our Constitutional Scheme of things, an Accused is entitled to maintain silence.

30.In fact, every cheque or liability upon which a cheque was issued was not an enforceable one. Further, once a cheque was signed by a Drawer, he could not absolve his liability unless he proves by evidence that the cheque was not given in discharge of a liability.

31.Besides the above, it is to be noted that the Negotiable Instruments Act, 1881 does not deny the word 'Dishonour', but the title of Section 138 of the Negotiable Instruments Act lists the 'Insufficiency of Funds' as being one of the situations that could contribute to a dishonour and inevitably the most vital one. Ordinarily, the legal presumption under Section 118 of the Negotiable Instruments Act is that a cheque was made for consideration. The presumption under Section 118 is a rebuttable one by the evidence of executant on their intention and circumstances of a given case.

32.As far as the present case is concerned, this Court, at the risk of repetition, points out that it is the evidence of D.W.1 (Mother of Appellant/Complainant) that a sum of Rs.5,00,000/- was given to the Appellant's/Complainant's Mother at the time of selling the property. However, in her evidence, she had stated that selling the property approximately after would have sold the house property for a sum of Rs.6 or 7 lakhs. But, the Appellant/Complainant, in her evidence as P.W.1, had deposed that a sum of Rs.4,00,000/- was given by her husband after selling the property. In this regard, this Court points out that under Ex.D2 - Sale Deed, the sale price was remained as only Rs.11,700/-. Therefore, it is very difficult to believe that the Appellant/ Complainant's (P.W.1's) husband would have

given to her a sum of Rs.4,00,000/-, as opined by this Court. In fact, D.W.1 (Appellant/ Complainant's daughter), in her evidence, had not deposed that a sum of Rs.5,00,000/- in her possession was given by her to her mother (Appellant/Complainant) (P.W.1) and in turn, the said amount was given to the Respondent/Accused. It passes beyond one's comprehension that when the Appellant/Complainant for the past 15 years was not having any income, as to how she could have advanced a hefty sum of Rs.4,00,000/- to the 2nd Respondent. As such, the contra plea taken on behalf of the Appellant/Complainant is not accepted by this Court.

33.Apart from that, when the house property was sold in the year 1987 itself, the plea taken by the Appellant/Complainant (P.W.1) that she was keeping the amount in her possession was hardly to be believed. It is needless for this Court to make a relevant mention that a Complainant must establish that he or she had sufficient wherewithal /capacity to lend the amount that too by a cheque. Moreover, D.W.2 (D.W.1's husband), in his evidence, had deposed before the trial Court that he was informed that the 2nd Respondent/A2 had taken a loan from his Mother-in-Law viz., the Appellant/Complainant (P.W.1).

34.Be that as it may, on a careful consideration of the respective contentions and in view of the fact that the Appellant/Complainant (P.W.1) had not established her case beyond all reasonable doubt that she had lent a sum of Rs.4,00,000/- to the Accused. Further, the Appellant/Complainant in the instant case had not proved about her financial capacity to lend such a heavy sum to the Respondents/ Accused. Hence, this Court comes to a consequent conclusion that the findings of not guilty arrived at by the trial Court in respect of the Respondents /Accused does not suffer from any flaw. Consequently, the Criminal Appeal fails.

35.In fine, the Criminal Appeal is dismissed. The Judgment of the trial Court in S.T.C.No.12 of 2005 dated 01.08.2016 is affirmed by this Court for the reasons assigned in this Appeal.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

Sgl

To

1.The Judicial Magistrate No.I,
Fast Track Court,
Erode.

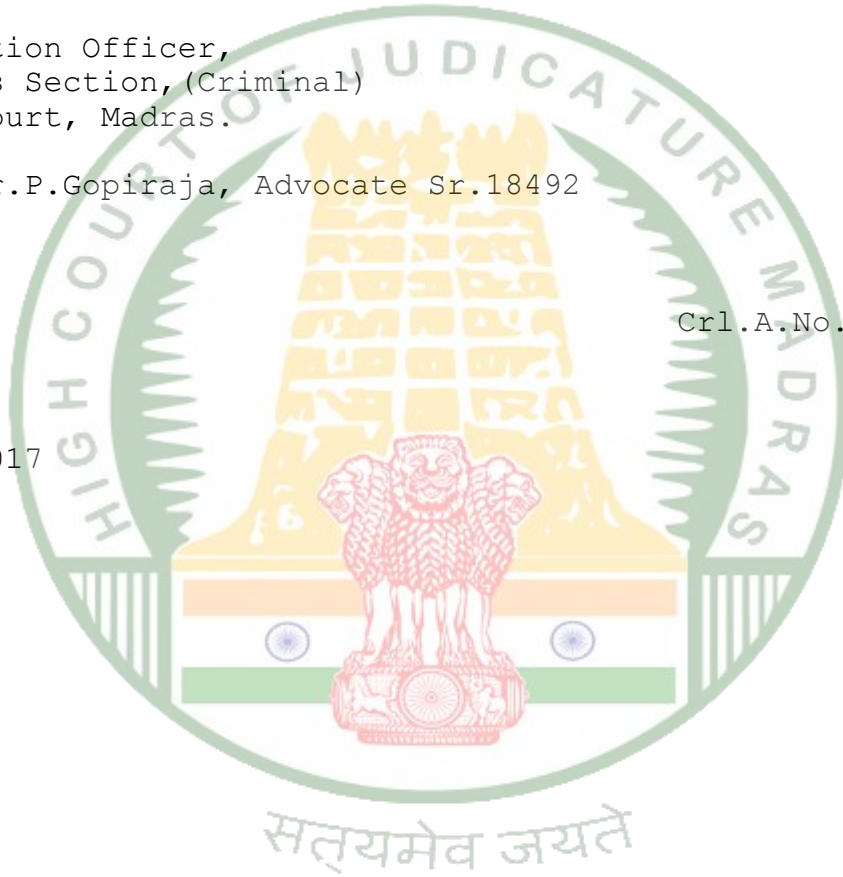
2.-Do- Thro The Chief Judicial Magistrate,
Erode.

3.The Section Officer,
Records Section, (Criminal)
High Court, Madras.

+lcc to Mr.P.Gopiraja, Advocate Sr.18492

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