

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	03.01.2017
Judgment Pronounced on	09.01.2017

THE HONOURABLE MR.JUSTICE **M.VENUGOPAL**

Crl.A.No.39 of 2014

S.Muniraj

..Appellant / Complainant

Vs.

B.V.Anantharao

..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., to set aside the order of acquittal passed by the Learned Principal District Sessions Judge, Krishnagiri dated 06.03.2013 in Crl.Appeal No. 69 of 2012 setting aside the Order of Conviction passed by the Learned Fast Track Judicial Magistrate, Hosur dated 05.10.2012 in STC No.143 of 2011.

For Appellant : Mr.N.E.A.Dinesh

For Respondent : Mr.C.Samivel

J U D G M E N T

The Appellant / Complainant has filed the present Criminal Appeal before this Court (as an aggrieved person) as against the Judgment dated 06.03.2013 in C.A.No.69 of 2012 passed by the Learned Principal District and Sessions Judge, Krishnagiri.

2. The First Appellate Court (as an Appellate Authority) while passing the impugned Judgment in CrI.A.No.69 of 2012 on 06.03.2013 at Paragraph No.8 had among other things observed that "...the Accused (the Respondent) after obtaining a loan from Byrappa and executing a sale deed had paid back a sum of Rs.2,50,000/- and after writing a cancellation of Sale Deed, a higher rate of interest was demanded and further that in the Sale Cancellation Agreement, the signature was erased after taking the photo, the Complainant (Appellant) was approached and the interest was additionally demanded to be paid, an harassment was made and because of the inability to pay the interest, the cheque, which was given for security was filled up by the complainant etc.," and ultimately it was concluded that the case filed against the Respondent / Accused under Section 138 read with 142 of Negotiable Instruments Act was not established beyond reasonable doubt and resultantly allowed the Appeal by setting aside the Judgment dated 05.10.2012 in STC No.143 of 2009 passed by the Learned Judicial Magistrate (Fast Tract Court), Hosur and acquitted the Accused / Respondent under Section 386 (b)(i) of Cr.P.C.,

3. Earlier, the Learned Judicial Magistrate, Fast Track Court, Hosur while delivering the Judgment in STC No.143 of 2011 on 05.11.2012 (filed

by the appellant / Complainant) at Paragraph No.5 had observed as under:

“ 5. The accused in order to disprove the case, he himself examined as DW1 in the proof affidavit he pleaded that he issued the cheque for the security of towards the interest of loan obtained from one Bairappa to prove the fact that he examined the DW2 Abdul Rehman and DW3 Raju, they in their evidence stated that the accused paid the loan to Bairappa and sale agreement was canceled but Bairappa demanded more interest and refused to get it registered by removing his photo in the cancellation deed and struck off the signature. The next day the complainant came to the accused shop and quarreled with accused. The accused called the DW2 and DW3 for the support there the accused given blank cheque to the accused for security of interest till the payment of interest. But the DW3 in the cross stated that on 03.05.2008 the accused called on him over phone at that time the Bairappa, the accused and Dw2 were present in accused shop Bairappa paid the amount to the accused but it is quiet contra to the defence case the accused in the evidence not stated that at time of receiving loan the DW2 and DW3 were present. It created the doubt on the evidence of DW3 and DW2. The evidence of DW2 is concerned why the cheque was given to complainant towards the amount to be paid to Bairappa is not explained the cheque could be filled with the name of Bairappa why it was not done it was not explained, more over the Bairappa was not examined to prove this fact, why he was not examined there is no explanation. Even the accused in the cross stated that when

the complainant came to the shop he has not asked about Bairappa why he was given the Blank cheque to the complainant there is no valid reason. Therefore the accused failed to prove the defence case. The case of the defence is highly unbelievable and the case of the complainant compare to the defence is believable. Therefore the accused failed to disprove the case of the complainant and complainant proved his case u/s 139 of N.I.Act.”

and resultantly found the Respondent / Accused guilty in respect of an offence under Section 138 r/w 142 of Negotiable Instruments Act, 1881 and imposed a punishment of Six Months Simple Imprisonment and directed him to pay a compensation of Rs.3,10,000/- to the Complainant (Appellant) in default of payment of compensation to undergo Simple Imprisonment for a further period of One Month.

4. Assailing the legality, validity and correctness of the Judgment of Acquittal passed in CrI.A.No.69 of 2012 on 06.03.2013, the Appellant / Complainant has preferred the instant Criminal Appeal before this Court primarily taking a plea that 'Judgment of Acquittal' is an erroneous one both 'in Law and on Facts' .

5. The Learned Counsel for the Appellant urges before this Court that the evidence on record before the trial court clearly points out that the cheque in question was issued towards the loan obtained by the Respondent / Accused from the Appellant / Complainant.

6. The Learned Counsel for the Appellant projects an argument that just because the Appellant / Complainant had attested the alleged 'Deed of Cancellation of Agreement for Sale' executed by the Respondent / Accused in favour of Byrappa, it could not be presumed that the cheque in question was issued by the Respondent / Accused towards the said transaction and not towards the loan borrowed by the Respondent / Accused. However, the First Appellate Court had failed to appreciate this plea in a proper and real perspective, which has resulted in miscarriage of justice.

7. Advancing his argument, the Learned Counsel for the Appellant takes an emphatic stand that the First Appellate Court had failed to take into consideration that the case of the Respondent / Accused was that he borrowed a sum of Rs.2,50,000/- on 03.05.2008 from one Byrappa and that the said Byrappa obtained 'Agreement of Sale' from him as 'Security' and

that after paying the said amount to Byrappa and at the time of execution of cancellation deed, the Respondent / Accused had issued a cheque to the said Byrappa as he insisted upon the enhancement on interest towards the said loan.

8. The Learned Counsel for the Appellant submits that the case cheque was issued only towards a 'Legally Enforceable Debt' and in fact there are enough materials available on record in the present case, which were not looked into by the First Appellate Court in a pragmatic fashion.

9. Lastly, it is the contention of the Learned Counsel for the Appellant that under Section 139 of the Negotiable Instruments Act, 1881, the presumption is that the cheque was issued for the purpose of discharging the loan obtained by the Respondent / Accused from the Appellant / Complainant, but this aspect was not considered by the trial court.

10. In response, the Learned Counsel for the Respondent / Accused submits that the First Appellate Court in the Judgment in C.A.No.69 of 2012 dated 06.03.2013 had categorically observed that D.W.2 and D.W.3 had tendered evidence in a corroborative fashion to the effect that the

Respondent / Accused in respect of his borrowings of Rs.2,50,000/- from Byrappa, a claim was made for higher payment of interest and since the Appellant / Complainant was instrumental in obtaining the loan, the Respondent / Accused was harassed with a view to pay higher interest and only in this context the unfilled cheque came to be issued and therefore, it was quite evident that the Respondent / Accused had not taken a loan of Rs.3,00,000/- from the Appellant / Complainant and only from Byrappa he took loan for Rs.2,50,000/- and only for the purpose of security, the cheque was issued by the Respondent / Accused, which was filled up by the Appellant / Complainant and filed a present case and the said conclusions arrived at are free from any flaw.

11. For a fuller and better appreciation of the factual matrix of the case, it is pertinent for this Court to make a meaningful and purposeful reference to the evidence of witnesses concerned.

12. It is the evidence of P.W.1 (Appellant / Complainant) that he knows the Accused because of the reason that he belongs to his village and that Byrappa is known to him and further that the Accused (Respondent) runs a Bakery shop, which is situated at Bagalur Bus stand and the said

building belongs to the Accused and that he knows about the Sale Agreement, which was entered into between the Respondent / Accused and Byrappa in which he had affixed his signature in the Registration Office and that he does not remember the Sale Agreement details and added further he does not remember as to how much money Byrappa had given to the Respondent / Accused.

13. P.W.1 proceeds to add in his evidence that he is carrying on 'Milk Diary Business' and also carrying out agriculture and per month he used to get a profit of Rs.5,000/- or Rs.6,000/- (after deducting expenses) and that he had lent a sum of Rs.3,00,000/- (in his shop) to the Respondent / Accused and he was in possession of the said amount for the purpose of construction of house and since the Respondent / Accused had asked for the money he had given him the savings money and at that time of paying the amount apart from himself and the Respondent / Accused no one was present and that the Respondent / Accused had given him the cheque on the day when he lent the money but he does not remember what day it was and it was in the month of January and that the Cheque Number was 278404 and he does not remember on what date the cheque was given.

14. P.W.1 proceeds to state in his evidence that the cheque was of ICICI Bank and the cheque was returned by the Bank on 24.04.2009 and that it was not correct to state that Byrappa is related to him like that of a brother-in-law and apart from that he does not know whether Byrappa, based on Sale Agreement had filed a Civil Case.

15. P.W.2 (Bank Manager) in his evidence had stated that on 24.04.2009 in the Respondent / Accused's Account, there was only a sum of Rs.231.16 paise and that the Ex.P.2 was a Return Memo and that Ex.P.6 was the Bank Statement.

16. D.W.1 (the Respondent / Complainant) in his evidence (by means of Proof Affidavit) had stated that the Appellant / Complainant is known to him and that the Appellant and one Byrappa both are relatives. Further on 03.05.2008 he approached Byrappa when the latter came to his shop and he asked him to arrange a sum of Rs.2,50,000/- and the said Complainant (Appellant) had represented on that day and they demanded security for the amount and advised him to execute the registered sale agreement in favour of Byrappa that the sale agreement was executed on

that day (vide document no.6182/2008) and in fact the Appellant (Complainant) has witnessed the deed and they gave money in his shop.

17. It is further evidence of D.W.1 that he had paid the interest regularly to Byrappa without any delay on 12.12.2008 and he obtained money to clear the hand loan, which he had taken from the said Byrappa and he called his friends and they intimated the same to him and they advised him to cancel the agreement which he executed on 03.05.2008. Furthermore, D.W.1 in his evidence adds that the said Byrappa and his relative Muniraj (Appellant / Complainant) informed him to prepare a cancellation deed and he prepared the cancellation deed. That apart, D.W.1 proceeds to state in his evidence that he along with his friends waited in the Document Writer's Office and when they arrived the Document writer, read over the contents and that Byrappa had received Rs.2,50,000/-.

18. Continuing further, D.W.1 in his evidence had deposed that the said Byrappa had affixed his photo and signature in cancellation deed and also that the Appellant / Complainant had affixed his signature as witness. That apart, it is the stand of D.W.1 that after receiving the amount, the said

Byrappa and the Appellant / Complainant demanded higher rate of interest Rs.5 /- per thousand and since he was unable to meet the demand on that day, Byrappa and the Appellant / Complainant took the Cancellation Deed and the photo, which was affixed to the deed and on the signature they drew lines and thrown on his face and left the Document Writer's office at Hosur with an amount of Rs.,2,50,000/-.

19. D.W.1 in his evidence had deposed that he expressed his inability to pay the amount (in addition to Rs.2,50,000/-) and that the Appellant / Complainant demanded a blank cheque without filling anything and on the advise of his friends, he issued a blank cheque to the Appellant / Complainant for security purpose which was to be handed over to said Byrappa. Besides these, the evidence of the D.W.1 (the Respondent / Accused) is that the Appellant / Complainant had kept the cheque with himself and he had not handed over the same to Byrappa and in fact both the Appellant / Complainant and Byrappa had played a foul game to grab his property worth Rs.25,00,000/- (Rupees Twenty Five Lakhs only) as market value.

20. The specific case of D.W.1 is that he had not approached the Appellant / Complainant for any loan and further the Appellant has no

capacity to pay the loan amount.

21. It is the evidence of D.W.1 (in cross-examination) that the Appellant / Complainant had received the money and when the Appellant came to his shop he had demanded a sum of Rs.5/- towards interest and further stated that 3% interest was not sufficient.

22. D.W.2 in his evidence had stated that the Respondent / Accused was in need of money and one Byrappa had arranged a sum of Rs.2,50,000/- on 03.05.2008 and for that Byrappa demanded security and he also demanded to execute the Sale Agreement in respect of the Respondent's (Accused) house and on the same day, a registered Sale Agreement was executed before the Sub-Registrar's Office, Hosur.

23. Furthermore, D.W.2 in his evidence went on to add that on 12.12.2008, the Respondent / Accused came to him and informed him that he had arranged a sum of Rs.2,50,000/- and he was advised to get Byrappa to cancel the Sale Deed so executed on 03.05.2008 and the said Byrappa and his relative came to the Document Writer's Office and received a sum of Rs.2,50,000/- and demanded higher interest.

24. D.W.2 in his Evidence had stated that the Respondent / Accused was not in a position to arrange the amount. Byrappa and the Appellant who left the office by taking a photo affixed on the Sale Agreement Cancellation Deed struck the signature so made by Byrappa and that Deed was thrown on the face of the Respondent / Accused and they went with a sum of Rs.2,50,000/-. That apart, it is the evidence of D.W.2 that on the next day, the Appellant / Complainant came to the Respondent / Accused shop and quarrelled with the Accused and that the Respondent / Accused called him to the shop and he along with one B.L.Raju both were present and the Appellant, who was the Mediator for Byrappa had demanded higher rate of interest and for that he demanded cheque and they advised the Respondent / Accused to issue the cheque and that the Respondent / Accused gave the cheque for security purpose without filling date and name and the cheque was to be given to Byrappa only.

25. D.W.2 (in his Cross-examination) had deposed that the Respondent / Accused asked loan with Byrappa and a sum of Rs.2,50,000/- was given by Byrappa and that he along with Raju and the Appellant (Complainant) were present.

26. D.W.3 in his evidence had stated that on 13.12.2008, the Appellant came to the Respondent / Accused shop and quarrelled with the latter and that the Respondent / Accused called him to the shop and he along with M.Abdul Rahaman were present and that the Appellant (who was mediator to Byrappa) demanded higher rate of interest for that he demanded a cheque and they advised the Respondent / Accused to issue the cheque and accordingly, the cheque was issued to Appellant by the Respondent / Accused for security purpose before them, without filling date and name and the cheque was to be given only to Byrappa.

27. D.W.3 (in his cross-examination) among other things had deposed that the Respondent / Accused asked for a sum of Rs.2,50,000/- from Byrappa and for which, the latter asked him to execute a Sale Agreement in respect of his house and subsequently Byrappa gave a sum of Rs.2,50,000/- to the Respondent / Accused and the Respondent / Accused took him to the Registration Office for sale deed to be executed in favour of Byrappa.

28. It is to be borne in mind that if the cheque is issued for discharge of any debt or liability, but issued 'by way of security' , the Accused could not be held liable under Section 138 of the Negotiable Instruments Act, 1881. Further, the strict liability under Section 138 of the Act would be enforced only when the cheque was issued in discharge of any Legally Enforceable Debt or other Liability, partly or wholly.

29. It is to be remembered that every Debt or Liability upon which cheque was issued was not an enforceable one. In order to attract the scope of Section 138 of the Act, the dishonoured cheque should have been issued in discharge of any 'Debt' either wholly or in part or other liability of the Drawer to the Payee, as the case may be.

30. Further, if a complainant is neither a 'Payee' nor 'Holder in Due Course', return of cheque in question after it was dishonoured would not give a legal right to him to assume the character of 'Payee or Holder In Due Course' as complaint could only be lodged by the 'Payee or Holder In Due Course'.

31. In fact, the presumption that a cheque was drawn for discharge of

liability of drawer is 'Presumption of Law'. Section 138 and 139 of Negotiable Instruments Act require that the Court 'shall presume' the liability of the drawer of cheques for the amounts for which cheques are/were drawn.

32. It cannot be ignored that the presumption under Section 139 of Negotiable Instruments Act is no doubt in favour of the 'Holder Of Cheque'. But the Respondent / Accused is required to dislodge the said presumption by bringing on record the necessary evidence which proves his version with reasonable probabilities.

33. At this juncture, on perusal of Ex.A.3, Lawyer's Notice dated 07.05.2009 addressed to the Respondent / Accused indicates that the Respondent / Accused is known to the Appellant / Complainant for the last many years and that he borrowed a sum of Rs.3,00,000/- only for meeting his urgent needs for the month of January 2009 and had promised to return the same within three months. Further, in the said notice it was made mention of that the Appellant / Complainant had approached the Respondent / Accused seeking repayment of the money lent and that the Respondent / Accused had issued a cheque bearing no.278404 dated

24.04.2009 drawn on ICICI Bank in favour of Appellant/ Complainant.

34. It cannot be gainsaid that the stand of the Appellant / Complainant is that the cheque in question was presented by him on 24.04.2009 through his bankers (ICICI Bank, Hosur Branch) for the purpose of collection and the same got returned on 24.04.2009 with a remark 'Funds Insufficient' . In short, through Ex.A.3, Lawyer's Notice, the Respondent / Accused was required to pay the cheque amount either by way of Demand Draft or Cash within 15 days from the date of receipt of Notice.

35. A mere perusal of Ex.A.5, Advocate's Reply Notice dated 25.05.2009 (issued on behalf of the Respondent / Accused and addressed to the Appellant / Complainant's Lawyer) points out that the Respondent / Accused interalia had taken a defence that the Appellant/ Complainant had introduced one Byrappa son of Belacheruvappa, by taking advantage of the Respondent's problems, the said Byrappa had agreed to pay the sum of Rs.2,50,000/- with strict condition that the sale agreement was to be executed by the Respondent / Accused in regard to the properties mentioned in the notice etc., To put it succinctly, the Respondent /

Accused in Ex.A.5, Reply Notice had taken an unequivocal stand that he had issued the blank cheque only towards security etc., Moreover, the Respondent / Accused took a plea in Ex.A.5, Reply Notice that at the instigation of Byrappa, the Appellant / Complainant had filled up the cheque for a sum of Rs.3,00,0000/- and deposited the same for collection with his knowledge and in fact he had not borrowed any money from the Appellant and also that there was no Legally Enforceable Debt Liability between the Appellant / Complainant and the Respondent / Accused.

36. On behalf of the Respondent / Accused before the trial court Ex.D.2, Cancellation of Sale Agreement dated 12.12.2008 entered into between himself and one Byrappa was filed. In fact, the Appellant / Complainant in his complaint and in his evidence as P.W.1 had not stated that the cheque was a filled up one. Furthermore, the evidence of D.W.2, points out to the effect that the Respondent / Accused had taken a loan of Rs.2,50,000/- on 03.05.2008, for which a Sale Agreement as demanded was executed and later on 12.12.2008 a sum of Rs.2,50,000/- was repaid and when a cancellation deed, in respect of sale agreement was returned at that time, a higher interest was demanded and since that was not paid, the signature in the cancellation deed was scored out by Byrappa and that the

photo was torn etc., The Evidence of D.W.3. in the instant case synchronises with the Evidence of D.W.2. Also that in Ex.D.1, Sale Agreement (entered into between the Appellant and one Byrappa) the Appellant / Complainant had affixed his signature as 'Witness'. Ex.D2 was marked to exhibit that the Sale Agreement was cancelled and besides this, in Ex.D2, the signature of Byrappa in each page was scored out.

37. In the light of the afore said qualitative and quantitative discussions and also this Court taking note of the Preponderance of Probabilities raised on behalf of the Respondent / Accused (through their side of Defence) comes to a resultant conclusion that the Appellant / Complainant had not established his case to the subjective conscience of this Court to the effect that the Respondent / Accused had committed an offence under Section 138 of Negotiable Instruments Act. Viewed at from any angle, suffice it for this Court to point out that the Appellant / Complainant had not established his case beyond reasonable doubt and consequently, the 'Judgment of Acquittal' passed by the First Appellate Court in CrI.A.No.69 of 2012 dated 06.03.2013 does not suffer from any legal infirmities. Consequently, the Criminal Appeal fails.

In fine, the Criminal Appeal is dismissed.

09.01.2017

Index: Yes/No

Internet: Yes/No

ssd

To

1. Learned Principal District Sessions Judge, Krishnagiri
2. Learned Fast Track Judicial Magistrate, Hosur

M.VENUGOPAL,J.,

ssd

Pre-Delivery Judgment in
Crl.A.No.39 of 2014

09.01.2017