IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No.59 of 2014

N.Nachimuthu ... Appellant / Complainant

Vs.

C.Saravanamoorthy ... Respondent / Accused

PRAYER: Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to set aside the Judgment dated 26.06.2013 in STC No.395 of 2012 on the file of Judicial Magistrate, Fast Track Court (Magisterial Level), Tiruchengode and to allow this appeal

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.T.R.Ravi

J U D G M E N T

The Appellant / Complainant has filed the instant Criminal Appeal before this Court as against the STC No.395 of 2012 passed by the Learned Judicial Magistrate (FTC, Magisterial Level), Thiruchengode.

2. The Learned Judicial Magistrate (FTC, Magisterial Level), Tirchengode) while passing the impugned Judgment in STC No.395 of 2012 on 26.06.2013 at Paragraph Nos.47 to 49 had clearly observed the following:

"47. In this case, the evidence on record makes it abundantly clear that the accused has proved the defence taken by him by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

48. Hence on consideration of all the above it is clear that the complainant has filed to prove the due execution of the cheque and legally enforceable liability on the part of the accused, and hence the presumption under Section 139 and 118 of the Act are not at all available to the complainant and by the reason that the cheque contains the signature of the accused alone can not raise presumption in favour of the complainant, when the due execution of the cheque has not been proved. More than that the very issuance of cheque in favour of the complainant itself has not been proved and so, none of the presumption as completed in the act can be raised in this case.

49. Merely basing reliance on the fact that the accused admitted his signature in Ex.P.1, Cheque and in spite of receipt of legal notice, the amount has not been repaid and the same has been spoken by P.W.1, accused can not be found guilty."

and finally opined that the Appellant / Complainant had failed to discharge his initial burden, and further he cannot seek any remedy under Section 138 of Negotiable Instruments Act and consequently held that the Appellant / Complainant had not proved the guilt of the Respondent / Accused beyond all reasonable doubt and acquitted him under Section 255(1) of Cr.P.C.,

3. Challenging the legality and correctness of the Judgment dated 26.06.2013 in STC No.395 of 2012 passed by the trial court, the Appellant / Complainant basically contends in this Appeal that the trial Court had committed an error in acquitting the Respondent / Accused which is against law, weight of evidence and probabilities of the case.

4. The Learned Counsel for the Appellant urges before this Court that the trial court erred in dismissing the complaint filed by the Appellant for the reason that he was not an Income Tax Assesee.

5. Continuing further, the Learned Counsel for the Appellant takes a plea that the trial court had wrongly held that the Appellant / Complainant had not established his sufficient means to lend the cheque for a sum of Rs.3,00,000/- to the Respondent / Accused.

6. Expatiating his submission, the Learned Counsel for the Appellant proceeds to take a stand that the trial court had shifted burden on the Appellant / Complainant when the Respondent / Accused took a stand that he had issued the cheque to Ganapathy Finance and not to the Appellant / Complainant, which is unsustainable in law.

7.According to the Learned Counsel for the Appellant once the signature of the cheque was not disputed, the presumption in Law is that the Respondent / Accused had issued the cheque and in short the Respondent / Accused is to rebut the presumption without sufficient evidence. However, these aspects were not looked into by the trial court in a proper and real perspective.

8. The Learned Counsel for the Appellant takes a emphatic stand that the trial court was not correct in acquitting the Respondent / Accused based on the reason that the Appellant / Complainant had not established his subsisting liability for which the cheque was issued to the Respondent / Accused without considering the fact that the Appellant / Complainant had established his initial onus and to disprove the same, the Respondent / Accused had not examined any one from 'Ganapathy Finance' or from 'Tamirabarani Enterprises'.

9. The Learned Counsel for the Appellant submits that the trial court was not correct in holding that the cheque sum (which was not assessed to Income Tax) was not a 'Legally Enforceable Debt'.

10. By way of reply, it is the contention of the Learned Counsel for the Respondent / Accused that the trial court had rightly observed in its Judgment that the Appellant / Complainant had not established the

execution of cheque by the Respondent / Accused in his favour and also the fact that the cheque was issued for a 'Legally Recoverable Debt' and in the instant case, the trial court went on to observe in its Judgment that the 'Presumption' under Sections 139 and 118 of Negotiable Instruments Act were not at all available to the Appellant / Complainant etc., and rightly found that the Respondent / Accused was not guilty in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 and acquitted him under Section 255(1) of Cr.P.C., which need not be displaced by this Court sitting in Appellant Jurisdiction.

11. It is seen from the contents of complaint of the Appellant (Filed under Section 138 of N.I.Act before the trial court) that the Respondent / Accused is known to the Appellant as friend for the past several years and that he borrowed a sum of Rs.3,00,000/- from him on 25.02.2011 as 'Hand Loan' (for his Urgent Family and Business Expenses) and issued a post dated cheque on 29.03.2011 to him to Discharge the 'Legally Enforceable Debt' .

12. The clear cut stand of the Appellant / Complainant is that he deposited the cheque No.088715 drawn at IDBI Bank Limited, Erode Branch for collection on 29.03.2011 with his bank, namely, Corporation Bank on 29.03.2011, Pallipalayam Branch, the same got dishonoured and returned on 30.03.2013, which was informed to him on 31.03.2011 by way

of Cheque Return Memo. As a matter of fact, the said cheque got bounced owing to 'Funds Insufficient' .

13. Indeed, the Appellant / Complainant had issued a Notice (Ex.P.3) dated 12.04.2011 to the Respondent / Accused (by registered post) invoking the factum of bouncing of the cheque and demanded the payment of cheque amount within 15 days from the date of receipt of the notice through his Counsel. The said notice was received on 18.04.2011. In fact the Respondent / Accused had given a Ex.P.5, Reply Notice dated 30.04.2011 which contained false version. Inasmuch as the Respondent / Accused had not paid the outstanding amount due to the Appellant / Complainant or to pay the amount of cheque issued by him because of the reason that the cheque got dishonoured, a complaint was lodged by the Appellant before the trial court which was taken on file in STC No.395 of 2012.

14. To appreciate the factual aspects of the main case, it is useful for this Court to make a significant mention of the evidence of the relevant concerned witness.

15. It is the evidence of P.W.1 (Appellant / Complainant) (in cross examination) that he owns 50 Electric Power Looms and by keeping 20 persons for work he looks after his business and he is not carrying on any

work other than 'Agriculture and Electric power Loom' and per year through agriculture he was getting an approximate profit of Rs.5,00,000/- and through Electric Power Loom Business, as his share, per year he was getting a profit of Rs.10,00,000/- and that he is not paying any licence amount towards the running 'Electric Power Loom Business' or for his income he is not paying the Income Tax.

16. P.W.1 proceeds to state in his evidence (in Cross examination) that in Ex.D.14 Receipt dated 27.11.2011, there was an endorsement for Rs.25,000/- in respect of the present case and to a suggestion he had deposed that it was correct to state that there was no endorsement to the effect that the Accused (Respondent) should pay the sum of Rs.3,00,000/- and further that the balance was to be repaid within a month. Furthermore, P.W.1 had also stated that when the present case was pending, there was a peace talk held between the Appellant / Complainant and the Respondent/ Accused and that the latter had informed that he would pay a sum of Rs.25,000/- and would pay the balance amount in installment and that on 27.11.2011, the afore stated settlement talk was held.

17. D.W.1 (the Respondent / Accused) in his evidence (Cross-Examination) had stated that it was correct to state that Ex.P.1- Cheque was issued in his name in respect of his Bank Account and the signature in the said cheque belong to him and further that in the Police Station his

uncle, Anbazhagan on his behalf gave a sum of Rs.25,000/- for which the receipt was written in the Police Station and the case cheque was not given to the Appellant / Complainant and the cheque was given to 'Ganapathy Finance' and since he got entangled in the case, a sum of Rs.25,000/- was given to the Appellant / Complainant towards costs and in the year 2010, he purchased a Refrigerator on monthly instalment basis from Tamirabarani Electronics and paid an initial sum of Rs.2,500/- and he gave a cheque to Shri Ganapathy Finance at the Erode address and the Appellant / Complainant had utilised the said cheque and it filed the present complaint.

18. D.W.1 in his evidence had also stated that he was ready to prove his case by examining the officials of Tamirabarani Electronics, Ganapathi Finance and Ex.D.12 was the receipt to show the payment of Rs.2,800/- towards first instalment to the Tamirabarani Electronics.

19.D.W.2 in his evidence (Bank Manager) had deposed that in his IDBI Bank at Erode, the Sangameswarar Dyes and Chemicals Firm has a Current Account bearing No.120102000022376 and the said Account was opened on 01.12.2007 and that the said account was closed based on the letter of the said firm on 25.04.2013 and the cheque book containing cheque leaves bearing nos.088701 to 088750 were given by their Bank to and in favour of Sangameswarar Dyes and Chemicals on 16.06.2009 subsequently on 12.06.2010 another cheque book containing Cheque Leaves bearing no. 113451 to 113500 were given and on 11.02.2011 another cheque containing cheque leaf bearing No.839906 was given and Ex.D.13 was the Account Ledgerr computer true copy and since the initial cheque book (containing cheque leaves) were over, based on the letter, again the cheque book was issued.

20. At this juncture, a mere running of the contents of Ex.P.3 Lawyers Notice addressed to the Respondent / Accused indicates that a sum of Rs.3,00,000/- was borrowed from the Appellant (Complainant) on 25.02.2011 for Respondent / Accused's urgent family and business expenses and that the Respondent / Accused had issued post dated cheque dated 29.03.2011 to the Appellant / Complainant, to discharge the 'Legally Enforceable Debt'. Further, in the said notice it was mentioned that the said cheque bearing no.088715 drawn at IDBI Bank limited, Erode Branch was deposited for collection on 29.03.2011 with his Corporation Bank, Palipalayam Branch etc.,

21. In this connection a cursory glance of Ex.P.5 (Lawyer's reply notice dated 30.04.2011 issued on behalf of the Respondent / Accused) addressed to the Appellant / Complainant's Counsel points out among other things that the execution of the alleged cheque in favour of the Appellant was denied and that apart it was mentioned that the Appellant /

Complainant is doing money lending business and he is in the habit of taking signature of his customers in blank cheques and promissory notes. Apart from that, it was also stated in the Ex.P.5, Reply Notice that several criminal cases are pending against the Appellant / Complainant like the Respondent / Accused.

22. In substance in Reply Notice, Ex.P.5 dated 30.04.2011 the Respondent / Accused had taken a clear cut stand that he is after all a small trader and that he had no occasion to borrow such huge sum from the Appellant / Complainant.

23. One cannot ignore a vital fact that P.W.1(Appellant / Complainant in his cross-examination) had deposed that he does not know about the family details of the Respondent / Accused and further that he does not whether the Respondent / Accused is carrying on any other business other than Sangameswarar Dyes Business. D.W.1 (the Respondent / Accused) in his evidence had stated that he does not know about the Appellant / Complainant as to who he is and further that he is a total stranger. Moreover P.W.1 (Appellant) in his evidence had stated that he was ready to file necessary documents to show that he was receiving an annual income of Rs.15,00,000/-

24. In the present case, it is to be pertinently pointed out that the Respondent / Accused had taken a stand that the Appellant / Complainant had filed 30 cheques before the trial court and on 17.01.2013, the memo was filed on his behalf before the trial court to inspect the cheque and only after such inspection, he came to know that the cheque filed before the trial court was issued by the Respondent / Accused to the Ganapathy Finance Limited towards security in respect of a loan, viz., for purchasing Refrigerator on 17.03.2010 through his friend viz., Mohankumar. In fact, the Respondent / Accused had purchased the Refrigerator from Tamiraparai Electronics by paying initial sum of Rs.2,800/- and for the balance amount, he had obtained loan amount from Ganapathy Finance in which the Respondent / Accused namely, Mohan Kumar had stood as Guarantor for the loan amount in question.

25. Added further, it is crystalline stand of the Respondent / Accused that he had issued Cheque No.088715 and the pronotes to the aforesaid Finance Company towards security for the loan amount and that he had paid the entire outstanding loan amount to the said Finance Company in the year 2010 itself. After making the old payment, the Respondent / Accused had requested the Finance Company to return back his cheque and pronotes, which were given towards security for the loan in question but the finance company had not return back the cheque leaves etc.,

26. The core stand taken on behalf of the Respondent / Accused is that in the instant case, there is no 'Legally Recoverable Debt' as averred by the Appellant / Complainant.

27.It cannot be gainsaid that the presumption envisaged under Section 139 of Negotiable Instruments Act, 1881 is a rebuttable presumption. As a matter of fact, 'Burden of Proof' is not 'Static'. If the initial 'Onus' is discharged by the Appellant / Complainant, then, it is for the Respondent / Accused to produce rebuttal evidence, of course, in the manner known to law and in accordance with law.

28. Also that it is to be borne in mind that Section 138 of Negotiable Instruments Act is a penal provision which speaks of a 'Strict Liability.'

29. Apart from the above, in the present case, it is the evidence of P.W.1(Appellant / Complainant) that it was correct to state that there were no account documents or other documents to show that the sum of Rs.3,00,000/- was given to the Respondent / Accused on that date.

30. Suffice it for this Court to point out that the Appellant / Complainant before the trial court had not established that he had the necessary resources / wherewithal to lend the purported sum of Rs.3,00,000/- to the Respondent / Accused. To put it precisely, P.W.1

(in his cross-examination) had stated that he is not an Income tax assessee.

31. A perusal of the complaint (filed by the Appellant / Complainant) before the trial court shows that the entire complaint is conspicuously silent as to the quantum of the interest agreed to be paid by the Respondent / Accused. Ordinarily, if a person lends money and that too a higher amount like Rs.3,00,000/- then, the said amount will carry some percentage of interest, which was agreed to be paid by the Respondent / Accused. However, as stated already, the complaint is silent about any agreement for payment of interest for the loan amount of Rs.3,00,000/-. When the Respondent / Accused is not a relative of the Appellant / Complainant and also not a close friend, then, the averment made in the complaint that the Respondent / Accused borrowed a sum of Rs.3,22,511/- from the Appellant / Complainant does not create a favourable circumstances in his favour.

32. In a criminal case, it is the duty of the prosecution to prove the case against the Accused beyond any 'shadow of doubt' However, in a Negotiable Instruments case, like the present one, it is enough that the Respondent / Accused projects / brings home certain preponderance of probabilities of his version of the case and in fact under our constitutional scheme, he can constantly maintain silence. Furthermore, he need not enter into the witness box. But he can utilise the evidence adduced on

behalf of the Appellant / Complainant to his own advantage at the optimum level, as opined by this Court.

33. Be that as it may, in view of the aforesaid detailed qualitative discussions, also this Court taking note of the attendant facts and circumstances of the instant case in a conspectus fashion and also by considering the defence taken on behalf of the Respondent / Accused comes to an inevitable and irresistible conclusion that the Respondent / Accused had raised some probable defences in the present case. In fact, the Appellant / complainant had not established his case under Section 138 of the Negotiable Instruments Act, 1881 against the Respondent / Accused. Looking at from any angle, the Criminal Appeal fails.

33. In fine, the Judgment of Acquittal dated 26.06.2013 passed by the trial court in STC No.395 of 2012 is affirmed by this Court for the reasons assigned in this Appeal. Accordingly, the Criminal Appeal is dismissed.

04.01.2017

Index : Yes / No
Internet : Yes / No

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To

The Judicial Magistrate,
Fast Track Court (Magisterial Level),
Tiruchengode

M.VENUGOPAL, J.

ssd

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