

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.10.2017

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Crl.A.No.565 of 2009

C.Angamuthu

... Petitioner

-Versus-

1.K.Ramaraj

2.The State

Rep. by Public Prosecutor,
Coimbatore.

... Respondent

Appeal filed by the complainant under Section 378 of Cr.P.C. against the judgement dated 20.07.2009 made in C.A.No.54 of 2009 by the learned Additional Sessions Judge, Fast Track Court-II, Coimbatore, reversing the judgement of conviction and sentence passed by the learned Judicial Magistrate-VIII, Coimbatore, on 18.04.2009 in C.C.No.151 of 2008.

For Petitioner : Ms.Elizabeth Ravi

For Respondent : Mr.Kolandasamy

ORDER

This appeal is directed against the judgement dated 18.04.2009 passed in C.A.No.54 of 2009 by the learned Additional Sessions Judge, Fast Track Court-VIII, Coimbatore, reversing the judgement of conviction and sentence dated 18.04.2009 made in C.C.No.151 of 2009 by the learned Judicial Magistrate-VIII, Coimbatore and acquitting the 1st respondent.

2. The appellant originally filed a private complaint in C.C.No.571 of 2004 alleging that the respondent committed an offence punishable under Section 138 of The Negotiable Instruments Act and thereafter, on the orders of the learned Chief Judicial Magistrate, Coimbatore, the case was transferred to the learned Judicial Magistrate-VIII, Coimbatore, which was renumbered as C.C.No.151 of 2008. After full trial, the learned Magistrate by judgement dated 18.04.2009, convicted the respondent for offence under Section 138 of the Act and sentenced him to undergo simple imprisonment for three months.

The respondent was also directed to pay a sum of Rs.60,000/- to the appellant as compensation under Section 357 of Cr.P.C. On appeal, the learned Additional Sessions Judge, acquitted the accused from the charges. Aggrieved by the order of acquittal, the complainant is before this court with this criminal appeal.

3. The case of the appellant/complainant in brief is as follows:- The appellant filed a private complaint in C.C.No.151 of 2008 before the learned Judicial Magistrate-VIII, Coimbatore, stating that he is a Civil Engineer and engaged in civil constructions. He has been running a construction firm in the name and style "AB Builders". While so, the respondent engaged the services of the respondent for the purpose of constructing his residential building. As per the agreement, he finished the construction work and handed over the building to the respondent. The respondent was due to pay a part and final settlement of Rs.60,000/- towards construction of house building. On repeated demands for payment, the accused issued a cheque bearing No.229007 dated 27.01.2004 for Rs.60,000/- drawn on Canara Bank, R.S.Puram Branch, Coimbatore. According to the complainant, when the above cheque was presented for realization, the same came to be returned for the reason of "insufficient funds". Hence, the complainant issued a legal notice to the accused demanding payment of cheque amount, for which, the complainant issued a reply denying his liability and stating that he was not due to pay any amount towards construction work as contended by the complainant. In the reply it was specifically stated that the disputed cheque was handed over by him to the complainant at the time when he entered into a construction agreement only as security for the amount payable in future under the contract which the complainant misused against the respondent. In the reply it was further stated that the disputed cheque was never intended to be used for realizing any amount.

4. Before the trial court on the side of the complainant, he himself was examined as P.W.1 and 8 documents were exhibited. According to P.W.1, the cheque in question, which was issued by the respondent towards payment due under the agreement of construction, got dishonoured on presentation for collection for the reason "insufficient funds". P.W.1 is an Engineer by profession and he has been engaged in civil construction work. It is not in dispute that the respondent engaged his services for the purpose of constructing a residential building and there was an agreement of construction entered into between them. P.W.1 has spoken to about the fact that the respondent was due to pay a sum of Rs.60,000/- under the agreement and on repeated demands, the respondent issued a cheque for Rs.60,000/- drawn on Canara Bank, R.S.Puram Branch, Coimbatore. He has further spoken to about the fact that when the cheque in

question was presented for realization, the same has been returned for want of funds. He has further spoken to about all the other subsequent facts including the issuance of statutory notice. On the side of the respondent, the wife of the respondent was examined as R.W.1. She has spoken to about the construction agreement entered into between her husband and the complainant and the payment allegedly made by her husband to the complainant. One Mr.Palanisamy, who is working as a Sub Staff in LIC, R.S.Puram Branch and a colleague of the respondent, was examined as R.W.2. Both the complainant and the accused are known to him. R.W.2 has spoken about the fact how the respondent mobilized the amount and he paid Rs.70,000/- to the complaint. According to him, when the respondent insisted a receipt for payment, the complaint told him to come and collect the receipt at his office. R.W.3-Mr.Jayakumar, another colleague of the respondent, has also spoken about the fact how the respondent mobilized the amount and how he has paid Rs.70,000/- to the complaint. The respondent himself was examined as R.W.4. He has spoken about the transactions between himself and the complainant and all other subsequent events including the issuance of reply to the statutory notice issued by the complaint. On his side, he adduced as many as 17 documents as Ex.D.1 to D.17.

5. Having considered the rival contentions, the trial court rejected the defence taken by the accused and convicted him and sentenced him as indicated in the second paragraph of this judgement. Challenging the conviction and sentence, the accused preferred an appeal which was allowed by the learned Additional Sessions Judge. Aggrieved by the judgement reversing the conviction and sentence of the accused, the complaint is now before this Court with this appeal.

6. The learned counsel for the appellant would contend that when respondent admitted his signature on the cheque, it was not open for him to urge that although the cheque had been dishonoured, no offence under the Act is made out. When the respondent admitted his signature on the cheque in question, there arises a presumption under Section 139 of The Negotiable Instruments Act that the cheque was issued for discharging his liability and it was for the respondent to rebut the presumption raised against him that the cheque was not at all issued for any legally recoverable debt. The trial court after having considered the facts and circumstances of the case and the legal position in this regard, rightly rejected the defence set up by the respondent and found him guilty of offence. But, the learned Additional Sessions Judge; without properly considering the facts and circumstances of the case and the legal position in this regard, erroneously shifted the burden upon the complaint and held he failed to establish the date and the place where he

advanced loan to the respondent and acquitted the respondent from the charge which is not legally sustainable. He, therefore, prays for setting aside the order of acquittal and to restore the conviction and sentence imposed on the respondent by the trial court.

7. Per contra, the learned counsel for the respondent submitted that even though the respondent admitted his signature in the cheque in question, accepting the probable defence set up by the respondent, the trial court rightly acquitted him from the charges and that the same does not require any interference at the hands of this court.

8. I have considered the rival submissions carefully.

9. The agreement of construction dated 03.07.2003 entered into between the complainant and the respondent was not in dispute. The specific case of the complainant is that he had completed the constructions and the respondent is due to pay a sum of Rs.60,000/- as part and final settlement and in order to discharge his liability, he has issued the cheque in question. But, a perusal of Ex.D5- an agreement dated 23.11.2003, under which the construction agreement entered into between the parties came to an end, would go to show that the complainant completed the constructions and handed over the possession of the building on 23.11.2003 itself wherein it has been mentioned that the appellant had completed the constructions and handed over the possession to the respondent on 23.11.2003. Under Ex.D.5 itself, the subsequent agreement, which was entered into between the parties on 17.07.2003 with regard to certain additional constructions, was agreed to be abandoned and the respondent agreed to finish them at his own costs. This agreement is not disputed by the complainant. In the said agreement, there was no mention about any outstanding amount. Apart from that, Ex.P.8, a letter addressed by the respondent to the Manager, Can Fin Homes Ltd., Cross Cut Road, Coimbatore, informing that he does not want to continue to stand as surety for the complainant. This would further fortify that there was money dispute between the parties and in such view of the position, the accused had withdrawn from the surety ship for the housing loan availed by the complaint. In Ex.P.3 legal notice, the complainant did not mention any thing about the liability of the respondent under the contract. Even in the complaint also, nothing about the liability of the respondent has been mentioned by the complainant. The complaint is bereft of particulars, like, description of contract, contract amount, amount already received and the amount due under the contract.

10. No doubt, the accused admitted that the cheque in question has been signed by him. Hence, the initial presumption was against the respondent. Of course, it is a rebuttable presumption. The accused can rebut the presumption by raising a probable defence. It is the contention of the learned counsel for the respondent that he was not due to pay any amount to the complainant under the contract. According to respondent, the cheque in question was never intended to be issued for realizing any money and it was obtained by the appellant only as a security for payment in future towards construction work which was subsequently misused by the appellant.

11. The learned counsel for the appellant relied on a judgement in T.Vasanthakumar v. Vijayakumari, 2005 - 5 - L.W. 818. That was a case where, the accused did not raise any probable defence to raise the initial presumption. In that factual circumstance, the Hon'ble Supreme Court allowed the appeal filed by the complainant. But, in the instant case, according to the respondent the cheque in question was issued only as a security for payment towards construction work. Therefore, the dictum relied on by the learned counsel for the appellant will not support the case on hand.

12. The trial court refused to accept the defence set up by the respondent and found him guilty of offence. But, on appeal, the learned Additional Sessions Judge, while examining the defence raised by the respondent and having regard to dispute between the parties with regard to construction work and Ex.D5 wherein the agreement of construction entered into between the parties came to end and there was no mention in the same with regard to payment of balance and also Ex.P.8 letter, rightly shifted the burden upon the appellant to prove that the respondent was really indebted to him and that the cheque in question was handed over to him by the respondent only to discharge a legally subsisting debt. The learned Additional Sessions has given a cogent and convincing finding for having accepted the probable defence raised by the respondent in preference to the case of the appellant and held that the appellant had failed to prove the existence of legally recoverable debt. The complaint is bereft of particulars, such as, total construction amount, amount paid and the amount due. As rightly held by the learned Additional Sessions Judge, the appellant did not produce any oral or documentary evidence to prove that there was legally enforceable debt and the details of transaction. When the accused is able to rebut the presumption by raising probable defence, it is for the complainant to prove the existence of legally recoverable debt, which he had failed to discharge. The learned Magistrate had not properly considered the materials available in the light of the probable defence raised by the accused, however, the learned Additional Sessions

Judge rightly appreciated both the oral and documentary evidence available on record and held that the complaint had failed to discharge his burden to prove his case and disturbed the findings of the trial court. Therefore, I do not find any infirmity in the judgement of acquittal recorded by the learned Additional Sessions Judge warranting interference in the revisional jurisdiction. The appeal lacks merit and the same deserves to be dismissed.

13. In the result, this criminal appeal is dismissed and the judgement of acquittal dated 20.07.2009 made by learned Additional Sessions Judge, Fast Track Court-II, Coimbatore, in C.A.No.54 of 2009 setting aside the judgement of conviction and sentence of the respondent dated 18.04.2009 in C.C.No.151 of 2008 recorded by the learned Judicial Magistrate-VIII, Coimbatore, stands confirmed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kmk

To

- 1.The Addl. Sessions Judge, FTC-II, Coimbatore.
- 2.The Judicial Magistrate-VIII, Coimbatore.

+lcc to Mr.P.Raja, Advocate Sr.No.76488
+lcc to Mr.S.Kolandasamy, Advocate Sr.No.76469

KS(CO)
sm:19.6.2018

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