IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13..12..2017

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.537 of 2007

A.Ganesan

... Appellant /Complainant

-Versus-

Dr.S.Mahalingam

... Respondent / Accused

Appeal filed under Section 378 of Cr.P.C. against the order of acquittal dated 29.07.2005 recorded in C.C.No.69 of 2005 by the learned Judicial Magistrate, Arakkonam, Vellore District.

For Appellant : Mr.M.Devaraj

For Respondent : Mr.Tirumalainambi

JUDGEMENT

Challenging the order of acquittal the present appeal has been filed by the complainant.

2. The petitioner filed a private complaint in C.C.No.69 of 2005 before the learned Judicial Magistrate, Arakkonam, alleging that the respondent had committed an offence punishable under Section 138 of The Negotiable Instruments Act. The learned Magistrate, by judgment dated 29.07.2005, acquitted the accused. Challenging the same, the complainant is before this court with this criminal appeal.

3. The case of the complainant in brief is as follows: The respondent for his urgent expenses availed an interest free loan of Rs.3,50,000/- from the complainant on 14.01.1999 agreeing to repay the same in August, 1999 and issued a cheque dated 20.08.1999 drawn on State Bank of India, Vellore Branch, in favour of the complainant. But, the respondent did not repay the loan till October, 1999. When the complainant made a demand on 13.10.1999 for repayment, the respondent quarreled with him and threatened him in the presence of witnesses. According to the complainant, when the above cheque was presented for collection, it was returned as unpaid on 20.10.1999 on the ground that payment was stopped by the respondent. The

complainant, therefore, issued a legal notice dated 03.11.1999 to the accused for which the respondent issued a reply dated 18.11.1999 denying his liability. Thereafter, the complainant issued a rejoinder dated 18.12.1999. As the respondent did not repay the cheque amount, the present complainant has been filed.

4. Before the trial court on the side of the complainant, he himself was examined as P.W.1 and the then Manager of the drawer bank was examined as P.W.2 and 8 documents were exhibited. P.W.1 has spoken to the fact that the cheque in question was issued by the respondent in discharge of his legally enforceable liability. When the said cheque was presented for encashment, the same was returned by the bank with an endorsement "payment stopped". He has further spoken about all the other subsequent facts including the issuance of statutory notice. P.W.2, the then Manager of the drawer bank, has stated that the cheque in question was returned as the payment was stopped by the drawer. Ex.P.1 is the cheque in question; Ex.P.2 is the memo returning the cheque by the drawer bank; Ex.P.3 is the statutory notice issued by the complainant through his counsel; Ex.P.4 is the reply issued by the respondent; Ex.P.6 to Ex.P.8 were the records maintained by the drawer bank regarding cheque transactions. On the side of the respondent, apart from himself, he examined as many as 9 witnesses as D.W.1 to D.W.9. He himself was examined as D.W.10. Exs.D.1 to D.67 were marked. The respondent denied his liability. According to him, he never borrowed any loan as alleged in the complaint and the cheque in question was issued only as a security for the loan availed by D.W.4. Subsequently, there arose dispute between the complainant and D.W.4 and D.W.4 had settled the entire dues. At the time when the loan amount was settled, the complainant returned the cheque and other documents to D.W.4, he, however, retained the cheque issued by the respondent and by using the same, the present complaint has been filed. D.W.4 deposed supporting the defence plea.

5. Having considered the rival contentions, the trial court accepted the probable defence taken by the respondent and acquitted him from the charges. Aggrieved over the same, the complainant is now before this Court with this appeal.

6. I have heard the learned counsel for the appellant and the learned counsel for the respondent also perused the available materials carefully.

7. The respondent admitted that the cheque in question has been signed by him. Thus, 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 definite case of the respondent that the cheque in question was issued as a security for the loan availed by D.W.4 and the loan amount was repaid by D.W.4.

8. In order to prove his defence, apart from himself, he examined as many as 9 witnesses out of whom, D.W.4, who claimed to have borrowed amount from the complainant, has stated that he only borrowed a sum of Rs.10,00,000/- from the complainant and he repaid the same. D.W.8, who was present during the entire transaction, has stated that it was only D.W.4 who borrowed amount from the appellant and at the time of lending money, the respondent had given his cheque as security for repayment. Subsequently, D.W.4 had settled his liability. Apart from that, even before the complainant could present the cheque for collection, the respondent had issued a notice to the drawer bank under Ex.D.29 requesting not to honour the cheque as the entire amount has been settled by D.W.4. There were also other materials to support the defence version. Thus, the respondent has rebutted the initial presumption raised against him under Section 139 of the Act by raising a probable defence. The evidence let in by the respondent are sufficient to rebut the presumption raised in favour of the complainant. If that be so, now the onus is again on the complainant to prove his case but the complainant did not examine any eye witness to prove the loan transaction. Except the evidence of the complainant (P.W.1), there is absolutely no other evidence available to establish his case. The trial court while examining the defence of the respondent and having regard to the facts and circumstances of the case, 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 as alleged in the complaint. The learned Magistrate has given cogent and convincing findings for having accepted the defence raised by the respondent in preference to the case of the appellant and hence re-shifted the burden on the appellant to prove existence of legally recoverable debt. As rightly held by the learned Magistrate, the appellant did not produce any other oral or documentary evidence to establish his case. When the respondent is able to rebut the presumption by raising probable defence, the burden is again shifted on the appellant to prove the existence of legally recoverable debt, which he failed to discharge the same. The learned Magistrate was right in holding that the appellant has failed to discharge his burden to prove that the cheque in question was issued by the respondent in discharge of any legally recoverable debt. Therefore, I do not find any infirmity in the judgment of acquittal recorded by the learned Magistrate warranting interference in the appellate

jurisdiction. The appeal lacks merit and the same deserves to be dismissed.

13. In the result, this criminal appeal is dismissed and the order of acquittal dated 29.07.2005 recorded by learned Judicial Magistrate, Arakkonam, Vellore District, stands confirmed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Judicial Magistrate, Arakkonam, Vellore District.

Through: The Chief Judicial Magistrate, Thiruvallur District.

+1cc to Mr. Mr.M.Devaraj, Advocate, S.R.No.89178
+1cc to Mr.Thirumalainambi, Advocate, S.R.No.89216

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cp(co)

nr 11/05/2018