

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.06.2018
DELIVERED ON : 18.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.A.No.438 of 2002

P.Kausalya ... Appellant/Respondent/Complainant

Vs

1.M/s.Jovial Leathers,
rep. by its Managing Partner
Mr.A.Elangovan,
No.174, Muthuvelappan Street,
Erode-1.

2.A.Elangovan ... Respondents/Appellant/Respondent

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., against the judgment of acquittal dated 29.01.2002 made in C.A.No.36 of 2001 on the file of the 1st Additional District and Sessions Judge, Erode reversing the order dated 20.02.2001 made in C.C.No.470 of 1998 on the file of the Judicial Magistrate No.I, Erode and to allow this appeal.

For Appellant : Mr.C.S.Saravanan

For Respondents: Mr.N.Manokaran (for R2)

No Appearance (for R1)

JUDGMENT

This Criminal Appeal is filed by the Appellant/Complainant under Section 378(4) of Cr.P.C. as against the order of acquittal made in Crl.A.No.36 of 2001, dated 29.01.2002 on the file of the learned I Additional Sessions Judge Cum Chief Judicial Magistrate, Erode, reversing the order of conviction and sentence made in C.C.No.470 of 1998 dated 20.02.2001 on the file of the learned Judicial Magistrate No.I, Erode.

2.The appellant herein filed a Private complaint under Section 200 of Cr.P.C. against the revision petitioners/accused

in C.C.No.470 of 1998 before the learned Judicial Magistrate No.I, Erode to punish the accused for the offence punishable under Section 138 r/w 142 of Negotiable Instruments Act (herein after referred as 'N.I. Act').

3.The following facts are necessary for the disposal of this appeal. The 2nd accused is one of the partners of the 1st accused firm and the 2nd accused is looking after the day to day affairs of the 1st accused firm. While so, on 05.01.1998 the 2nd accused borrowed a sum of Rs.1,00,000/- from the complainant to meet out the urgent business expenses of the 1st accused firm and for that a cheque dated 10.01.1998 drawn on Indian Bank, Erode South Branch was issued to the complainant. The said cheque was presented for collection in the complainant's bank namely Indian Overseas Bank, Erode and the same was returned on 23.06.1998 with an endorsement that "Funds Insufficient". Thereafter notice was issued by the complainant on 25.06.1998 through her Advocate to the accused and the same was received by the accused. The accused sent a reply to the complainant on 08.07.1998. Since the accused failed to pay the cheque amount, the above complaint was filed to punish the accused under Section 138 of N.I. Act.

4.The accused was questioned in respect of the charges and he denied the same. Thereafter trial was conducted by the Learned Judicial Magistrate. On the side of complainant two witnesses were examined, including the complainant as PWs-1 and 2 and 13 documents were marked as Exs-P1 to P13 on the side of the accused, the 2nd accused was examined as DW-1 and five documents were marked as Exs-D1 to D5.

5.The Learned Judicial Magistrate on completion of trial come to the conclusion that the accused was found guilty of the offence and hence, the accused was questioned under Section 313 (1)(a) of Cr.P.C. and he denied saying that false case was filed against him. Therefore, the learned Judicial Magistrate by order dated 20.02.2001 convicted and sentenced the accused to undergo 6 months Rigorous Imprisonment and imposed fine of Rs.5000/- to the 1st accused, if the fine amount is not paid by the 2nd accused on behalf of the 1st accused firm, the 2nd accused shall undergo 2 months Rigorous Imprisonment. Further from the payment of fine of Rs.5000/-, a sum of Rs.1000/- to be paid to the Government and the balance amount of Rs.4000/- to be paid to the complainant after the appeal period was over as per section 357 (1) (a & b) of Criminal Procedure Code.

6.Feeing aggrieved over the order of conviction, the

accused/respondents herein filed appeal in Criminal Appeal No.36 of 2001 before the learned 1st Additional Sessions Judge Cum Chief Judicial Magistrate, Erode. The learned appellate Judge acquitted the accused and thereby set aside the order of conviction and sentence made against the accused by order dated 29.01.2002. Challenging the same this criminal appeal is filed by the complainant.

7.I heard Mr.C.S.Saravanan, learned counsel appearing for the appellant and Mr.N.Manokaran, learned counsel appearing for the 2nd respondent. There is no representation on behalf of the 1st respondent. The entire materials available on record are perused.

8.It is seen from the records that the defense taken by the accused/respondents herein is that the complainant is none other than his sister. Her husband Mr.Ponnusamy is an Advocate and he was in need of money. Since the 2nd respondent was not having sufficient money to meet out the expenses of the complainant's husband, therefore he has given his blank Cheque to make use of the same for getting money. However, by misusing the said cheque and by playing fraud the complainant has presented the same with her banker as if the accused have borrowed Rs.1,00,000/- to meet out the business expenses. Further, the 2nd respondent herein contended that the 1st respondent firm was closed in the year 1995 itself and therefore the subject cheque dated 05.01.1998 could not have been issued to the complainant.

9.The perusal of the order passed by the learned Magistrate would disclose that there is a presumption in favour of accused under section 139 of N.I. Act and the same has to be rebutted by the Accused. Unless the presumption available to the complainant under section 139 of N.I. Act has been rebutted by the accused, the Court is obliged to presume that the cheque was issued to the complainant by the accused to discharge the legally enforceable debt. In the present case, the 2nd accused though admitted the fact that he had issued the cheque, but denied his signature in Ex-P1 cheque and it is his contention that his signature was forged. But the said contention was found to be false and the same was proved from the evidence of PW1 and PW2.

10.It is further seen from the records that 2nd accused is not in constant state of mind which could be proved from his reply notice sent to the complainant under Ex-P9. In Ex-P9 at 1st place the 2nd accused stated that Ex-P1 cheque was stolen by the

complainant and she has forged the signature of the 2nd accused. Whereas in the next paragraph, the 2nd accused stated that the complainant's husband Mr. Ponnusamy to meet out his financial necessity obtained blank cheque from the 2nd accused. Therefore the learned Magistrate has rightly held that the accused has not proved under what circumstances the cheque was handed over to the complainant.

11. In respect of the closer of 1st accused firm, the same has not been communicated to the Registrar of Firms. Further, as per Partnership Act no paper publication was effected and no Gazette publication was made in respect of closer of partnership firm.

12. In the absence of non compliance of the above said legal formalities, this Court cannot come to the conclusion that the 1st accused firm was closed. Even assuming for the arguments sake, the 1st accused firm was closed, the unused cheques of the 1st accused firm should have been handed over to the bank. But in the present case it is found that the accused having used the cheque, when the cheque amount was demanded, he has turned down saying that the account was closed in respect of the subject cheques. In my considered opinion, the order of the learned Magistrate in the above said aspect found to be proper and legally sound. On the other hand, the order of acquittal made by the learned 1st Additional Sessions Judge was solely relying upon Exs-D1 to D5, documents filed on the side of the accused in respect of closer of Firm. But in my considered opinion the said approach of the learned 1st Additional Sessions Judge is not proper and the same is liable to be set aside, since the complaint discloses the prima facie existence of a legally enforceable debt or liability.

13. In view of the discussion made above, this Court is of the considered view that the learned Magistrate after discussing the entire evidence that was available on record has rightly come to the conclusion that the complainant has proved the fact that the subject cheque was issued to discharge legally enforceable debt. On the other hand, the appellate Court has reversed the Judgment of the Trial Court mainly by relying upon the documents produced on the side of the accused, come to the conclusion that the subject cheque could not have been issued by the accused. Since, the first accused firm was closed as early as in the year 1995 itself. As discussed above, a perusal of records show that the accused was aware of the fact that the subject cheque was with the complainant's husband. In view of

the above, this Court find that the order of the appellate Court is liable to be interfere with and accordingly it is set aside.

14.In the result, this Criminal Appeal is allowed and the order of acquittal made in C.A.No.36 of 2001 dated 26.01.2002 on the file of the learned I Additional District and Sessions Judge, Erode is hereby set aside and the order of conviction and sentence dated 20.02.2001 made in C.C.No.470 of 1998 on the file of the learned Judicial Magistrate No.1, Erode, is confirmed. The learned Magistrate is directed to secure the accused for undergone the punishment.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vs
To

1. The Principal District Judge
Erode.
- 2.The 1st Additional District and Sessions Judge,
Erode
3. The Chief Judicial Magistrate
Erode.
- 4.The Judicial Magistrate No.1,
Erode.
5. The Superintendent of Police
Erode.
6. The Public Prosecutor
High Court, Madras 104.

Copy to

The Section officer
Criminal Section
High Court, Madras 104.

+1 CC to Mr.C.S.Saravanan, Advocate sr 89478
+1 CC to Mr.N.Manokaran, Advocate sr 88129.

Crl.A.No.438 of 2002

SSV(CO)
SP(15/02/2019)