

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.02.2018

Delivered on : 29.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.547 of 2008

R.M.Karuppannan

... Appellant

Vs

S.Sakthi

... Respondent

Appeal under Section 378 of the Code of Criminal Procedure against the judgment dated 18.2.2008 in C.A.No.108 of 2007 on the file of the Additional District Sessions Judge (Fast Track Court No.II) Salem, reversing the judgment dated 03.7.2007 in C.C.No.715 of 2005 on the file of the Judicial Magistrate No.II, Salem.

For Appellant : Mr.R.Nalliiyappan

For Respondent : Mr.N.Karthikeyan

JUDGMENT

This appeal has been filed seeking to set aside the judgment dated 18.2.2008 made in C.A.No.108 of 2007 on the file of the learned Additional Sessions Judge (Fast Track Court No.II) Salem, reversing the judgment dated 03.7.2007 made in C.C.No.715 of 2005 on the file of the learned Judicial Magistrate No.II, Salem.

2. For the sake of convenience, the appellant and the respondent will be referred to as per their array in the complaint.

3. It is the case of the complainant that the accused borrowed a sum of Rs.25,000/- from him and in discharge of the said loan, the accused issued the cheque in favour of the complainant. When the complainant presented the said cheque for encashment through his banker, the same has been returned as funds insufficient. Hence, the complainant had issued a legal notice to the accused to pay the cheque amount, but the respondent refused to pay the same. Thereafter, the complainant has filed the complaint under Section 138 of Negotiable Instruments Act (hereinafter referred to as "the NI Act") before the learned Judicial Magistrate No.II, Salem in C.C.No.715 of

2005. On receipt of summons, the accused appeared and when he was questioned about the accusation against him, he denied the same.

4. To prove the case, the complainant examined himself as P.W.1 and marked five documents. The accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C., which he denied. One N.M.K.Raja was examined as D.W.1 and one Janjappan, the then Sub Inspector of Police, Omalur Police Station was examined as D.W.2 and through D.W.2, Ex.D1 was marked.

5. After considering the evidence adduced by both sides and hearing the learned counsel on either side, the trial Court, by judgment dated 3.7.2007, convicted the accused under Section 138 of the NI Act and sentenced him to undergo three months simple imprisonment and to pay compensation of Rs.50,000/-.

6. Aggrieved by the conviction and sentence, the accused filed appeal being C.A.No.108 of 2007 before the learned Additional District Judge (Fast Track Court No.II), Salem, who by the judgment dated 18.2.2008, has acquitted the accused. Aggrieved by the same, the complainant had filed the present appeal against acquittal.

7. I heard Mr.R.Nalliyappan, learned counsel for the complainant and Mr.N.Karthikeyan, learned counsel for the accused and also perused the materials available on record.

8. In his evidence, the complainant, who was examined as P.W.1 had stated that the accused borrowed Rs.25,000/- on 15.8.2005 for his family expenses from him and for repayment of the said amount, he had issued Ex.P1 cheque dated 15.10.2005 for Rs.25,000/-. He further stated that when the cheque was presented for encashment, the same was returned as funds insufficient through Ex.P2. Thereafter, the complainant issued Ex.P3 legal notice to the accused to his two addresses demanding money and the acknowledgment cards were marked as Exs.P4 and P5.

9. Admittedly, in the case on hand, the accused has not examined as witness. However, in his evidence D.W.1-Raja has stated that he was running Gas Agency and was doing cement sales business and at the relevant point of time the accused was working in his shop. Since the accused sold different brand, he was removed. In his evidence, D.W.1 stated that in the business transaction between the complainant and the accused, there was a balance to be paid by the accused. Since the accused failed to pay the amount, the complainant lodged a complaint before the Omalur Police Station, where they entered into a compromise.

Pursuant to which, the accused paid Rs.15,000/- to the complainant and also issued cheque for Rs.25,000/-. Narrating all these things, the complainant had written a letter to the Sub Inspector of Police and the same has been marked as Ex.D1. In his evidence, D.W.1 stated that the cheque in question was not issued for due consideration and therefore, the cannot be prosecuted under Section 138 of NI Act.

10. The issuance of Ex.P1-cheque by the accused and his signature therein are admitted by him. When the accused pleaded that he had not issued the cheque (Ex.P1) for repayment of the loan amount borrowed, it is the bounden duty of the accused to prove the same by way of preponderance of evidence. As stated supra, the accused has not gone to the witness box. On the other hand, one N.M.K.Raja was examined D.W.1, who had spoken about the cement vending business by the accused.

11. In this case, the initial burden lies on the accused, however, he has failed to do so. As recorded by the trial Court, the accused has not examined himself as witness. D.W.2 is the Sub Inspector of Police attached with Omalur Police Station, who had deposed that on 17.6.2005, when he was on duty, the complainant came to the police station and lodged a complaint against the accused qua cement business. Since the dispute was civil in nature, he advised the complainant to file a civil suit or settle through panchayat. But on the same day evening, the complainant came to the police station and informed him that as per the settlement in the panchayat, the accused paid Rs.15,000/- cash and issued cheque for Rs.25,000/-. The complainant had also shown the letter executed by him and on seeing the same, he advised to take photocopy and keep them each one.

12. On a perusal of the evidence of D.W.1 and Ex.D1, it is clear that the accused had issued the cheque in question in favour of the complainant for amount due to the complainant. However, the lower appellate Court erred in accepting the evidence of D.W.1 through which it does not express about the disputed cheque. Further, the lower appellate Court ought not to have reverse the finding of the trial Court by accepting a xerox copy of Ex.D1-letter alleged to have been executed by the complainant.

13. On a perusal of the judgment of the lower appellate Court, it is seen that it has shifted the burden on the complainant. The said approach adopted by the lower appellate Court is not correct and it had failed to consider that the accused has to prove his case and discharge his liability over the complaint by making sufficient evidence that he has no liability to pay the cheque amount to the complainant. Whereas

the lower appellate Court reversed the finding of the trial Court and acquitting the accused based on the evidence of D.W.1 and Ex.D1, which does not speak about the disputed cheque.

14. In order to appreciate the respective submissions of the counsel for the parties, it will be desirable to reproduce the relevant provisions:-

"118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

138. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

i. the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

ii. the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and iii. the drawer of such

cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt, or other liability."

15. Ordinarily in cheque bouncing cases, what the Courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the N.I. Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the N.I. Act.

16. It is settled that Sections 138 and 139 of the N.I. Act introduced exceptions to the general rule as to the burden of proof in criminal cases and shifted the onus on the accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

17. It is also settled that the accused had to prove in the trial by leading cogent evidence that there was no debt or liability and that the accused not having led any evidence could not be said to have discharged the burden cast on him. Existence of legally recoverable debt or liability is a matter of presumption under Section 139 of the N.I. Act. As stated supra, in the case on hand, the accused has not gone into the witness box.

18. In Rangappa vs. Mohan, reported in AIR 2010 SC 1898, it has been held that when once the execution of the cheque is admitted, the presumption under Section 138 of the N.I. Act will work backwards to cover the debt also.

19. On a reading of the judgment of the lower appellate Court, it is seen that the lower appellate Court went into by saying that prior to the issuance of the cheque in question, the accused has not borrowed any amount towards his family expenses from the complainant. The lower appellate Court went into further by saying that it is unbelievable that without execution of promissory note and/or any security document, the complainant had given Rs.25,000/- to the accused and that the complainant had failed to prove that on the date of issuance of cheque in question, the accused was liable to pay the sum to the complainant. The lower appellate Court also held that as per Ex.D1, due to cement transaction, Ex.P1-cheque was issued by the accused and therefore, the accused cannot be convicted under Section 138 of the N.I. Act.

20. In a complaint filed under Section 138 of the N.I. Act, presumption is the accused has to pay the cheque amount to the complainant and to rebut the same the accused has to produce documents and evidence and make a clear picture that the claim of the complainant is not true. As stated supra, in the case on hand, the accused has failed to do so.

21. Since issuance of Ex.P1-cheque by the accused and his signature therein are admitted by the accused and the complainant has proved his case by way of preponderance of evidence to show that Ex.P1-cheque returned with an endorsement funds insufficient, it is to be held that the complainant has proved his case and that the lower appellate Court went wrong in setting aside the judgment of the trial Court, which is a well founded.

22. Thus, on reading and evaluation of entire evidence on record, this Court finds that the judgment of acquittal passed by the lower appellate Court is erroneous and perverse and is not sustainable both on facts and in law.

23. For the foregoing reasons, the acquittal of the accused by the lower appellate Court deserves interference and accordingly, the appeal is allowed and the judgment of the trial Court in C.C.No.715 of 2005, dated 03.7.2007 on the file of the learned Judicial Magistrate No.II, Salem is restored. Since the prosecution under Section 138 of the N.I. Act is quasi civil in nature, the Parliament has thought it fit to permit compounding of the offence under Section 147 of the N.I. Act. Instead of sending the accused to prison, this Court is of the view that if the accused deposits Rs.25,000/- towards the cheque amount and another sum of Rs.25,000/- as compensation and costs to the credit of C.C.No.715 of 2005, before the learned Judicial Magistrate No.II, Salem on or before 31.12.2018, the Magistrate shall disburse the amount to the complainant. If the amount of

Rs.50,000/- is not deposited on or before 31.12.2018, the trial Court shall issue warrant of commitment for the accused to undergo the sentence imposed upon him by judgment dated 03.07.2007 in C.C.No.715 of 2005.

vs

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate No.II,
Salem.

2. The Additional District Judge,
Fast Track Court No.II,
Salem.

3.The Chief Judicial Magistrate, Salem

+1cc to Mr.N.Karthikeyan, Advocate SR.NO.74174

+1cc to Mr.R.Nalliappan, Advocate SR.NO.74032

JP(CO)

sm:31.10.2018

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