

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2018

DELIVERED ON : 30.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN  
Criminal Appeal No.345 of 2009

P.Govindaraj @ Mani  
Proprietor, Goldwin Enterprises  
No.14, N.M.Complex  
Indra Street, Kumaranandapuram  
Tirupur. .... Appellant

Vs

R.Kannan  
Proprietor, Rowenta Exports  
12/10, Kuppanna Gounder Street  
Anupparpalayam Post  
15, Velampalayam Municipality  
Tirupur. .... Respondent

Prayer: Appeal filed against the judgment dated 22.4.2008  
made in S.T.C.No.3091 of 2006 on the file of the Judicial  
Magistrate I, Tirupur.

For Appellant : Mr.R.Rajarajan

For Respondent : Mr.C.Anandaramani

JUDGMENT

This appeal arises out of the judgment dated 22.4.2008  
passed in S.T.C.No.3091 of 2006 by the learned Judicial  
Magistrate I, Tirupur, holding that the respondent accused  
is not guilty of the offence punishable under Section 138  
of the Negotiable Instruments Act.

2. The facts in a nutshell are as under: It is the  
case of the appellant complainant that the respondent  
purchased yarn from him and towards discharge of a portion  
of the liability, he had issued a cheque dated 27.1.2006  
for Rs.2,08,000/- and when the said cheque was presented  
for collection on 14.6.2006, it was returned unpaid for  
want of funds. The appellant complainant sent a statutory  
notice on 23.6.2006 and despite that, the respondent  
accused failed to repay the same and hence, a complaint was

filed for the offence under Section 138 of the Negotiable Instruments Act and summons were issued to the accused.

3. The learned Judicial Magistrate No.I, Tirupur, by judgment dated 22.4.2008, dismissed the appeal and acquitted the respondent accused finding that there is no proof for supply of yarn and there is no legally enforceable debt either.

4. Assailing the said judgment, the present criminal appeal is filed by the appellant complainant.

5. It is the contention of the learned counsel for the appellant complainant that the trial Court had misconstrued the deposition of P.W.2 and distorted it to hold that the appellant complainant had not supplied yarn to the respondent accused and such a finding is against the evidence of P.W.2, more so, when the appellant complainant had filed Exs.P1 and P2 to prove that he had supplied yarn to the respondent accused.

6. The learned counsel for the appellant complainant further submitted that the respondent accused had not rebutted the presumption under Section 118 of the Negotiable Instruments Act and had not explained as to how the cheque had gone into the hands of the appellant accused, but the Court below erroneously held that the accused had rebutted the presumption.

7. Per contra, the learned counsel appearing for the respondent accused reiterated the reasons that weighed with the trial court in acquitting the respondent accused and prayed for dismissal of the appeal.

8. I heard Mr.R.Rajarajan, learned counsel for the appellant and Mr.C.Anandaramani, learned counsel for the respondent and perused the documents available on record.

9. It is the case of the appellant accused that the respondent accused had purchased 34 bags of yarn under invoice No.100 for a sum of Rs.2,12,160/- on 11.1.2006 and as per the statement of accounts, the respondent accused is liable to pay a sum of Rs.2,14,547/-, for which the respondent accused had issued a cheque bearing No.108998, dated 27.1.2006 for a sum of Rs.2,08,000/-, agreeing to pay the balance after honoring the said cheque. The said cheque was said to be presented for collection on 14.6.2006 and was returned with an endorsement "funds insufficient". Thereafter, the appellant accused is stated to have issued the legal notice (Ex.P6), which was received by the respondent accused on 23.6.2006.

10. In support of the case of the appellant complainant, he had examined three witnesses and marked 16 documents, whereas the accused examined one witness and did not mark any documents.

11. Considering the documents filed on the side of the appellant complainant, viz., the purchase order (Ex.P1), the invoice (Ex.P2), Cheque (Ex.P3), return memo (Ex.P4), banker's advice (Ex.P5), statutory notice (Ex.P6), acknowledgment cards (Exs.P8 and P9), reply notice (Ex.P11), the Court below held that the complainant had adequately discharged the initial burden cast on him and thus the burden shifts on the respondent accused to prove the contrary.

12. The respondent accused, who was examined as D.W.1, had denied the issuance of cheque towards the discharge of any liability.

13. The trial Court noted that only during the cross-examination, the appellant complainant, for the first time, brought in two other companies, viz., Saabbro Fabrics and Kavin Knit Fashions. A new version is stated by the appellant complainant that the respondent accused had directed him to supply yarn to Saabbro Fabrics and thereafter at the instance of the respondent accused the goods were taken by persons connected with Kavin Knit Fashions. This fact the Court below found to be a new plea, which was not raised either in the notice or in the complaint or in the sworn statement. Therefore, as rightly held by the Court below, in the absence of pleadings, the evidence need not be looked into. To justify the said plea, the appellant accused had not produced any document.

14. P.W.2, who is the accountant in Sri Ratnagiri Spinners, deposed that as per the invoice No.453, dated 10.1.2006, they had delivered yarn to Saabro Fabrics, however, during cross examination, he had admitted that there is no written direction given by the appellant complainant to deliver yarn to Saabbro Clothing and that Saabbro Clothing has not given any memo acknowledging the receipt of the goods. Assuming arguendo that goods had been supplied on 10.1.2006 by Saabbro Clothing, as rightly held by the Court below, there is no necessity for drawing another invoice under Ex.P2 on 11.1.2006.

15. The next vital fact to be noted is the deposition of P.W.3, one Kandasamy, who is said to be the Manager of Saabbro Clothing. It is his deposition that yarn was delivered to them by Kavin Knit Fashions on 12.1.2006 and

on the next day, the employees of Kavin Knit fashions have taken back the goods and they had given memos Ex.P14 and Ex.P15 for it. This only leads to the conclusion that yarn was not supplied by Sri Ratnagiri Spinners as was contended by P.W1 and P.W2, but was delivered by Kavin Knit Fashions. Therefore, this Court has no hesitation to hold that the case of the appellant complainant that the respondent accused had directed him to deliver yarn to Saabro Fabrics does not hold water. When the supply of yarn to the respondent accused itself is in dispute, there is no liability to be discharged by the accused.

16. One more fact which needs mention is that the value of the yarn as per Ex.P2 is Rs.2,12,160/-, whereas even as per Exs.P12 and P13, Rs.15,000/- each was paid on 13.3.2006 and 14.3.2006 even before the cheque was presented. In that case, even for the sake of argument, the amount due would be only Rs.1,82,160/-. All these facts only lead to ruling against the appellant complainant.

17. To attract the penal provisions under Section 138 of Negotiable Instruments Act, a cheque must have been drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from and out of that account for the discharge in whole or in part, of any debt or other liability due. That means, the cheque must have been issued in discharge of a debt or other liability wholly or in part. Thus, it must be shown that the cheque was issued for the purpose of discharge of any subsisting debt or other liability. In this case, the appellant complainant had not produced an iota of evidence to show that yarn was supplied by the appellant complainant to the respondent accused and that the respondent accused is liable to pay amount towards the said transaction. It is trite that an offence is not made out merely by the reason that a cheque was issued and it was dishonoured, but it must also be proved that it was for discharge of a legally enforceable debt or other liability.

18. Section 118 of the Act reads as under:  
"Section 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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

b. as to date -that every negotiable instrument bearing a date was made or drawn on such date;

c. as to time of acceptance -that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

d. as to time of transfer -that every transfer of a negotiable instrument was made before its maturity;

e. as to order of endorsements -that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

f. as to stamps -that a lost promissory note, bill of exchange or cheque was duly stamped;

g. that holder is a holder in due course -that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

19. It has been held by a line of decisions that under Sections 139, 118(a) and 138 of the Negotiable Instrument Act, 1881, the existence of debt or other liabilities has to be proved in the first instance by the complainant and only thereafter the burden of proving to the contrary shifts on the accused. Indisputably, the initial burden could not be discharged by the petitioner/complainant

20. The accused having rebutted the presumption, it was for the complainant to prove that there was a debt or liability to the extent claimed by the complainant. The above means that once the presumption under Sections 118 and 138 of the Negotiable Instruments Act become available to the complainant, it is the accused who has to first rebut the said presumptions and thereafter the burden

shifts on the complainant to prove that there was debt or liability to the extent claimed by him.

21. As per the language used in Section 138 of the Act, offence under it can be made out only when it is shown that the cheque was issued for the discharge, in whole or in part, of a legally enforceable debt or the other liability. The Hon'ble Supreme Court time and again held that Section 138 of the Act treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138 of the Act. The appellant had failed to prove his case.

22. It is a well settled law that the appellate Court shall not set aside the judgment of acquittal unless it was found to be perverse and the evidences both oral and documentary has not been properly considered. I do not find any perversity in the judgment of acquittal and hence, the appeal is liable to be dismissed.

23 In fine, the Criminal Appeal is dismissed. The judgment of acquittal dated 22.4.2008 passed in S.T.C.No.3091 of 2006 by the learned Judicial Magistrate No.I, Tirupur, is hereby confirmed.

Sd/-

Assistant Registrar(CS ix)

//True Copy//

Sub Assistant Registrar

vs

To

The Judicial Magistrate No.I,  
Tirupur.

2. The section officer,  
Criminal Section,  
High court Madras

+1cc to Mr.C.Anandaramani , Advocate SR.No. 74836

+1cc to Mr.R.Rajarajan , Advocate SR.No. 74769

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ASK(14/11/2018)