

IN THE HIGH COURT OF JUDICATURE AT MADRAS

08.11.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.706 of 2009

Suresh Kumar D.Kochar .. Appellant / Respondent /
Complainant

versus

Chambagam Muralidhar ... Respondent / Appellant /
Accused

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment and decree dated 18.04.2009 passed in Crl.A.No.460 of 2004 on the file of the learned V Additional Sessions Court, Chennai, in reversing the judgment dated 10.11.2004 passed in C.C.No.15 of 2004 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai, by allowing the present Criminal Appeal.

For Appellant : Mr.A.M.Packianathan Easter

For Respondent : Mr.V.Padmanaban
Senior Counsel for
Mr.L.Baskaran

सत्यमेव जयते
J U D G M E N T

This Criminal Appeal is directed against the judgment rendered by the learned V Additional Sessions Judge, Chennai, in Crl.A.No.460 of 2004 dated 18.04.2009, wherein, he allowed the appeal filed by the respondent and set aside the conviction and sentence passed by the learned VIII Metropolitan Magistrate, George Town, Chennai in C.C.No.15 of 2004 dated 10.11.2004.

2. For the sake of convenience, hereinafter, the appellant is called as "complainant" and the respondent is called as "accused".

3. The case of the appellant / complainant in the Trial Court, is as follows: The complainant has filed this case by alleging that the accused approached him and obtained a loan of Rs.12 lakhs, on 14.10.2002, for which, she executed a promissory note and also issued two cheques dated 11.11.2003 for a sum of Rs.5 lakhs each, drawn on Bank of Baroda, S.I.E.T. College Branch, Chennai. The complainant presented the above said cheques before his Banker, namely, UCO Bank, Sowcarpet Branch, Chennai, for collection, but the same were returned unpaid on 12.11.2003 with an endorsement as "account closed". Therefore, on 20.11.2003, the complainant issued a statutory notice to the accused, in which, he calling upon her for paying the cheque amount within a period of 15 days from the date of receipt of notice. On receipt of the notice issued by the complainant, the accused issued a reply notice with false allegations. Thereafter, the complainant has issued a rejoinder notice to the accused. Thus, the complainant lodged a private complaint for punishing the accused under Section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as "N.I.Act"].

4. In the trial Court, the complainant examined himself as P.W.1 and marked the following documents as Ex.P.1 to Ex.P.9.

Serial Nos.	Exhibits	Particulars
1	Ex.P.1	Promote
2	Ex.Ps.2 & 3	Cheque bearing nos.022462 and 022464
3	Ex.P.4	Return memo issued by the Bank
4	Ex.P.5	Debit advice
5	Ex.P.6	Advocate notice
6	Ex.P.7	Acknowledgment
7	Ex.P.8	Reply notice issued by the accused
8	Ex.P.9	Rejoinder notice issued by the complainant

5. The trial Judge with relevant to the incriminating materials available in the evidence of P.W.1 examined the accused under Section 313 Cr.P.C., for which, the accused denied the same as false. On the side of the accused, she examined herself as D.W.1 and marked 5 documents as Ex.D.1 to D.5, the details of exhibits are as follows:

Serial Nos.	Exhibits	Particulars
1	Ex.D.1	Invitation for temple celebration
2	Ex.D.2	Copy of the demand draft

Serial Nos.	Exhibits	Particulars
3	Ex.D.3	Copy of the Plaint in O.S.No.6413 of 2003 pending on the file of the City Civil Court, Chennai
4	Ex.D.4	Copy of the written statement filed in the said case
5	Ex.D.5	Receipt dated 06.10.2004 for proving that the accused stayed in Salem in the above said date

6. Having considered all the above, the learned VIII Metropolitan Magistrate came to the conclusion that, the accused is found guilty for an offence under Section 138 of N.I. Act, convicted and sentenced her to undergo 6 months simple imprisonment and to pay a sum of Rs.12 lakhs as compensation. Aggrieved over the said judgment, the accused prepared an appeal before the learned V Additional Sessions Judge, Chennai, in Crl.A.No.460 of 2004. After elaborate enquiry, the learned V Additional Sessions Judge, allowed the appeal and set aside the conviction and sentence passed against the accused. Now, as against the said judgment, the complainant is before this Court with the present Appeal.

7. Heard Mr.A.M.Packianathan Easter, learned counsel appearing for the appellant, Mr.V.Padmanaban, learned Senior Counsel appearing for the respondent and also perused the material documents available on record.

8. According to the case of complainant, he is doing the finance business, on 14.10.2002, the accused availed a loan of Rs.12 lakhs from him and executed a pronote under Ex.P.1. Further on the same date, she issued two cheques for a sum of Rs.5 lakhs each, drawn on Bank of Baroda, S.I.E.T. College Branch, Chennai.

9. In this regard, the learned senior counsel appearing for the respondent/accused would submit that, on 14.10.2002 alleged to be the date on which the accused has borrowed the loan, the accused has attended the function in Salem. In order to prove the said contention, an invitation of the Palaniandavar Temple was exhibited as D.1. Further, according to the learned senior counsel, in the year of 1996, the accused issued a cheque to the complainant and the same has been misused now by the complainant, filed a false case against her. In otherwise, the signature found in the cheques have not been disputed on the side of the accused.

10. Now on going through the Ex.D.1, it is an invitation related to the Palaniandavar Temple festival, the contents of the said invitation shows that, on 14.04.2002, there was a festival celebrated in the above temple, further, the festival starts on 14.04.2002 and completed on 30.04.2002. In the said circumstances, the said invitation alone cannot prove that the accused was available in Salem on 14.04.2002. In order to prove her presence, she produced a letter issued by the retired Accounts Officer dated 06.10.2004 stating that, the accused stayed in Salem and attended the Navarathri celebrations from 13.10.2002 to 15.10.2002. In fact, the said document has not been marked through the author of the document, so the said document has also not proved according to the law required. It is very easy for every accused to mark those type of documents and create an alibi. In fact, such type of documents is not a strong piece of evidence and those documents are not having any sanity to prove that the accused present in Salem from 13.10.2002 to 15.10.2002, therefore, the plea of alibi now taken by the accused is not proved.

11. In otherwise, since the signature found in the pronote and the cheques have not been disputed by the accused, it is relevant to see the judgment of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in (2010) 11 SCC 441 wherein, it has observed as follows :

"The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence."

12. Furthermore, in the same judgment, our Honourable Apex Court has held as follows:

"The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, herein, there can be no doubt that there is an initial presumption which favours the respondent complainant."

13. Since the presumption under Section 139 of N.I. Act is rebuttable in nature, the accused is having the duty to show the probable defence and create a doubt over the case of the complainant as the cheque has not been issued for discharging the legally enforceable debt or other liability.

14. In this case, in the written submission filed by the accused, she has stated that, the cheques were issued by her for the transaction she had with the father of the complainant. For the said submission, on the side of the complainant, it was submitted in the reply notice sent by the accused, she has not stated anything about the transaction she had with the father of the complainant.

15. Now considering the said submissions, it is true in Ex.P.8, which was the reply notice sent by the accused, nowhere she has stated anything about the transaction she had with the father of the complainant. In fact, the reply notice is the earliest document, which is created by the accused for this case. In the said circumstances, without mentioning anything in the earlier stage now taking a defence as above, is unbelievable one.

16. Moreover, in the trial Court, the accused filed a copy of the Plaint pertaining to O.S.No.6413 of 2003 on the file of the City Civil Court, Chennai. The said case has been filed by the accused against the complainant in the month of December 2003. In the said suit, she seeking the relief of mandatory injunction directing the complainant to return of the schedule mentioned documents to the accused herein by receiving a sum of Rs.2,50,000/- as agreed by way of full and final settlement of all dues from the accused.

17. On the other hand, the complaint pertaining to this appeal has also been filed in the same month. In the said case, the accused alleged that from the year of 1991, the complainant and the accused had money transaction and in the year of 1992, when the accused paid the loan to the complainant, the complainant returned certain blank cheques drawn on Bank of Baroda, S.I.E.T. Branch, Chennai. Now considering the averments made, the defence of the accused is nothing but the inconsistent plea as the cheque has been handed over by her to the father of the complainant but alternatively in the Plaint she has stated that the cheque has been handed over by her directly to the complainant, so the said inconsistent plea with regard to the handing over of the cheque is nothing but fatal to the defence.

18. The next submission made by the learned counsel appearing for the complainant is that, as per the evidence given by P.W.1 for discharging the loan of Rs.12 lakhs, two cheques

for a sum of Rs.5 lakhs each, have been issued by the accused and the cheques are bearing serial numbers as 022462 and 022464. But the cheques bearing subsequent serial numbers had been enhanced prior to the date of presenting the cheques pertaining to this case. Further, as per the case of the accused, the cheques have been issued without filling the contents of the cheques, but the First Appellate Court without considering those aspects, allowed the appeal and set aside the conviction awarded against the accused.

19. Considering the same, it is true in the evidence given by P.W.1 he has stated that the accused availed Rs.12 lakhs as a loan, and in the statutory notice sent to the accused, he has specifically stated that the accused availed loan of Rs.12 lakhs. In the said situation on the date of availing loan itself, the cheques have been handed over to the complainant. In the said circumstances, those cheques alone are presented for enhancement and hence, there is no occasion to the complainant for asking a cheque for Rs.12 lakhs. So issuing of two cheques for a sum of Rs.5 lakhs each, is not a ground for allowing the appeal.

20. With respect to the contents of the cheques, it is relevant to see the judgment of this Court in P.PARAMASIVAN vs. RAMALAKSHMI reported in 2017 (1) TNLJ 222 (Civil), in which, it has held as follows:

"13.....Once the signatures in the promissory notes are admitted as per Section 20 of the Negotiable Instruments Act, the holder of instrument is authorised to fill up the blank promissory notes or fill up the incomplete portions. The consideration mentioned in the promissory notes are presumed to be paid to the appellant as per Section 118 of the Negotiable Instruments Act. The burden is cast on the appellant to rebut the said presumption." सत्यमेव जयते

21. Further, in the judgment of RAJENDRAN vs. USHARANAI reported in 2001-1-LW (Cri) 319, this Court has observed as follows:

"What is material is signature of drawer or maker and not the body writing. Hence, question of body writing has no significance. This has been laid down by the Gujarat High Court in Satish Jayantilal Shah v. Pankaj Mashruwala MANU/GJ/0013/1996 : 1996 Cri.L.J.3099."

22. Accordingly, as rightly pointed out the position which emerges now by the accused has already decided in the above judgments.

23. The next point which was raised by the learned counsel appearing for the respondent/accused is that, being a financier in order to show the capability for lending Rs.12 lakhs as a loan, she should produce the accounts maintained in her business or atleast she produce a copy of the income tax returns for proving the debt. In this regard, during the time of cross examination, P.W.1 has specifically stated as the copy of the accounts and the income tax particulars had not been produced, however, he specifically stated, if necessary, he is ready to produce the same.

24. In this regard, the learned counsel appearing for the accused relied on the judgment of our Honourable Apex Court in M.S.NARAYANA MENON @ MANI vs. STATE OF KERALA reported in 2006 (3) CTC 730, in which, it has held as follows:

"49. Two adverse inferences in the instant case are liable to be drawn against the second respondent:

(i) He deliberately has not produced his books of accounts.

(ii) He had not been maintaining the statutory books of accounts and other registers in terms of the bye-laws of Cochin Stock Exchange."

25. Further, he relied on the judgment of this Court in SRI MURUGAN FINANCIERS vs. P.V.PERUMAL reported in CDJ 2004 MHC 1662, in which, it has observed as follows:

"8. Case of the Complainant/Financier is that prior to 15.05.1993, the Accused was bound to pay Rs.3,50,000/- to the Complainant. On 15.05.1993, the Accused is said to have borrowed a further sum of Rs.50,000/- from the Complainant. Calculating the earlier amount due, Interest and the amount payable, the Accused is said to have issued Ex.P.1-Cheque in question for a sum of Rs.4,65,000/-. Case of the Accused is that he had borrowed only Rs.50,000/- on 15.05.1993 and for proper return of the said loan, the Cheque in question was issued by him. The Accused also has denied execution of the Promissory Notes as alleged by the Complainant. Inasmuch as huge amount of

Rs.4,65,000/- is involved. Case of the Complainant is that an amount of Rs.3,50,000/- was due from the Accused prior to 15.05.1993. If that be so, the Complainant being a Finance Company ought to have produced Accounts in support of their claim. The Penal Provision under Sec.138 N.I.Act could be attracted only when the Complainant proves that the Cheque in question was issued "....for discharge in whole or in part of any Debt or other Liability...." As rightly found by the Lower Appellate Court, the Debt or legally enforceable liability is not satisfactorily proved by the Complainant/Financier. When no definite evidence is forthcoming, learned Additional Sessions Judge was right in holding that the Penal Provision of Sec.138 N.I. Act is not attracted."

26. So following the principles laid down in the above two judgments, the duty is cast upon the complainant to produce the account books for showing the debt availed by the accused. But in this case, those documents, which are necessary to decide the case has not been produced. However in the trial Court, the issuance of cheque was admitted by the accused itself, further in the suit filed by her, she specifically stated in the prayer column as "agreed by way of full and final settlement of all dues from the complainant itself". Accordingly, the accused has approached this Court without mentioning the correct debt availed from the complainant. In the said circumstances, now only the Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in (2010) 11 SCC 441 has held as "presumption mandated by Section 139 of the N.I.Act does indeed include the existence of a legally enforceable debt or liability". So in order to rebut the presumption, the accused alone is having the duty to say the actual transaction made with the complainant. But in this case, the accused approached this Court without telling the details of transaction happened between them.

27. The Lower Appellate Court, on considering the year printed in the cheque, for the reason the father of the complainant not examined and not called for the records from the custody of the accused hold that the offence is not made out and allowed the appeal, particularly, the Appellate Court allowed the appeal for the non-production of accounts alone. As already discussed, the said fact alone cannot be a ground for allowing the appeal.

28. Lastly, the learned counsel appearing for the accused relied on the judgment of our Honourable Apex Court in AKOIJAM RANBIR SINGH vs. THE GOVERNMENT OF MANIPUR reported in AIR 1976 SC 2191 and made submission that, if two different conclusions are possible, the accused cannot be convicted in the appeal filed against the order of acquittal. It is true in the judgment reported in BHARWAD JAKSHIBHAI NAGJIBHAI vs. STATE OF GUJARAT reported in AIR 1995 SC 2505, in which our Honourable Apex Court has reiterated the same view as two views are reasonably possible allowing the appeal filed against the order of acquittal is not proper.

29. In this case, in our hand, we have to necessarily see the evidence given by the accused, she herself admitted the issuance of the cheque, further in the trial Court she took the inconsistent plea, moreover she has not stated the correct loan amount availed from the complainant. If those aspects is clarified by the accused necessarily there may be two views that are reasonably possible for better adjudication, but in this case the accused had not clarified those aspects, further as already discussed in order to rebut the presumption she has not raised a suspicious circumstances over the case of complainant, thereby, I am of the considered view that the reason stated by the First Appellate Court by allowing the appeal and setting aside the conviction, which is erroneous in law.

30. In the light of the above discussions, this Criminal Appeal is allowed. The judgment dated 18.04.2009 in CrI.A.No.460 of 2004 on the file of the learned V Additional Sessions Court, Chennai, is set aside and the judgment dated 10.11.2004 in C.C.No.15 of 2004 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai, is restored. However, since the respondent issued two cheques for Rs.10 lakhs [Rs.5 lakhs each], apart from the punishment imposing a compensation of Rs.10 lakhs alone is sufficient for the offence committed by the respondent.

31. 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 N.I. Act. Therefore, instead of sending the accused to prison, this Court is of the view that if the accused deposits Rs.10 lakhs towards the cheque amount and another sum of Rs.1 lakh to the compensation and costs to the credit of C.C.No.15 of 2004, before the VIII Metropolitan Magistrate, George Town, Chennai,

on or before 12.12.2018, the Magistrate shall disburse the amount to the complainant if he is alive or to his legal heirs and compound the offence. If the amount of Rs.11 lakhs is not deposited on or before 12.12.2018, the trial Court shall issue warrant of commitment for the accused to undergo the sentence imposed upon her by judgment dated 10.11.2004 in C.C.No.15 of 2004.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

sri
To

1.The V Additional Sessions Court,
Chennai.

2.The VIII Metropolitan Magistrate,
George Town, Chennai

3.The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+ 1 cc to Mr. L. Baskaran, Advocate Sr.76550

+ 2 ccs to MR. A.M.Packianathan Easter, Advocate Sr.76586

Cr1.A.No.706 of 2009

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