

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.02.2018
DELIVERED ON : 08.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.21 of 2010

Murali ... Appellant

Vs

Daya Sekar Respondent

Prayer: Criminal Appeal filed under Section 374 of the Criminal Procedure Code, against the Judgment made in C.C.No.150 of 2005 dated 05.10.2009 on the file of the Judicial Magistrate No.2, Salem.

For Appellant : Mr.T.Karunakaran
For Respondent : Mr.PA.Sudeshkumar

JUDGMENT

Challenging the order of acquittal made in C.C.No.150 of 2005 dated 05.10.2009 on the file of the learned Judicial Magistrate No.II, Salem, the appellant herein filed this Criminal appeal under Section 378 of Cr.P.C.

2.The Learned Counsel for appellant would submit that the appellant herein as complaint initiated proceedings against the respondent herein for dishonor of cheques under Section 138 r/w 142 of N.I. Act. The contention of the learned counsel for appellant is that the accused borrowed the hand loan of Rs.40,000/- in the month of May 2004 on various occasion from the complainant. To discharge the said loan amount the accused issued two cheques for Rs.10,000/- dated 05.11.2004 (Exhibit P-1) and Rs.15,000/-dated 22.11.2004 (Exhibit P-2). When the complainant put the above cheques for collection through his banker the same was returned on 12.01.2005 with an endorsement "insufficient funds". Thereupon statutory notice was issued to the accused on 17.01.2005 and on receipt of the same the accused sent reply dated 02.02.2005 (Exhibit P-8) with false contention. Since the accused failed to repay the cheque amount, the complainant filed the above private complaint for the offence punishable under Section 138 of N.I. Act.

3.I heard Mr.T.Karunakaran, learned counsel for the appellant and Mr.Pa.Sudeshkumar, learned counsel for the respondent and perused the entire materials available on record.

4.The learned counsel for appellant has relied upon the following judgment in support of his contention:

(i) The case of Suresh Chandra Goyal Vs Amit Singhal report in 2015 SCC Online Del 9459: (2005) 3 BC 659, wherein it is held that unless the accused has rebutted the presumption under Section 139 of N.I. Act, the trial Court have drawn presumption available under Section 139 of N.I. Act in favour of the complainant.

(ii).In the case of N.K WAHI Vs SHEKHAR SINGH AND OTHERS (2007) (9) Supreme Court Cases 481, wherein it held that in the matter of 138 of N.I. Act case, the following averment in the complainant is sufficient to convict the accused i.e,

- 1) Cheque was issued.
- 2) The same was presented.
- 3) It is dishonored on presentation.
- 4) A notice in terms of the provision was served on the person sought to be made liable.
- 5) Despite service of notice, neither any payment was made nor other obligation, if any, were complaint with within 15 days from the date of receipt of the notice.

5.Whereas, it is the contention of the Learned Counsel for respondent/accused that the subject cheques were issued not to discharge the alleged loan amount said to have borrowed by the accused. In fact, the accused owned car bearing Registration No.TN-27-V-009 and wants to sell the same. In this regard the complainant contacted the accused through his relative Raja. The complainant agreed to buy the car for Rs.1,40,000/- and paid an advance amount of Rs.40,000/- in 3 installments through his friend Raja. When the accused requested the complainant to pay the balance amount of Rs.1,00,000/- along with R.C. book of the car, the complainant stated that he did not want the car and asked the accused to repay the advance amount paid by him. At that time the accused found that the car was not in good condition when it was given to the complainant and there was damage and for that Rs.15,000/- was asked from the complainant. The accused stated that he paid the balance amount within two months. Therefore, the learned counsel argued that the accused

has not borrowed the amount for his business purpose as alleged by the complainant. The said fact was also clearly mentioned in the reply notice sent to the complainant. The complainant has not sent any reply to the averment made in Exhibit-P-8 reply notice of the accused which would prove the case of the respondent as genuine one and falsify the case of the appellant herein.

6.The learned counsel for the respondent herein further submitted that the Trial Court after considering Exs.R3, R4, R5 and R6 has lightly held that the case of the complainant is false and further held that from Ex.R3 and Ex.R4 the address of the complainant and the car No.TN-27-V-009 has been mentioned would through light that the alleged loan transaction was false and the transaction was relating to purchase of car as stated by the accused and in that regard only the cheque was issued by the accused.

7.The further contention of the learned counsel for respondent is that the complainant was not even stated the dated on which the accused has borrowed money from the complainant. In this regards the learned counsel for respondent relied upon the following judgments:

(1) In this case G.Vasu vs Syed Yaseen Sifuddin Quadri reported in AIR 1987 AP 139 wherein it is held as follows:

"From the aforesaid authorities, we hold that once the defendant adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer".

2. In the case of Muthukumar Vs Periyasamy reported in 2012 (2) MWN (Cr.) DCC 113 (Mad) where in it is held as follows:-

"In this case, the learned Counsel for the Revision Petitioner/Accused, has pointed out various imponderable and improbabilities found in the case of the complainant. First of all, the learned Counsel for the Revision Petitioner/Accused has pointed out the fact that the case of the Complainant is not consistent and his stand was oscillating from time to time as he changed his version according to the exigencies of the circumstances. Ex.P4 is the copy of the statutory notice issued to the Revision Petitioner/Accused by the Respondent/Complainant through his Counsel. In Ex.P4-notice, it had been stated that the Revision

Petitioner/Accused borrowed a sum of Rs.4,00,000/- from the Respondent/Complainant and in order to discharge the said liability, he issued a cheque bearing No. 936888 dated 07.11.2008 drawn on State Bank of Hyderabad, West Perumal Maistry Street Branch, Madurai and that when the cheque was presented for collection, it was returned unpaid with an endorsement 'insufficient fund and A/c inoperative'. It is pertinent to note that in the said notice, the Respondent/Complainant had not stated the date on which the Revision Petitioner/Accused borrowed the said amount and the date on which the cheque was issued. It has not even been stated as to whether the cheque was issued on the date of borrowal or on a subsequent day".

8.Before the Trial Court on the side of complainant, he was examined as PW-1 and marked Exhibits P-1 to P-8. On the side of the accused, he was examined as RW-1 and marked 6 documents, Exhibits R-1 to R-6.

9.On the perusal of records, it is seen that there are two cheques dated 05.11.2004 and 22.11.2004 for a sum of Rs.10,000/- and 15,000/- respectively issued by the accused to discharge payment of alleged loan amount borrowed by him from the complainant. Whereas, rebutting the said contention, it is argued on the side of the accused that the accused never borrowed by loan from the complainant. At the same time, the Car owned by the accused was agreed to purchase by the complainant through one Raja who is the friend of accused. In this connection the complainant paid advance amount of Rs.40,000/- to the accused, but subsequently the complainant stated that he is not willing to purchase the Car and he wants to get back the advance amount paid to the accused. At this stage, accused found that the Car given to the complainant was not in good condition and it got damaged, therefore the damage was assessed at Rs.15,000/-. For payment of balance amount of Rs.25,000/- two months time was requested by the accused and for that a blank cheque was also issued. After deducting Rs.15,000/-, regarding the balance amount of Rs.25,000/- the accused paid Rs.21,500/- to the complainant at junction and remaining amount Rs.3,500/- was deposited into the Bank account of the complainant. To show the payment of Rs.3,500/- deposited Ex-R6 counter foil of ICICI Bank was produced. Further in order to establish the fact that the accused has paid Rs.21,500/- to the complaint at Railway Station, Ex-R5 Train Ticket dated 29.10.2004 was produced. From the above it has been clearly proved that case rebutted the presumption available under section 139 of N.I. Act.

10.From the records produced by the accused, it is made clear that under Ex.R1, sale receipt, the complainant purchased the car of the accused. Further, Exs.R3 and R4 proved that the damage of the car was given to the workshop and the same was

repaired. Therefore, this Court has no other go, except to believe the case of the respondent/accused. The case projected by the complainant / appellant seems to be false one. The subject cheque was not issued for the loan transaction as alleged by the complainant and it was issued only in purchase of car. Therefore there is no legally enforceable debt for the complainant against the accused. The finding of the trial Court in this regard is legally sustainable and the same not requires any interference by this Court.

11. That apart regarding the contention of the respondent herein that the complainant not even mentioned the date on which the accused borrowed Rs 40,000/- is concerned, the said contention of the respondent herein is justified one and the same is also squarely covered by the Judgment of this Court reported in 2002 (2) MWN (Cr.) DCC 113 (MAD) cited supra.

12. In this case, appellant herein has not proved the case and he has not come to the Court with clean hands and therefore he cannot take shelter of presumption available to him under section 118 and 139 of N.I. Act.

13. No doubt that presumption is to be drawn under section 139 and 118 of N.I. Act as against the accused. However, for the same the complainant has to satisfy the Court at first instance to show a legally enforceable liability.

14. In view of the forgoing reason, I do not find any error and infirmity attached to the order of the trial Court. Hence this Criminal Appeal is liable to be dismissed, accordingly it is dismissed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate No.2, Salem.

2.-do-thro' The Chief Judicial Magistrate,
Salem.

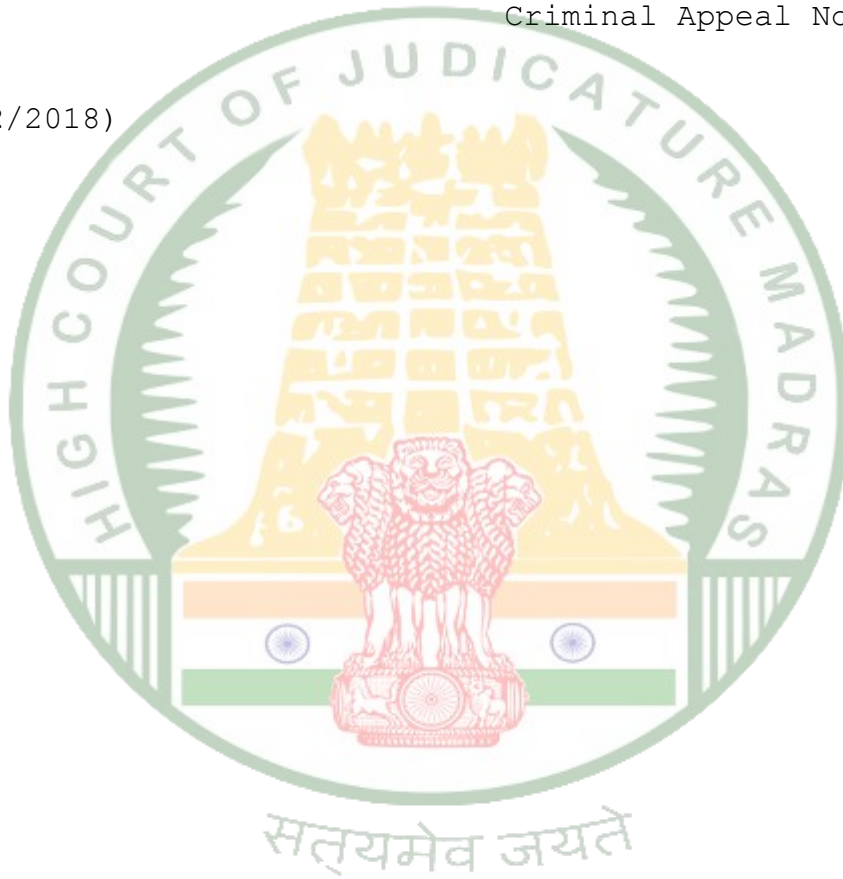
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The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.T.Karunakaran, Advocate, S.R.No.76575

+1cc to Mr.PA.Sudesh Kumar, Advocate, S.R.No.77105

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