

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.02.2018

Delivered on : 29.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.630 of 2007

P.Velusamy

... Appellant

Vs

1.P.Rajkumar

2.Geetha P.Narang

... Respondents

Appeal under Section 378 of the Code of Criminal Procedure against the judgment dated 18.6.2007 in C.A.No.30 of 2006 on the file of the Additional Sessions Judge (Fast Track Court No.I) Salem, reversing the judgment dated 17.1.2006 made in C.C.No.329 on the file of the Judicial Magistrate No.II, Sankari.

For Appellant : Mr.N.Manokaran
for Mr.V.Anandhamoorthy

For Respondent : Mr.V.Ayyadurai
Senior Counsel
for Mr.V.B.Perumal Raj

JUDGMENT

This appeal has been filed seeking to set aside the judgment dated 18.6.2007 made in C.A.No.30 of 2006 on the file of the learned Additional Sessions Judge (Fast Track Court No.I) Salem, reversing the judgment of conviction dated 17.1.2006 made in C.C.No.329 of 2002 on the file of the learned Judicial Magistrate No.II, Sankari.

2. For the sake of convenience, the appellant and the respondents will be referred to as per their array in the complaint. The respondents herein are accused Nos.3 and 12.

3. It is the case of the complainant that he was doing cotton business and the 1st accused M/s.Shanmugaraja Spinning Mills Private Limited was his customer. The 2nd accused was the Managing Director, 8th accused was the Director-cum-General Manager and accused Nos.3 to 12 were involved in day-to-day business affairs of the 1st accused. On 12.9.2000, the 1st accused purchased 4021 kilogram cotton worth Rs.2,40,275/- on credit basis. Despite repeated demands by the complainant, the

accused have not repaid the debt. However, the 1st accused had issued post-dated cheques for a sum of Rs.1,20,000/- dated 17.9.2002 and sum of Rs.1,20,275/- dated 3.10.2002 (Exs.P3 and 4). On 15.10.2002, the complainant presented the said cheques for encashment through his banker and the same were returned with Memo Ex.P5 that the account of the first accused was closed. On 28.10.2002, the complainant sent Ex.P6-legal notice to all the accused. The accused 1 to 12 sent Ex.P20-reply containing false allegations and also demanded time for repayment. On 08.11.2012, accused 3 and 12 have also sent Ex.P21-reply notice to the notice issued by the complainant. Since the accused failed to pay the amount, the complainant had filed the complaint under Section 138 of Negotiable Instruments Act (hereinafter referred to as "the NI Act") before the Judicial Magistrate No.II, Sankari in C.C.No.329 of 2002. On receipt of summons, the accused appeared and when they were questioned about the accusation against them, they denied the same.

4. To prove the case, the complainant had examined 3 witnesses and marked 33 exhibits. The accused was questioned about the incriminating circumstances appearing against them under Section 313 Cr.P.C., which they denied. On the side of accused 4 witnesses were examined and 8 documents were marked. Ex.C1 was marked Court's exhibits.

5. After considering the evidence adduced by both sides and hearing the learned counsel on either side, the trial Court, by judgment dated 17.1.2006 convicted all the accused under Section 138 of the NI Act and sentenced them to undergo one year rigorous imprisonment and to pay fine of Rs.5,000/- each, in default to undergo 3 months simple imprisonment and also to pay compensation of Rs.50,000/- by the 1st accused and Rs.20,000/- by the 2nd accused.

6. Aggrieved by the conviction and sentence, the accused 3 and 12 have filed appeal being C.A.No.30 of 2006 before the Additional District Judge (Fast Track Court No.I), Salem, who by the judgment dated 18.6.2007, has acquitted the accused 3 and 12. Aggrieved by the same, the complainant had filed the present appeal against acquittal.

7. I heard Mr.N.Manokaran, learned counsel for the complainant and Mr.V.Ayyathurai, learned Senior Counsel for Mr.V.B.Perumal Raj, learned counsel for the accused 3 and 12 and also perused the materials available on record.

8. Assailing the judgment of the lower appellate Court, the learned counsel for the complainant/appellant submitted that findings of the lower appellate Court to acquit the accused 3

and 12 are perverse and it cannot be sustained both on law as well as on facts. The lower appellate Court failed to note that the complainant has proved his case to the satisfaction of the Court. It is for the accused to rebut the presumption beyond all reasonable doubts. He would submit that the lower appellate Court erred in disbelieving the evidence of P.W.1 merely based on some assumption and it has failed to note that the contention of the accused that there was no legal enforceable liability under Section 139 of the NI Act, it has to be presumed that once the cheque has been issued by the accused, the same was issued towards the discharge of liability.

9. The learned counsel for the complainant further submitted that the lower appellate Court has failed to note that there was a presumption under Section 118 (g) of the N.I. Act in favour of the complainant, who was holder of the cheque, that the cheque received was of the nature referred to in Section 138 for the discharge in whole or in part of any debt or any other liability and the accused were required to dislodge the presumption under Section 139 of the NI Act.

10. The learned counsel next contended that the lower appellate Court failed to note that except the respondents/accused Nos.3 and 12, all other accused persons have paid their liability in C.A.Nos.23, 24, 26, 27, 28 and 29 of 2006 by compromise. The learned counsel next contended that setting aside of conviction by the lower appellate Court on the basis of the formal evidence of accused was not permissible.

11. Per contra, reiterating the judgment of the lower appellate Court, the learned Senior Counsel for the accused 3 and 12 submitted that finding the error in the judgment of the trial Court, the lower appellate Court has rightly set aside the conviction insofar as the accused 3 and 12 are concerned. Since the said finding of the lower appellate Court was based on evidence, there is no necessity to interfere with the same and prayed for dismissal of the appeal.

12. The lower appellate Court while allowing the appeal preferred by the accused 3 and 12 observed that the accused 1 and 2 have failed to inform other Directors and others, including the accused 3 and 12 whether accused Nos.1 and 2 have issued cheque in favour of the complainant for the debt due towards the purchase of cotton.

13. Challenging the said finding of the lower appellate Court, the learned counsel for the complainant contended that all the accused have involved in the 1st respondent's day-to-day business affairs, in which the second accused in the capacity of Managing Director has issued letter dated 1.4.2002, wherein all

the accused have admitted the liability and disprove the same, the accused have not filed any document. Since D.W.1 admitted the supply of cotton and the other accused having admitted their liability and paid the fine, the accused 3 and 12 alone were defending the case of the complainant and the lower appellate Court erred in allowing the appeal preferred by the accused Nos.3 and 12.

14. The accused Nos.3 and 12, by relying upon the letter dated 15.2.2002 addressed by the Syndicate Bank to the first accused, pointed out that when the account of the 1st respondent was closed on 26.11.2001 itself, the act of the second accused in issuing the impugned cheques would clearly show that the second accused alone responsible for issuance of the impugned cheques.

15. In P.J.Agro Tech. Ltd. and others Vs. Water Base Limited, Criminal Appeal No.1357 of 2010 arising out of Special Leave Petition (Crl) No.1361 of 2007), dated 28.7.2010, the Apex Court dealt with a situation where an employee of a company gave a cheque discharging the dues of the company and its Directors. The said cheque was returned due to insufficiency of funds. The question before the Apex Court was whether the company and its Directors can be made liable for dishonour of cheque issued by an employee in discharge of a debt of a company and its Directors. After referring to the provisions of the NI Act, the Apex Court held as under:

"9. In the instant case, the cheque which had been dishonoured may have been issued by the respondent No.1 for discharging the dues of the Appellant No.1 company and its Directors to the respondent No.1 Company and the respondent company may have a good case against the appellant No.1 company for recovery of its dues before other for a, but it would not be sufficient to attract the provisions of Section 138 of the Act. The appellant company and its Directors cannot be made liable under Section 138 of the Act for a default committed by the respondent No.11. An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."

16. On a perusal of the trial Court judgment, it is seen that at one stage the Directors of the first accused company resigned and new Directors have taken charge. The resigned

Directors have stood as one group and the new Directors stood as another group. The accused 3 and 12 were in the new group. In its order, the trial Court stated that it was not known whether accused No.12 was still in the post of Director or not. When the trial Court arrived at such a finding, how it could fasten the liability on accused No.12 also.

17. On a perusal of the entire records, it is seen that except the accused 3 and 12, all other accused stood as one group. Knowing the fact that the account of the first accused Company maintained in Syndicate Bank was closed way back on 26.11.2001, the second accused had issued the impugned cheques in favour of the complainant. Therefore, it would not be appropriate to penalize the accused 3 and 12 for the ill-motive act done by the second accused.

18. Admittedly, in the case on hand, without the knowledge of the accused 3 and 12, the second accused had issued Ex.P20-reply notice to the notice sent by the complainant. The complainant had failed to prove the liability of the accused 3 and 12 by preponderance of evidence. Since the other accused have admitted their liability and paid fine as alleged by the complainant is not a ground in disbelieving the version of the accused 3 and 12.

19. It is seen from Ex.D2, the parties (accused) were entered into an agreement, wherein 16 persons were made as "A" party and the third accused and his brother Harishkumar were made as "B" party. As per the agreement, though the debt due to the complainant was mentioned, since the purchase was made in the name of the first accused company, how action could be initiated against the accused 3 and 12.

20. The impugned cheques which were issued were not on a account maintained in his individual capacity of the second accused, but that of a company of which he was the Managing Director and also an authorized signatory to the cheques. Therefore, the circumstances under which the cheques signed by the second accused was issued to the complainant on behalf of the first accused company only.

21. The learned Senior Counsel for the accused 3 and 12 contended that the accused 3 and 12 have no knowledge for issuance of the impugned cheques and that they are not signatories of the cheques and therefore, they cannot be prosecuted. This Court finds much force in the contention of the accused 3 and 12.

22. The lower appellate Court after re-appreciating the oral and documentary evidence, rightly discharged the accused 3 and

12 from the liability on the ground that without their knowledge, the second accused had issued the impugned cheques. In its judgment, the lower appellate Court held that only the accused 3 and 12 have preferred appeal. On the other hand, the learned counsel for the complainant contended that the other accused have filed appeals, wherein they have compromised the matter and paid their respective portion of the liability. To prove the same, no material has been produced by the complainant. Mere submission of the learned counsel for the complainant and the grounds raised in the memorandum would not sufficient to contend that the other accused have compromised the matter and paid their respective liability and therefore, the accused 3 and 12 are also liable to pay their liability. Assuming that the other accused have paid their liability, the same cannot be taken into account against the accused 3 and 12, as the complainant had failed to prove the role played by the accused 3 to 12 in issuing the impugned cheques and more particularly the liability of the accused 3 and 12.

23. For the foregoing reasons, this Court is of the view that there is no perversity in the judgment of the lower appellate Court in setting aside the judgment of the trial Court as far as the accused 3 and 12 are concerned. No valid grounds have been made out interfere with the judgment of the first appellate Court in so far as the accused 3 and 12.

24. In the result, the appeal is dismissed.

vs

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate No.II, Sankari.

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

VSNII(CO)
sm:14.11.2018

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