

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.03.2018

Delivered on : 29.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.971 of 2005

R.Dhamodarasamy ... Appellant

Vs

1.M/s.Srivalsa Agency (Petrol Pump)
rep. by Sathya Bama, Managing Partner,
Mettupalayam Main Road,
Karamadai, coimbatore.

2.Sathya Bama ... Respondents

Appeal under Section 378 of the Code of Criminal Procedure against the judgment dated 06.10.2005 passed in c.C.No.609 of 2002 on the file of the Judicial Magistrate No.II, Coimbatore.

For Appellant : Mr.Su.Srinivasan

For Respondent : Mrs.S.Sujatha
(Legal Aid Counsel)

JUDGMENT

The unsuccessful complainant in case relating to offence punishable under Section 138 of the Negotiable Instruments Act (in short "NI Act") is the appellant herein. He filed C.C.No.609 of 2002 before the Judicial Magistrate No.II, Coimbatore against the accused alleging offence under Section 138 of the NI Act on the ground that in order to discharge the loan amount, on 26.3.2002, the accused issued two cheques from the 1st accused firm account, in which the 2nd accused was the Managing Partner. On 29.4.2002, the complainant presented both the cheques for collection before his banker viz., Indian Overseas Bank, Gandhipuram Branch, Coimbatore-12, but the same were returned unpaid on 2.5.2002 with a bankers Memo containing endorsement funds insufficient. Thereafter, the complainant caused a legal notice dated 13.5.2002 through his counsel.

Though the accused received the notice served on certificate of posting and after knowing the contents therein, refused to receive the registered post and the same was returned as not claimed. Since the accused failed to repay the amount nor issued reply within the stipulated time, the complainant had filed the complaint under Section 138 of the NI Act.

2. During trial in the trial Court, the complainant examined himself as P.W.1 and one Duraisamy was examined as P.W.2. On the side of the complainant, 11 documents were marked. On the side of the accused, 3 witnesses were examined and 2 documents were marked.

3. The trial Court, after considering the contention of both the parties, found the accused not guilty of the offence under Section 138 of the NI Act and acquitted the accused by stating that the complainant has failed to prove that the 2nd accused received a sum of Rs.50,000/- from the complainant as loan and in order to discharge the said loan, she had given the impugned two cheques and also the role played by the 2nd accused in Srivalsa Agency.

4. Aggrieved by the judgment of the trial Court, the present appeal has been preferred by the complainant/appellant under Section 378 Cr.P.C. Bare reading of Section 378 Cr.P.C (Appeal in case of acquittal) makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to re-appreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

5. Applying the above said provision, it will now be appropriate to advert to the factual matrix of the case.

6. The learned counsel for the appellant challenged the findings of the trial Court on the ground that the accused issued the two impugned cheques dated 28.3.2002 bearing Nos.1642561 and 1642562 for an amount of Rs.25,000/- each in favour of the complainant and when the said cheques were presented for encashment, the same were returned with an endorsement that funds insufficient. Since the cheques were bounced for insufficient funds, the complainant caused a legal notice to the accused on 13.5.2002. Despite receipt of the notice, the accused have not paid the amount and having followed with the procedure, the complainant had filed the complaint.

7. Per contra, the learned counsel for the accused submitted that the trial Court after analysing the oral and documentary evidence rightly acquitted the accused and there is no need to interfere with the same. He would submit that after pointing out lot of suspicion, the trial Court arrived at such a finding and the said finding of the trial Court is based on evidence and prayed for dismissal of the appeal.

8. I heard Mr.Su.Srinivasan, learned counsel for the complainant and Mrs.S.Sujatha, learned Legal Aid Counsel for the accused and also perused the materials available on record.

9. The main argument of the learned counsel for appellant is that the trial Court erred in holding that the complainant ought to have proved the signature of the cheque of the 2nd accused as the signature was disputed. He would submit the trial Court failed to see that even PW2 (bank official) did not dispute that the signature was not of the 2nd accused. The learned counsel then submitted that the cheques were returned not on the ground of variation of signature, but on the ground of insufficiency of funds. This Court finds some force in the submissions of the learned counsel for the complainant.

10. The case of the accused is that there was no transaction between the complainant and the accused and accused never borrowed any amount from the complainant and to discharge the said loan, the accused have not issued cheques in favour of the complainant. According to the accused, in the year 1995, the husband of the 2nd accused borrowed a sum of Rs.50,000/- from D.W.1-Rajagopal and for security, he had given the impugned cheques without signature. Further, the amount due to Rajagopal was discharged by the 2nd accused on 16.1.2002 and when the 2nd accused demanded Rajagopal for return of the impugned cheques, he replied that the same had been misplaced and he would search and give it later. According to the accused, subsequently, the impugned cheques have been wrongly used and filed the complaint. When the 2nd accused pleaded that the impugned cheques have been wrongly used by the said Rajagopal and filed a false case through the complainant, it is the bounden duty of the accused to prove the same. Admittedly, in the case on hand, the accused failed to do so.

11. The trial Court found that during the year 1995, the husband of the 2nd accused had received a sum of Rs.50,000/- from Rajagopal and for the purpose of security, he had executed promissory note and had given cheques. Thereafter, for repayment of the said amount, there was a difference between the husband of the 2nd accused and Rajagopal and by using the said cheques, Rajagopal set up the complainant and filed the complaint. In his evidence D.W.3-Gangadaran, husband of the 2nd

accused deposed that on 16.1.2002, he had repaid a sum of Rs.1,33,000/- to Rajagopal and Rajagopal had also executed receipt for the same.

12. When the accused pleaded that the impugned cheques have been wrongly used by the Rajagopal and filed a false case through the complainant, as stated supra, it is the duty of the accused to prove that the present case has been filed with false documents. Nothing has been produced to corroborate the version of the accused. No police complaint has been filed either by the husband of the 2nd respondent or the 2nd respondent in this regard. From the evidence on record, it is seen that only for the purpose of this case, the 2nd accused pleaded like. In fact, in his evidence as well as in the complaint, the complainant has categorically stated that on 30.1.2002, 2nd accused approached him and borrowed a sum of Rs.50,000/- and when demanded, the 2nd accused issued Ex.P1 and P2-cheques dated 28.3.2002 for a sum of Rs.25,000/- each for repayment of the said sum.

13. The complainant examined PW2-bank official, who categorically deposed that since there was insufficiency of funds, the impugned cheques were returned and the return memo and debit advise have been marked as Ex.P3 and P4. Immediately, the complainant had issued Ex.P4 legal notice to the accused. Despite receipt of the notice through certificate of posting, the accused have not replied. In reality, the 2nd accused have not borrowed any amount from the complainant and had not issued the impugned cheques for discharge of the loan, nothing prevented the accused from issuing suitable reply to the notice issued by the complainant. The non-issuance of reply notice by the 2nd accused would clearly shows that she had borrowed Rs.50,000/- from the complainant and for repaying the loan amount, she had given impugned two cheques in favour of the complainant. When the complainant presented the said cheques for encashment, the same were returned as funds insufficient.

14. The trial Court, in its judgment held that if really the accused had borrowed Rs.50,000/- from the complainant, for the purpose of repayment, the accused would have issued only one cheque. But in the case on hand, the complainant pleaded that for discharging the said loan, the accused had given two cheques and there was no necessity to issue two cheques. The aforesaid finding of the trial Court is unacceptable for the reason that nothing prevented the accused in giving two cheques for discharge of a single loan.

15. On overall analysis of the evidence on record, it is seen that the trial Court erred in holding that DW1 had set up the complainant to initiate the proceeding against the accused

by giving the impugned cheques given to him as security by the accused. The story of setting up pleaded by the accused has not been proved by way of documentary proof. In the absence of any proof, it cannot be contended that DW1 had set up the complainant to initiate the present proceedings.

16. On a perusal of the judgment of the trial Court, it is seen that it has shifted the burden on the complainant. The said approach adopted by the trial Court is not correct and it had failed to consider that the accused have to prove their case and discharge, if any, by making sufficient evidence that they have no liability to pay the cheque amounts to the complainant.

17. 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."

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

19. It is settled that Sections 138 and 139 of the NI 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.

20. 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 NI Act. In the case on hand, the 2nd accused has not gone into the witness box.

21. In a complaint filed under Section 138 of the NI 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 have failed to do so. On the other hand, the complainant has established his case by way of oral and documentary evidence.

22. Since issuance of Exs.P1 and P2-cheques by the accused is admitted and the complainant has proved his case by way of preponderance of evidence to show that Exs.P1 and P2-cheques returned with an endorsement funds insufficiency, it is to be held that the complainant has proved his case and that the trial Court went wrong in dismissing the complaint and acquitting the accused.

23. In the result, the criminal appeal is allowed setting aside the acquittal recorded by the trial Court and finds the accused guilty of offence under Section 138 of the NI Act. Accordingly, the accused is convicted for the offence under Section 138 of the NI Act and is directed to pay a sum of Rs.50,000/- towards the cheque amount and another sum of Rs.50,000/- as compensation and costs to the credit of C.C.No.609 of 2002 on the file of the learned Judicial Magistrate No.II, Coimbatore within a period of eight weeks from the date of receipt of a copy of this judgment, failing which the trial Court is directed to get the same realized in accordance with law.

24. The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Smt.S.Sujatha, Legal Aid Advocate.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

vs

To

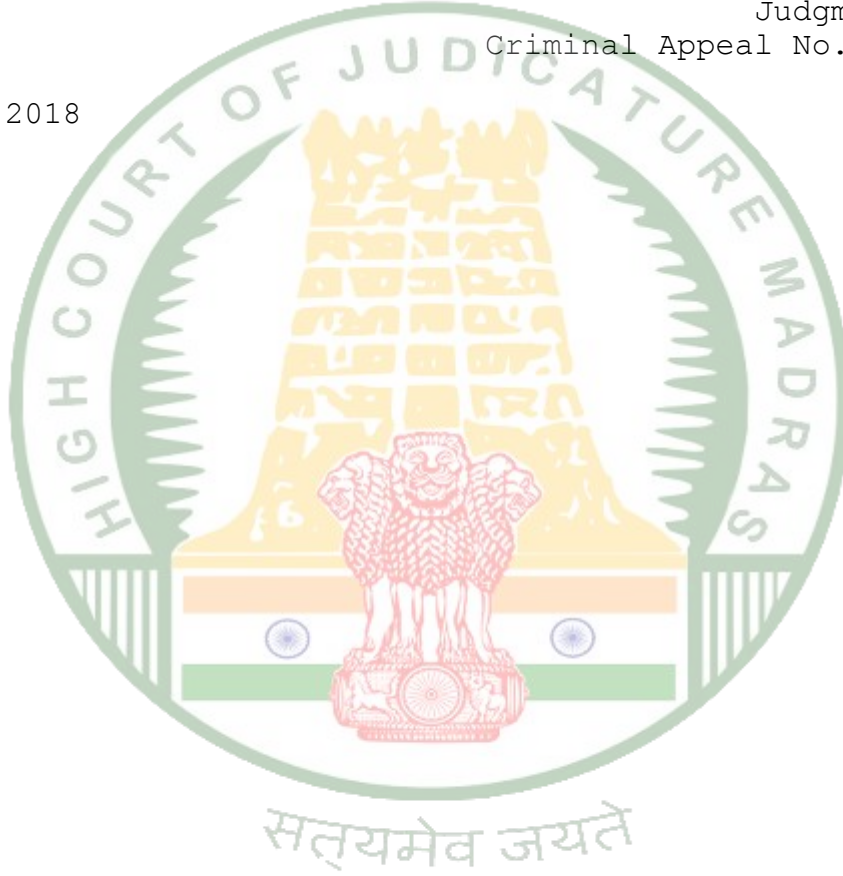
1. The Judicial Magistrate No.II,
Coimbatore.

2. The Secretary,
Legal Aid Authority,
High Court Campus, Chennai.

+2 cc to M/s.S.Sujatha, Advocate Sr.No.73735

Judgment made in
Criminal Appeal No.971 of 2005

CSL/19.11.2018



WEB COPY