IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 31.10.2018

CORAM:

THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

Criminal Appeal No.207 of 2011

K.Udhayakumar ... Appellant / Complainant

Vs

K.Sengodan
S/o Kandasamy
Proprietor
M/s. Ragupathi Exports ... Respondent / Accused

Prayer: Criminal Appeal is filed under Section 378 of the code of Criminal Procedure, to set aside the order of acquittal dated 15.02.2010 made in C.A.No.204 of 2009 on the file of Additional District and Sessions Judge, (Fast Track Court No.I, Erode) reversing the order of conviction dated 14.09.2009 made in CC No.117 of 2007 on the file of the Judicial Magistrate No.III, Erode by allowing this appeal.

For Appellant : Mrs. Nalini Chidambaram(SC) for M/s.C.Uma

For Respondent : Mr. C.S. Saravanan

JUDGMENT

This criminal appeal is directed against the Judgment rendered by the learned Additional District and Sessions Judge (Fast Track Court No.I, Erode), in Crl.A.No.204 of 2009 dated 15.02.2010, wherein, he allowed the appeal filed by the respondent and set aside the conviction and sentence passed by the learned Judicial Magistrate No.III, Erode in CC No.117 of 2007 dated 14.09.2009.

2. The case of the appellant / complainant in the Trial Court is as follows.

On 20.12.2006, the respondent/accused availed a loan of Rs.5,00,000/- and in order to discharge of the same, he issued Ex.P.1 Cheque drawn on Tamil Nadu Mercantile Bank, Erode dated 20.01.2007 bearing Sl.Nos.444973 and when it was presented for collection on 20.01.2007, the same was returned as unpaid for the reason “account closed”. The cheque which has been issued by the respondent/accused was marked as Ex.P.1. The return memo issued by the bank authorities is marked as Ex.P.2. Thereafter, the appellant/ complainant sent a statutory legal notice on 25.01.2007 under Ex.P.3, in which he called the respondent to pay the cheque amount within a period of 15 days. The said notice was served to the respondent under Acknowledgment Ex.P.5. The postal receipt issued by the postal authorities was marked as Ex.P.4. Subsequently, the respondent/ accused has not paid the cheque amount within the stipulated period mentioned in the notice. But, he sent a reply notice under Ex.P.2. Hence, the appellant filed a complaint against the respondent/accused under section 138 r/w 142 of Negotiable Instrument Act.

3) Before the trial Court, the appellant examined himself as PW 1 and exhibited 5 documents as Ex.P.1 to Ex.P.5.

4) With regard to the incriminating materials available in the evidence of PW 1, the trial Court examined the respondent under Section 313 (1) (b) of Cr.P.c., for which, the respondent denied the same as false. However, on his side, he examined 3 witnesses and marked 6 documents Ex.D.1 to Ex.D.6

5) When the respondent was examined as DW 1, he has stated as he is doing a business of power loom and manufacturing the Kada cloth in the name of Ragupathy Exports and his wife also doing the same business in the name and style of Sri Amman Exports. In the said business, the Complainant Udayakumar was working as a commission agent and purchased the Kada cloth on behalf of other customers. During the course of business transaction, for the orders placed by Udayakumar, he prepared different bills and Copy of the same are marked as D1 series. Further, he has stated in the business transaction for the advance amount received from the customers, it is usual practice that issuing a cheque without mentioning the date and the amount as security. In the said circumstances, the appellant / Complainant received blank cheques and subsequently by misusing the same, foisted a false case against him. Further, he has stated on 08.09.2006 itself, the account maintained by him in the Tamil Nadu Mercantile Bank was closed.

6) DW 2 Matheswaran is the clerk working under DW 1. He has stated that he knew the Udayakumar and he was working as a commission agent for selling the Kada cloth prepared by the respondent. In otherwise, he corroborated the evidence of PW 1, by saying that there is a practice adopted in the business community in issuing blank cheque towards advance amount received from the customers.

7) DW 3 is the Bank Manager of Tamil Nadu Mercantile Bank has stated that the respondent running current account in his bank and the same was closed on 11.09.2006. Further, he submitted the statement of accounts maintained in the name of respondent's firm for the period from 11.01.2003 to 08.09.2003 as Ex.D5 and Ex.D6.

8) After concluding the trial, the learned Judicial Magistrate No.III, Erode convicted the respondent / accused under Section 138 r/w 142 of Negotiable Instrument Act and sentenced him to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5,000/- , in default to undergo simple imprisonment for 3 months. As against the said conviction and sentence the respondent filed this criminal appeal before the Additional District Judge, Erode in CA No. 204 of 2009.

9) After elaborate enquiry, on 15.02.2010, the learned Additional District and Sessions Judge, Erode allowed the appeal and set aside the order of conviction. Against which, now the appellant who is the complainant in the trial court approached this Court by way of this appeal for setting aside the Judgment passed by the learned Additional District and Sessions Judge, Erode and for restoring the order of conviction passed by the learned Judicial Magistrate No.III, Erode dated 14.09.2009 in CC No. 117 of 2007.

10) Heard Mrs. Nalini Chidambaram, learned senior counsel, Ms.C. Uma, for the appellant / complainant and Mr. C.S. Saravanan, learned counsel for the respondent /accused and perused the documents available on record.

11) The learned Counsel appearing for the appellant would contend that the signature of the respondent found in the cheque is (Ex.P.1) not disputed by the respondent. Therefore, Section 139 of Negotiable Instrument Act comes to play and the Court is having the duty to presume that the cheque has been issued by the respondent for discharging the loan availed from the complainant. Further, he would contend, Section 20 of Negotiable Instrument Act authorizes the holder to fill the contents of the cheque. In the said circumstances, the respondent is having duty to create a suspicious circumstances over the case of the appellant. But in this case, the evidence let in by DW 1 to DW3 did not create any suspicious circumstances over the case of appellant. She would further contend that the learned 1st appellate Court relying the Judgment of Krishna Janardan Bhatt Vs. Battatraya reported in (2008 (1) TNJR 41 (SC) came to the conclusion that the debt has not been proved by the complainant in the Court below and accordingly set aside the order of conviction. According to her, the judgment rendered by the 1st appellate Court is liable to be set aside and

the conviction awarded by the Magistrate is liable for restoration.

12) On the other hand, the learned counsel appearing for the respondent would contend that it is unbelievable that the complainant to lend Rs.5,00,000/- as a loan to the respondent without obtaining any security document. According to the case of the respondent, the cheque has been issued to the respondent as a Security for the advance amount received by the customers. Further he would contend that the appellant had not produced the relevant document to show that he is having the capacity to lend Rs.5,00,000/- as a loan. According to him, the judgment rendered by the 1st appellate Court does not need any interference.

13) I have heard the rival submissions made by either side and perused the records carefully.

14) In order to substantiate the claim of appellant, the Counsel appearing for the appellant would relied on the judgment of our Honourable Apex Court in Rangappa Vs. Sri Mohan reported in (2010) 11 Supreme Court Cases 441. In the said Judgment, our Honourable Apex court has held in Para 26 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."

So in the said Judgment, our Honourable Apex court clearly held that the presumption raised under Section 139 of the Act does indeed include the existence of legally enforceable debt or liability. Before holding as above, our Honourable Apex Court over ruled the observations made in Krishna Janardhan Batt case, on this point.

15) The 1st appellate Court mainly following the principles laid down in the Krishna Janardhan Batt case and came to the conclusion that the debt is not proved by the appellant. Further more, it is not a disputed area that Section 20 of Negotiable Instrument act authorizes the holder to fill the cheque. Accordingly, the law quoted by the Counsel for the appellant is fully supported on her contention made in this

case. So the respondent is having the duty to create a doubt in the mind of the court with regard to the existence of a debt or a liability.

16) In this case, the respondent when at the time of giving evidence as DW1 has specifically stated that the cheque now under dispute was issued to the appellant as a security for the advance amount received from the customers during the time of placing orders for selling kada cloth. The said evidence was fully corroborated through the evidence of DW 2, who is the manager of a firm run by the respondent. It is the contention on the side of the respondent that Ex.R.1 Receipt Book was prepared only by the appellant. Since the same was denied, on going through the said submission, in the said exhibit, no where the appellant was signed as a party to the said document. Hence, merely giving evidence as the receipts are prepared by the appellant is not relevant to accept the case of respondent.

17) However, on go through the entire material supplied by either side, no document was produced on the side of the complainant to show that the respondent received a sum of Rs.5,00,000/- as a loan amount. The said loan amount is not a meager amount. Nowadays, even common pruded man asked some security document at the time of lending such a huge amount as a loan. It is the case of the respondent that the complainant was working as a Commission Agent under him. So, it is necessary for the complainant to prove that the respondent is in what way related to the complainant, upto the level of lending Rs.5,00,000/- as a loan. In the said circumstances, it is relevant to refer the judgment of our Honourable Apex Court reported in (2015) 1 Supreme Court Cases 99, in which it was observed as follows.

> It is pertinent to note that the alleged loan of Rs. 14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial Court took into account the testmony of the wife of the complainant in another criminal case arising under Section 138 of the Negotiable Instrument Act in which she has stated that the present appellant-accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to

him.

"In our view, the said conclusion of the trial Court has been arrived at on proper appreciation of material evidence on record. The impugned judgment of remand made by the High Court in this case is unsustainable and liable to be set aside."

As per the observation made by the Honourable Apex Court, in this case also, when at the time of giving evidence, PW 1 has stated that the loan given to the respondent was shown in the Income Tax Returns. But the said document is not produced by the complainant. Further, he has stated in the statutory notice sent to the respondent, he has not stated the details of the business transaction doing with the accused.

18) Further, in respect to the presumption raised under Section 139 of Negotiable Instrument Act, our Honourable Apex court in the case of Kumar Exports Vs. Sharma Carpets, 2009 (2) SCC 513 observed as follows.

"....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist…."

So, following the principles, it is necessary for the respondent to rebut the presumption raised under Section 139 of Negotiable Instruments Act. In this case, as already discussed, in order to prove the capability to lend Rs.5,00,000/- is not shown by the appellant. Further more, in the trial Court, on the side of the respondents, the Bank Manager of the Tamil Nadu Mercantile Bank was examined as DW 3. He has specifically stated that the cheques having earlier serial numbers and subsequent serial numbers of the present cheques have been encashed in the year of 2005 itself. Further, in order to prove the same, he produced copy of the statement of accounts pertaining to the account maintained by the respondent. It would also go to show and enabling a doubt whether the present cheque has been issued during the period of December 2006 or not. Further, in the light of the above discussion, the respondent creates a doubt, whether a man without having any sufficient means, lend Rs.5,00,000/- as a loan to the stranger. For the said question, the answer is not available from the evidence of complainant. In this connection, it is relevant to see the Judgment of our Honourable Apex Court reported in In Kali Ram v. State of Himachal Pradesh, 1973 (2) SCC 808, Khanna, J., speaking for the 3-Judge Bench, held:

> "One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the Courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

19) Further, in respect to the presumption under Section 139 of Negotiable Instrument Act, this Court relied upon a decision of our Honourable Apex Court reported in Hiten P. Dalal v. Bratindranath Banerjee, 2001 (3) CTC 243: 2001 (6) SCC 16 wherein it is held that

> "22. 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.
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> 23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

20) Furthermore, in this case, in order to prove the fact that the alleged cheque has been given to the Complainant as a security, no relevant document is produced on the side of the respondent. Further, in order to show the relationship with the appellant / complainant particularly for showing that he is a Commission Agent, no relevant document was produced by the respondent. Accordingly, in order to settle the issue raised in this case two conclusions are possible.

21) Apart from that, in an appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him and the fundamental principle of criminal justice delivery system is that every person, accused of committing an offence shall be presumed to be innocent, unless his guilt is proved by a competent Court of law. Secondly if the accused has secured an order of acquittal, the presumption of his innocence is reaffirmed and strengthened by the trial Court. Even if two reasonable conclusions are possible on the basis of evidence on record, the appellate Court should not disturb the finding of the acquittal recorded by the trial Court.

22) In the light of the above discussions, the Judgment rendered by the 1st appellate Court does not need any interference and the appeal is dismissed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate No.III,
   Erode.

2. The Chief Judicial Magistrate Court
   Erode.

3. The Additional District and Sessions Judge,
   (Fast Track Court No.I)
   Erode.

4.-Do- Thro' The Principal Sessions Judge,
   Erode.

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

+1cc to M/S.C.Uma, Advocate Sr.74819

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srg 21/01/2019