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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.03.2018

DELIVERED ON : 30.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.86 of 2011

A.Mahalingam ... Appellant /Respondent/Complainant

Vs

P.Subbaiyan ... Respondent/Appellant/Accused

Prayer: Appeal filed under Section 378(4) of the Criminal Procedure Code, to set aside the order of acquittal dated 22.12.2008, passed in C.A.No.153 of 2008 by the Additional District Judge-cum-Fast Track Judge No.1, Erode and to confirm the judgment dated 14.03.2008, passed in C.C.No.183 of 2006, on the file of the District Munsif-cum-Judicial Magistrate, Kodumudi.

For Appellant : Mr.V.S.Kesavan

For Respondent : Mrs.S.Sujatha
Legal Aid Counsel

JUDGMENT

This Criminal Revision Case is directed as against the Judgment in C.A.No.153 of 2008 22.12.2008 on the file of learned Additional District Judge cum Fast Track Judge No: I of Erode, reversing the Judgment made by the learned District Munsif cum Judicial Magistrate, Kodumudi in C.C.No.183 of 2006 dated 14.03.2008.

2.The Revision petitioner herein is the complainant in the above C.C.No.183 of 2006 filed under section 138 of N.I Act for dishonor of a cheque issued by the accused/respondent.

3.On trial the learned Magistrate having held the respondent / accused guilty of the offence, thereby convicted the



respondent by a Judgment dated 14.03.2008 sentencing him to undergo simple imprisonment for one year and to pay a fine of Rs. 5000/-.

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4. Aggrieved over the conviction, the respondent herein filed Criminal Appeal in C.A.No.153 of 2008 before the learned Additional District Judge and Fast Track Court No. I, Erode. The Appellate Judge vide the impugned order herein had reversed the conviction holding that the revision petitioner failed to establish that there was a legally enforceable debt in his favor behind the complaint and thereby the Learned Appellate Judge acquitted the respondent. As against the said order of acquittal this Criminal Appeal is filed by the appellant/complainant.

5. I heard Mr.V.S.Kesavan, learned counsel for the appellant and Mrs.S.Sujatha, learned Legal Aid Counsel for the respondent and perused the materials available on record.

6. The short point to be decided in this revision is whether the appellate court is right in holding appellant failed to prove his case, provided that the accused had not let in any evidence rebutting the presumption as to liability drawn against him.

7. The learned counsel for the petitioner would submit that the Appellate Court below erred in shifting the burden over him, when the respondent/accused himself had not adduced any evidence and had disputed his signature in the cheque.

8. Per contra, the learned counsel for the respondent would submit that though the trial Court had erred in shifting the Borden over the accused, the appellate Court has rightly held that only when the complainant has established that there is a legal enforceable debt it can be followed by presumptions. It is his case that the presumption to be drawn under section 118 and 138 of N.I. Act will come to picture.

9. By way of reply the Learned Counsel for the Revision petitioner/complainant would rely on section 118 and 138 of N.I. Act contemplating the Court to draw a presumption as against the accused.



10.He would contend that as per section 118(a) until the contrary is proved the Negotiable Instrument drawn has to be presumed to be transferred for consideration. In as much section 139 of N.I. Act is concerned, unless the contrary is proved the Court has to be presumed that the holder of the cheque received the cheque towards the discharge of a debt in whole or part or towards any debt or other liability.

11.Therefore it is the contention of the Learned Counsel for the revision petitioner that when the above presumptions under sections 118 and 139 are to be taken at the 1st instance by the Court, the Appellate court below had chosen to hold that it is for the respondent/complainant to establish a legally enforceable debt previous to presumption. Thus at the first instance Courts has to raise presumption against the accused and it is for the accused to rebut such presumption drawn against him.

12.The learned counsel for the revision petitioner would also submit that when issuance, presentation, cheque dishonor and as well the signature of the respondent is not in dispute and there were no contrary evidence let in by the accused rebutting the same, the appellate Court erred in reversing the finding of the Trial Court in convicting the respondent.

13.On perusal of case records, it is seen that the revision petitioner's case as projected against the accused / respondent is that the respondent had borrowed a sum of Rs.1 lakh and towards the discharge of said debt the accused issued the subject cheque for Rs.1 lakh in revision petitioner's favor. When the above cheque was presented for encashment it was dishonored. Thereupon statutory notice was issued by revision petitioner, however as even then debt was unpaid the complaint in C.C.No.183 of 2006 came to be filed against the accused.

14.To substantiate his claim, the revision petitioner has got examined himself as PW1 and documents Ex-P1 to Ex-P4 were marked through him. Ex-P1 is the cheque dated 02.06.2006, Ex-P2 dated 06.06.2006 is the return memo of the cheque, Ex-P3 is legal notice cast upon the respondent and Ex-P4 is its acknowledgement card.

15.The record further discloses that the accused while questioned under section 313 Cr.P.C. has stated that subject



cheque was not issued to appellant herein. It is the case of the accused / respondent that the cheque was originally issued to one Hariram Alagan towards the sum of Rs. 1 lakh borrowed from him.

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16.It is the case of the respondent that totally 5 cheques were issued to Hariraman Alagan towards a loan for security purpose. Despite payment of the loan amount said Hariram Alagan instead of returning the cheque but through the complainant/appellant herein had lodged the above complaint in C.C.No.183 of 2006.

17.It is needless to say that the burden of proving a cheque had not been issued for a debt or liability always is on the accused. In this regard it would be relevant to look into decision of the Hon'ble Apex Court made in the matter of Hiten P.Dalal (vs) Bratindranath Banerjee, holding that the burden of proving that a cheque had not been issued for a debt or liability is on the accused.

18.The next point for consideration for this Court is whether the above formal evidence let in by the accused while 313 questioning would be sufficient to shift the burden over the complainant, provided that there is no evidence let in by the accused.

19.In an identical situation, the point of law remains answered by the Hon'ble Apex Court in the matter of K.M.Beena - vs- Muniyappan and another reported in 2001 (4) CTC 382 holding as following that:

"7.In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."



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20.The above decision of the Hon'ble Apex Court would precisely demonstrate that an accused not having led any evidence could not be said to have discharged the burden cast on him.

21.Thus in line with the decision of the Hon'ble Apex Court, I am of the considered opinion that the respondent herein has not successfully rebutted the presumptions drawn against him. Accordingly, findings of the lower Appellate Court stand erroneous. On application of Law held as above by the Hon'ble Supreme Court of India, there is no doubt that the impugned order of acquittal passed against the accused / respondent cannot be sustained.

22.In the result, the revision petition stands allowed by setting aside the impugned Judgment in C.A.No.153 of 2008 dated 22.12.2008 on the file of the learned Additional District Judge cum Fast Track Judge No.I of Erode, upholding the Judgment made by the learned District Munsif cum Judicial Magistrate, Kodumudi in C.C.No.183 of 2006 dated 14.03.2008.

23.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(CS VI)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Additional District Judge-Cum-Fast Track Judge No.1,
Erode.

2.The District Munsif-Cum Judicial Magistrate,
Kodumudi.



3. The Secretary,
Legal Service Authorities,
High Court, Madras.

(The Legal Aid Authority attached to this Court is directed to
pay a sum of Rs.5,000)

+1cc to Mr.V.S.Kesavan, Advocate sr.74480

+2cc to Ms.S.Sujatha, Advocate sr.74152

Criminal Appeal No.86 of 2011

ad[co]
srg 16/11/2018