

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM :

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

CRL.A.No.347 of 2011

S.K.Meenakshi Sundaram ... Appellant/Respondent/
Complainant

-Vs-

M.S.Nagarajan ... Respondent/Appellant/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., against the Order of acquittal dated 08.04.2011 made in C.A.No.139 of 2010 on the file of the Additional District and Sessions Court / Fast Track Court No.1, Salem, reversal of the order of conviction dated 04.09.2010 made in C.C.No.120 of 2009 on the file of the Judicial Magistrate No.1, Salem.

For Appellant : Mr.N.Manokaran
For Respondent : M/s.Zeenath Begum
for Mr.V.Rajesh

JUDGMENT

This Criminal Appeal is directed against the Judgment dated 08.04.2011 in C.A.No.139 of 2010 on the file of the learned Additional District and Sessions Court (Fast Track Court No.I), Salem, whereby acquitting the accused/Respondent herein by reversing the Judgment of conviction and sentence and also compensation dated 04.09.2010 made in C.C.No.120 of 2009 on the file of the learned Judicial Magistrate No.I, Salem.

2.I have heard Mr.N.Manokaran, learned counsel for the appellant and M/s.Zeenath Begum for Mr.V.Rajesh, learned counsel for the respondent and perused the materials available on record.

3.Succinctly stated, the appellant has filed private complaint against the respondent herein under Section 200 of Cr.P.C. r/w Sections 138 and 142 of Negotiable Instruments Act, stating that as many as 6 cheques dated 22.01.2009, 10.02.2009, 18.02.2009, 25.02.2009, 14.02.2009 and 05.03.2009 were issued by the respondent herein in discharge of sale consideration in respect of the property sold by the appellant under Ex-P12 Sale

Deed in favour of the son of the respondent herein. When the cheques were presented for collection, two cheques were honoured and remaining four cheques Ex-P1 to Ex-P4 were returned by the banker with an endorsement "Payment stopped by the drawer" and "Exceeds arrangements" vide Exs-P5 to P8. Notice of demand under Ex-P9 dated 09.03.2009 was issued by the complaint to the respondent. Reply notice was given by the respondent to the complaint vide Ex-P13 dated 30.06.2009 disputing liability to pay. Hence, the complainant filed the above private complaint against the respondent with regard to the offence punishable under Section 138 of Negotiable Instrument Act.

4.The trial was conducted by the learned Judicial Magistrate No.1, Salem. On the side of the complainant, he was examined as PW-1 and on his side Exs-P1 to P13 were marked. There was no oral and documentary evidence made on the side of the accused. On considering the oral and documentary evidence adduced on either side, the learned Magistrate come to the conclusion that the accused is guilty of the offence punishable under Section 138 of Negotiable Instruments Act and convicted and sentenced him to undergo Simple Imprisonment for one year and also ordered to pay a sum of Rs.5 lakhs as compensation. By challenging the same, the respondent filed an appeal before the learned Additional District and Sessions Court, Salem in C.A.No.139 of 2010 and the learned Appellate Judge found that the accused is not found guilty of the offence and thereby acquitted the respondent herein vide the impugned Judgment dated 08.04.2011. Assailing the same, the present appeal is being filed by the complainant.

5.It is the submission of the learned counsel for the appellant that the learned Appellate Judge on presumption and assumption held that the possession of the property purchased by the respondent/ accused was not handed over to him on the date of registration of sale deed and was agreed to be handed over at a future date. Further contention of the learned counsel for the appellant is that the respondent herein has admitted the issuance of 6 cheques to the appellant herein and therefore, there is a presumption under Section 118 of Negotiable Instruments Act as to Negotiable Instrument of Consideration and therefore, the Lower Appellate Court ought to have held that the presumption has not been rebutted by the accused by adducing any oral or documentary evidence on his side, hence, the respondent is liable to be punished under Section 138 of Negotiable Instruments Act. The learned counsel would further submit that the learned appellate judge has unnecessarily gone into the handing over the possession of the property.

6. Whereas it is the contention of the learned counsel for the respondent that it is agreed between both parties that 6 post dated cheques has to be encashed only after handing over possession to the respondent herein. Since the appellant/complainant has encashed without the knowledge of the accused/respondent and without handing over the possession of the house to him, he instructed his banker to stop payment with respect of four cheques. Therefore, the learned counsel would submit that the learned Appellate Judge has rightly held that there was no legally enforceable debt or liability when the possession was not handed over, since the subject cheques were issued as security to ensure the possession. It is the further contention of the learned counsel that neither C.Ambika Textiles nor the accused/respondent is having nexus with the appellant and there was no privity of contract between the appellant and the respondent. Hence, he prayed to dismiss the above appeal.

7. I have given my anxious consideration to the arguments advanced on either side. At this juncture, it would be appropriate to look into the decision reported in CDJ 2016 SC 1007 in the case of B.M.Basavaraj -Vs- Srinivas S.Datta, wherein it is held as follows:

"9. Section 139 of the Act reads as under :-

"139. Presumption in favor 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"

10. Once the appellant files a complaint on the basis that he was holding the aforesaid cheques as holder in due course which were admittedly given by the respondent to the appellant and the said cheques were dishonoured when they were presented for encashment to the Bank and he, further, is able to establish that due notice of the dishonour of the said cheques was given to the respondent as provided in law, there was a clear presumption in favour of the appellant that the money was due under the said cheques. It may be noted that there is no defence to the effect that the cheques were not issued by the respondent or the cheques do not bear its signatures or they were not presented properly for encashment.

11. In the aforesaid circumstances, it was not even necessary for the appellant to produce any document to the effect that it had fulfilled the obligation under the agreement which was entered into between the parties. The case was founded on the dishonour of the two cheques and not on the basis of

the said agreement. Further, it was not a civil suit which was filed on the basis of the said agreement or any demand was raised for money on the ground that the agreement had been fulfilled. The case is that the payment was not released. It is here where the High Court has fell in legal error.

12. We are, therefore, of the opinion that the dishonour of the aforesaid cheques in the aforesaid manner clearly establish that the amount was due to the appellant and it is the respondent which has failed to discharge its obligation. This is more so, when in the legal notice, specific averment was made by the appellant that the appellant had discharged its obligation under the contract and only thereupon, the cheques were issued and the respondent had not even replied to the said notice. We, thus, set aside the orders of the courts below and hold that the respondent has committed an offence in terms of the provisions under Section 138 of the Act. The respondent shall pay to the appellant the amount due with interest at the rate of 9 per cent from the date of filing of the complaint within two months. If the amount is not paid within the aforesaid period, the respondent shall be liable to pay the appellant double the amount of cheques as well as the interest accrued on the cheques amount."

8. Now coming to the issue involved in this case, it is needless to say that the issue of possession and title can be gone into only by a Civil Court. Insofar as in a complaint under Negotiable Instruments Act, the same cannot be gone into unless otherwise presumption under Section 139 of Negotiable Instruments Act is rebutted with oral and documentary evidence, the accused is liable to be convicted and sentenced under Section 138 of Negotiable Instruments Act. The Appellate Court erred in holding that on the date of sale, possession was not handed over to the accused and hence, the appellant is not legally entitled to enforce the alleged debt. The Lower Appellate Court further failed to see that out of 6 cheques issued by the respondent, first two cheques were encashed by the appellant, however, the remaining 4 cheques were stopped payment, which itself would demonstrate the liability of the respondent. Once the accused admitted the issuance of cheque, there ends the matter and the presumption is always there to the complainant, unless it is rebutted by the accused, he cannot absolve from his liability. In the present case on hand, as discussed above, the presumption available to the complainant has not been rebutted by the accused and therefore, acquittal by the Lower Appellate Court is perverse and the same is liable to be set aside.

9. In view of the discussion above, I have no hesitation to hold that the respondent is guilty of the offence punishable under Section 138 of Negotiable Instruments Act and therefore, the appeal is liable to be allowed and accordingly allowed.

10. In the result:

(a) the Criminal Appeal is allowed and the Judgment dated 08.04.2011 in C.A.No.139 of 2010 on the file of the learned Additional District and Sessions Judge (Fast Track Court No.I), Salem is set aside;

(b) the Judgment of conviction and sentence and the compensation dated 04.09.2010 made in C.C.N.120 of 2009 on the file of the learned Judicial Magistrate No.I, Salem is hereby affirmed;

(c) the learned Judicial Magistrate No.I, Salem is hereby directed to secure the accused and send him to prison to undergo the remaining period of imprisonment as per the order of the learned Magistrate.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vs
To

1. The Additional District and Sessions Court/
Fast Track Court No.1, Salem.

2. The Judicial Magistrate No.1, Salem.

3. The Chief Judicial Magistrate, Salem (for information)

copy to

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

+1cc to Mr.N.MANOKARAN, Advocate, S.R.No.44622

+1cc to Mr.ZEENATH BEGUM, Advocate, S.R.No. 44641

Pre-delivery judgment made in
Crl.A.No.347 of 2011

SSV(CO)
TR(18/07/2018)