IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Criminal Appeal No.534 of 2011

Haribaskar ... Appellant/Complainant

Vs

1. M/s. Seema Sago & Starch Products (P) Ltd
   Rep by its Managing Director
   B.Mothilal Chowdhary
   302, Varadan Apartments II Floor
   Nanda Patkar Road, Ville Parle East
   Mumbai.

2. B.Mothilal Chowdhary

3. Mamta Chowdhyary ... Respondents/Accused 1 to 3

Prayer:- Appeal filed under Section 378 of the Code of Criminal Procedure, praying to set aside the order made in C.A.No.66 of 2009 dated 25.08.2010 on the file of the Principal Sessions Judge, Namakkal and to confirm the Trial Court Judgment made in STC No.50 of 2008 dated 01.09.2009 on the file of the Judicial Magistrate No.II, Namakkal.

For Appellant : Mr.V.Ashok Kumar
for Mr.SU.Srinivasan

For Respondent : Mr.A.K.Kumarasamy

J U D G M E N T

This Criminal Appeal has been filed against the judgment passed in C.A.No. 66 of 2009 on the file of the Principal Sessions Judge, Namakkal dated 25.08.2010 reversing the judgment of conviction made in STC.No. 50 of 2008 on the file of the Learned Judicial Magistrate No.II, Namakkal dated 01.09.2009.

2. The case of the prosecution in brief is as follows:

(i). The first accused/1st respondent is a Private Limited Company. The second and third accused are the Managing Director and the Director of the first accused company respectively. Admittedly, the second accused is the authorized signatory of the first accused company. Further, he is actively participating in the day to day affairs of the said company. On 26.12.2005, the second accused/2nd respondent approached the complainant/petitioner herein for financial assistance and he borrowed a sum of Rs.25,00,000/- from the complainant. In order to discharge the above said loan, he issued a cheque dated 05.04.2006 drawn on City Bank N.A., Mumbai bearing serial Nos.833509 000037000, 309540 for the said sum. At the time of issuing the cheque, the second respondent promised to the complainant that the cheque will be honoured. On 09.05.2006, the complainant presented the said cheque for encashment in Indian Overseas Bank, Pudanchanthai Branch, but, on 18.05.2006, the said cheque has been dishonoured and returned for the reason "Account closed". In view of the said dishonour on 16.06.2006, the complainant issued a statutory notice to all the accused demanding them to pay the cheque amount within 15 days from the date of receipt of statutory notice and the same was received by the first accused on 19.06.2006. On the other hand, the notice sent to the second and third accused are returned as "not claimed". Subsequent to the receiving of notice, no reply has been received from the accused.

(ii). So, the complainant preferred a private complaint under Section 138 of the Negotiable Instruments Act. After taking cognizance, the learned Judicial Magistrate issued summons to the accused. After the appearance of all the accused, they were questioned with regard to the allegations leveled in the complaint filed by the complainant, for which, all the accused denied the same and opted for trial.

3. In the trial court, in order to prove the case of the complainant, two witnesses were examined as P.W.1 and P.W.2, besides, 7 documents were exhibited as P1 to P7. After examining the prosecution side witness, all the accused were examined under Section 313 Cr.P.C about the incriminating evidence against them, for which all the accused denied the same as false. Subsequent to that the second accused examined himself as DW.1 and marked Ex.X1 to Ex.X4.

4. Having considered the evidence and the documents on record, the learned Judicial Magistrate No.II Namakkal found the accused guilty under Section 138 of N.I. Act, he convicted the accused and sentenced them to undergo 1 year Simple Imprisonment.

5. Aggrieved over the Judgment passed by the trial court, all the accused preferred an appeal before the Principal Sessions Judge, Namakkal/First Appellate Court in Criminal Appeal No.66 of 2009. After elaborate enquiry, the learned Principal Sessions Judge, Namakkal set aside the order of conviction and sentence imposed upon the accused and allowed the appeal.

6. Having been aggrieved against the said Judgment, now the complainant preferred a criminal appeal before this court, praying to set aside the judgment passed by the Principal Sessions Judge, Namakkal and consequently to confirm the conviction and sentence awarded by the learned Judicial Magistrate No.II, Namakkal.

7. Today, when the appeal is taken up for consideration, I have heard the arguments of Mr.V.Ashok Kumar, learned counsel appearing for the appellant and Mr.A.K.Kumarasamy, learned counsel appearing for the respondents and also perused the records carefully.

8. The first submission made by the learned Counsel for the appellant is that in the Trial Court, the signature found in the cheque was admitted by the accused. So, automatically the presumption under Section 139 of N.I.Act came in to play. The Trial Court Judge observing that A2 being a prudent business man was unable to state to whom this cheque was handed over, how the cheque went to the hands of the complainant and for non-proving of the said fact by the accused convicted and sentenced them as above. Further, the first Appellate Court observed that no prudent man can give a loan of Rs.25,00,000/- to anybody without getting any documents. Further, the complainant has not proved that he is having the capability for giving Rs.25,00,000/- as loan, and therefore, allowed the appeal and set aside the conviction and sentence passed by the learned trial Judge.

9. Now, in order to substantiate the claim made in the present criminal appeal, the learned counsel appearing for the appellant submitted that since the signature found in the cheque was admitted by the accused, it is his duty cast upon the respondent to put forth a probable defence for rebutting the presumption.

10. In this regard, in the trial Court, the accused took a stand that the cheque under dispute was stolen away from the accused company. It is the submission of the learned counsel for the respondents that in the trial court, it was pointed out that the said defence was proved by showing the copy of the complaint lodged before Police Station with regard to the theft of cheque.

11. Further, the learned counsel appearing for the respondent/accused had relied on the judgment reported in 2007 AIR SCW 6736 in the case of John K.John V.Tom Varghese and Anr,which reads as follows:

> "The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay installments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of of the Act, no exception thereto can be taken."

12. It is submitted that without considering the said observation made by the Hon'ble Apex Court, the trial Court convicted the accused. On the other hand, the First Appellate Court clearly held that the complainant has not proved the source for giving the said amount as loan.

13. In the above said circumstances, it is necessary for this Court to see other facts involved in this case, to arrive at a conclusion. It is an admitted fact that in 2003 itself, the bank authorities who have lent the loan to the accused company issued a notice under Section 132 of SARFAESI Act for taking symbolic possession. But, as per the case of the complainant, only in the year 2006, the loan of Rs.25,00,000/- was given to the accused. No doubt, the amount of Rs,25,00,000/- is not a small amount. The accused and complainant did not have any business relationship prior to the present one. Furthermore, the complainant was doing his business in Namakkal District. On the other hand, the accused was running a company in Mumbai. In the said circumstances, it is unbelievable that any prudent person would lend an amount of Rs.25,00,000/- without obtaining any collateral security. Even assuming that Section 139 of NI Act is in favour of the complainant, it is necessary to analyze the other circumstances also. In the evidence given by PW1 during cross examination, he clearly admitted that he had not received any pro note from the accused. Subsequently, he had stated that no written documents were obtained from the accused at the time of giving loan. Furthermore, he admitted that he did not enquire about the financial position of the accused. Further, he deposed that he had not verified about the properties which stand in the name of the accused.

14. Finally, he also admitted that he had not produced any documents before the trial Court to show his financial capacity to lend a huge amount of Rs.25,00,000/- as loan. Specifically, on going through the evidence of P.W.2, it is seen that the accused was having only Rs.9,00,000/- in his bank account.

15. So the said facts are the probable defence put forth by the accused in rebutting the prosecution. Accordingly, the learned First Appellate Court also considered the evidence given by P.W.1 in his cross examination and allowed the appeal.

16. Reliance is placed in the Judgment of Kalavally Vs Parthasarathy reported in 2008 (5) CTC 527, which reads as follows:

> "42. As laid down by the Apex Court in a catena of decisions referred to above, the burden upon the accused of proving the non-existence of the

consideration can be either by direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the accused is entitled under law to rely upon the evidence led in the case including that of the complainant as well.

43. In case, where the accused fails to discharge initial onus of proof by showing the non-existence of the consideration, the complainant would invariably be held entitled to the benefit of presumption arising under Section 118(a) of the Act in his favour. The Court may not insist upon the accused to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.

44. In this case, the evidence on record makes it abundantly clear that the accused has proved the defence taken by her by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies. In this case, the accused has elicited vital admissions during the course of cross-examination of P.W.1. From the evidence of D.Ws.1 and 2, which in the considered view of this Court, has not been discredited, coupled with the fact that the complainant had not produced any account books to show that he was carrying on quarrying business as claimed by him and no documentary proof has been produced to prove his means it should be held that the complainant has failed to prove that the cheque was given in discharge of a legally recoverable liability. When the defence taken by the accused is that the complainant was a man of no means, it is the bounden duty of the complainant to prove by acceptable evidence that he had the means on the date on which he is alleged to have advanced the loan to the accused. In this case, admittedly, the accused had not given any receipt or executed any instrument in favour of the complainant evidencing the payment of the loan amount said to have been advanced by the complainant to the accused. When a huge amount of Rs.3,00,000/- is said to have been paid, normally, a prudent man would have obtained a document evidencing such payment. But the complainant had failed to get such document. The complainant had not explained as to why such document was not obtained from the accused."

17. The observations laid in the above said judgments of the Hon'ble Apex Court are also squarely applicable to the facts of present case.

18. It is obligatory on the Court to raise the presumption in every where all the factual aspects have been established. In the present case, the facts as shown above clearly reveal that the complainant has miserably failed to prove his case beyond all reasonable doubt.

19. Hence, this Court comes to the conclusion that the judgement rendered by the First Appellate Court on the above fact is justified and there is no need to interfere with the findings arrived by the First Appellate Court.

20. Accordingly, this criminal appeal is dismissed. The judgment of the First Appellate Court in C.A.No.66 of 2009 is confirmed. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

msv
To

1. The Principal Sessions Judge
   Namakkal.

2. The Judicial Magistrate-II
   Namakkal.

3. -Do- Thro' The Chief Judicial Magistrate,
   Namakkal.

4. The Section Officer,
   Criminal Section, High Court, Madras-104.

+1cc to Mr.Su.Srinivasan, Advocate Sr.53412
+1cc to Mr.A.K.Kumarasamy, Advocate Sr.52719

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srg 17/10/2018