

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 04.07.2018

JUDGMENT PRONOUNCED ON : 11.09.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.10 of 2010

M/s.Innovative Enterprises.,
Rep. by its Partner,
Kaisar T.Johar,
No.65, Moore Street, 1st Floor,
Chennai - 600 001. .. Appellant / Respondent /
Complainant
versus
1.M/s.Steel and Tubes Syndicate,
Rep. by its Partner Ayyappen [R2]

2.Ayyappen,
Partner, Steel and Tubes Syndicate,
Both at No.95, Lingi Chetty Street,
Chennai - 600 001. .. Respondents / Appellants /
Accused 1 & 2

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment and decree dated 24.10.2009 passed in Crl.A.No.301 of 2006 on the file of the learned V Additional Sessions Court, Chennai, in reversing the judgment dated 18.10.2006 passed in C.C.No.3788 of 2001 on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, by allowing the present Criminal Appeal.

For Appellant : Mr.J.Jaseem Mohammed

For Respondents : Mr.P.V.Sanjeev

J U D G M E N T

The complainant in C.C.No.3788 of 2001 on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, is the appellant herein. By a judgment dated 18.10.2006, the learned Magistrate convicted the respondents /accused under Section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as "N.I. Act"] and sentenced the second respondent to undergo simple imprisonment for 6 months with a fine of Rs.5,000/- each, in default to undergo further period of 2 months simple imprisonment.

2. Aggrieved over the said conviction, the accused prepared an Appeal [in Crl.A.No.301 of 2006] before the learned V Additional Sessions Judge, Chennai, wherein he reversed the verdict of conviction and acquitted the respondents/accused. As against the order of acquittal dated

24.10.2009, the complainant has preferred the present Appeal.

3. The facts leading to the present Appeal may be stated briefly: The appellant [complainant] is a partnership firm carrying on the business in Galvanized Steel Tubes, Pipes, Pipe Fittings and other allied products. On behalf of the first accused firm [first respondent], the second accused [second respondent] in the capacity, as its partner approached the complainant and on the basis of the orders placed by the accused, the complainant supplied the materials to the accused. The last supply was made and the balance outstanding in this regard is Rs.2,00,000/-. In order to discharge the liability, the accused issued a cheque bearing serial No.119234 dated 31.12.2000 for a sum of Rs.2,00,000/- drawn on Lakshmi Vilas Bank Limited, Chennai.

4. On receiving the said cheque, the complainant presented the same through his bankers for realisation on 17.05.2001 and the same was returned on 18.05.2001 with an endorsement [exceeds arrangement]. The fact of the dishonour was intimated to the complainant by his bankers. Therefore, on 24.05.2001, the complainant issued a statutory notice to the respondents through his counsel under Section 138 of N.I. Act. Having received the said notice, both the accused have failed and neglected to pay the cheque amount. Hence, the complainant filed a private complaint for the offence under Section 138 of N.I. Act.

5. In the trial Court, the complainant examined himself as P.W.1, besides 11 documents were marked as Ex.P.1 to Ex.P.11. On the side of the respondents, 3 witnesses were examined as D.W.1 to D.W.3 and 11 documents were exhibited as D.1 to D.11. After concluding the trial, the learned XV Metropolitan Magistrate, George Town, Chennai, convicted the accused as stated in the first paragraph of this judgment.

6. After elaborate enquiry, on 24.10.2009, the learned V Additional Sessions Judge, Chennai, allowed the appeal and set aside the order of conviction. Against which, now the appellant being the complainant in the trial Court approached this Court for setting aside the judgment passed by the learned V Additional Sessions Court, Chennai and for restoring the order of conviction passed by the learned XV Metropolitan Magistrate, George Town, Chennai.

7. When the appeal is taken up for consideration, I have heard the arguments of Mr.J.Jaseem Mohammed, learned counsel appearing for the appellant, Mr.P.V.Sanjeev, learned counsel appearing for the respondents and also perused the records carefully.

8. The learned counsel appearing for the appellant [complainant] contended that the Lower Appellate Court has erred in finding the respondents guilty of the offence under Section 138 of N.I. Act stating that the material alteration found in the cheque is not an admitted alteration. Further, the Lower Appellate Court is not justified in applying the presumption under Section 139 of N.I. Act.

9. Supporting the findings of the Lower Appellate Court, the learned counsel appearing for the respondents submitted that the findings rendered by the Lower Appellate Court does not suffer from any infirmity.

10. Whether the order of acquittal passed by the Lower Appellate Court is manifestly erroneous warranting interference is the only point that arises for consideration in this Appeal.

11. Now, on going through the judgment of the learned First Appellate Court it was held that, the cheque now under dispute has been issued in the year of 1999 and subsequently the year 1999

materially altered as 2000. The said alteration was not done by the respondents, thereby, the conviction and sentence awarded by the trial Court is liable to be set aside. Further, in the very same judgment, the First Appellate Court has held that the complainant did not prove the legally enforceable debt existed in the year 2000 and no document was produced in this regard either before the trial court or in the appellate court. So, for the said reason, the Appeal filed by the respondents was allowed.

12. Now on considering the material alteration alleged by the respondents, during the time of giving evidence, P.W.1 has stated in his evidence that he presented the cheque after 5= months from the date of issue. In otherwise, it was contended on the side of the respondents that the year mentioned by the respondents was altered as 2000 instead of 1999. Further, it is the case of the respondents, if the said date was altered definitely it is necessary to obtain the signature of drawer near to the correction. But in this case, there is no signature obtained from the drawer. In the said situation, during the time when the drawer of the cheque was examined as D.W.3, he has stated that the cheque now under dispute was handed over to the appellant's company on 16.06.1999. So, according to the case of the respondents, the date i.e. 16.06.1999 was filled with the date as [31.12.2000] and presented the same for enhancement.

13. In usual course, only the bank authorities are handle the cheques in day-to-day work. So, the evidence given by the bank officers alone are the competent evidence to solve the said issue.

14. In the trial Court, the Assistant Manager of Union Bank of India was examined as D.W.1, he has stated that the cheque under dispute has came to his bank on 30.12.2000 for enhancement. Further, he has stated that, if any correction is made in the date or in the amount, the full signature of drawer is necessary for passing the cheque. Further, the alteration made in Ex.P.1 is the permitting alteration but not a material alteration. However, on going through the Ex.P.1 as already stated that there is no signature found in the material alteration. So, with regard to the material alteration, the evidence given by D.W.1 is contradictory in nature.

15. Moreover, in the trial Court, the Branch Manager of the Lakshmi Vilas Bank was examined as D.W.2, he has stated in his evidence that for the correction made in the cheque, the full signature of drawer is necessary. Further, in the cross-examination after seeing the Ex.P.1, he has specifically stated that the year written through the typewriting machine was erased and corrected as 2000. Further, he stated that the said correction is not a permitted material alteration. Since, the evidence given by the D.W.2 is a crucial evidence, which changes the entire case of the appellant. In order to dispute the evidence given by D.W.2, on the side of the appellant, no supporting document was produced to substantiate the claim made by him. Accordingly, the First Appellate Court arrived at the conclusion that the Ex.P.1 cheque was materially altered is found correct.

16. Secondly, the learned counsel appearing for the appellant would submit that in the trial Court in order to prove the liability of the respondents, as many as 11 documents were exhibited on the side of the complainant. Without considering the said documents, the First Appellate Court came to the conclusion that the cheque pertaining to this case has not issued in order to discharge the liability of the respondents is nothing but erroneous one. Further, he submits that in order to rebut the presumption raised under section 139 of N.I. Act, the respondents have not produced any evidence and they failed to create a doubt over the case of the complainant.

17. However, the learned counsel appearing for the respondents would contend that the copy of the invoice and the statement of accounts, which were marked as Ex.R.2 and Ex.R.4 proved that the respondents are not having any liability. Further, he would contend that the First Appellate Court rightly appreciated the evidence of respondents and set aside the conviction and sentence, which

does not need any interference.

18. Before considering the rival submissions made on either side, it is necessary to see the judgment of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in [2010] 11 SCC 441 wherein, it has observed as follows :

¶26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat vs. Dattatraya G.Hegde [(2008) 4 SCC 54] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, 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, there can be no doubt that there is an initial presumption which favours the complainant.¶

27.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.¶

19. Accordingly, in this case also, the duty cast upon the respondents to rebut the presumption mandated under Section 139 of N.I. Act.

20. In the trial Court, through the evidence of D.W.3, it was established, previous to the date in which the cheque was dishonoured, the respondents issued another 4 cheques for various amounts. Further, the same were acknowledged by the appellant through Ex.P.8. In the trial Court, it was the case of the respondents that the entire due was paid to the appellant through various cheques, for which, the copy of the accounts pertaining to the respondents was marked as Ex.P.6. On close scrutiny of the said document reveals that the cheques contained the serial number earlier to the date, in which, the cheque was issued has been presented and the same was collected. Further, as per Ex.R.7, Rs.35,000/- was paid to the appellant. Likewise, as per Ex.P.8, Rs.15,636/- was paid to the appellant through demand draft. The said facts are admitted by the complainant.

21. Furthermore, it is an admitted fact that the date, in which, the cheque was issued is a Holiday. Both the respondents are running the Company, issuing the cheque in the Holiday is also create a doubt, whether the transaction as stated by the appellant had happened or not. Further, at the time of filing the complaint, before the trial Court, the appellant did not enclose the copy of invoice to show his bonafide. However, only during the time of trial, he produced the invoice.

22. Apart from that during the time of cross-examination, P.W.1 has specifically stated as he did not know the date on which the material was supplied to the respondents, he has stated that for supplying the materials to the respondents, registers and bills were maintained, but those documents have not been exhibited before the trial Court. Further, he has stated that on 12.08.2000, the materials worth about Rs.2,04,200/- were sent to the respondents through Invoice No.603, subsequently, in order to pay the said amount, the respondents issued the cheque in the month of

December. So, the said evidence establish that after 4 months from the date of purchase, the respondents issued the cheque for the sale price, would create a doubt whether the transaction stated by the complainant is true or not. Further, creates a doubt, whether the said cheque was issued in order to discharge the liability arises in Invoice No.603 or not.

23. In the business community, it is the common practice to receive the blank cheque or filled cheque immediately after sending the materials. But in this case, the evidence of P.W.1 shows such practice is not adopted in this case.

24. In the light of the above discussions, the case of the appellant suffers through two reasons; [i] the material alteration stated by the respondents has not been properly explained, and [ii] the respondents raised a reasonable doubt in respect of his liability. Hence, there is no need to interfere with the findings arrived at by the trial Judge.

25. In the light of the above discussion, this Court finds that the Criminal Appeal filed by the appellant deserves no merits and accordingly, the same is dismissed. The order of acquittal dated 24.10.2009 passed by the learned V Additional Sessions Court, Chennai, in CrI.A.No.301 of 2006 is hereby confirmed.

11.09.2018

Speaking order / Non-speaking order

Index : Yes / No

Internet : Yes

sri

To

1.The V Additional Sessions Court,
Chennai.

2.The XV Metropolitan Magistrate,
George Town, Chennai

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

R.PONGIAPPAN, J.,
sri

Pre-delivery Judgment in
Crl.A.No.10 of 2010

11.09.2018