

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:02.02.2018

CORAM

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

Crl.Appeal No.314 of 2009

K.Jeganathan

... Appellant

Vs

K.Santhi

... Respondent

Prayer: Criminal appeal preferred under Sec.378 of the Code of Criminal Procedure, praying to set aside the order of acquittal dated 11.03.2009 made in C.C.No.125 of 2007 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai.

For Petitioner : Mr.N.Manoharan

For Respondents: No Appearance

JUDGMENT

This appeal against the order of acquittal passed by the learned District Munsif-cum-Judicial Magistrate, Perundurai, in C.C.No.125 of 2007, dated 11.03.2009.

2. The appellant/complainant who is a resident of Karakkankattur of Perundurai Taluk, Erode District, has filed this appeal and has contended that he knew the respondent/accused for many years and that the respondent/accused was owning a business in the name and style of "Delight Enterprise". The appellant/complainant had taken a loan of Rs.5,00,000/- and had given a cheque dated 13.02.2007 drawn on Punjab and Sindh Bank, Tiruppur Branch, bearing No.044523. When the cheque was presented for collection by the appellant in his account with Indian Bank, Perundurai Branch, the cheque got returned unpaid with a reason mentioned in the return memo dated 01.03.2007 as "exceeds arrangement". Consequently, the complainant issued a legal notice dated 24.03.2007, a copy of which is marked as Ex.P3 and the same was returned as evidenced by the returned cover Ex.P4. This complaint under Section 138 of the Negotiable Instruments Act, arose since the respondent did not make good the payment and had committed an offence under Section 138 of the Negotiable Instruments Act.

3. In the trial Court, the appellant examined himself and marked as Ex.P1 to Ex.P4. The respondent examined himself and five other witnesses and marked as Ex.R1 to R.30.

4. In brief, the respondent had contended that she did not take any loan from the complainant and also that she was taking treatment for fracture of her leg for a period of about four years, during which she has entrusted her business to her Manager, Mr.Surendhrakumar Jain. Accordingly, Mr.Surendhrakumar Jain was managing her affairs and was found to have committed serious irregularities and misappropriation of funds by issuing her cheques and when it was made known to the family of Mr.Surendhrakumar Jain by the respondent, he had taken the extreme step of ending his life after which she had to publish in the newspaper regarding the misuse of her cheques. She had also communicated to the bank for stop payment of the cheques apprehending such misuse. According to her, all these events took place much before the date of the subject cheque which was returned unpaid and therefore, the cheque (Ex.P1) has been misused by the appellant who is the relative of one Mr.K.N.Shanmugam running a finance business in the name of "Amudham Finance". The further contention of the respondent is that the appellant did not have financial capacity to lend such a huge amount of Rs.5,00,000/-.

5. In order to substantiate all these contentions, the respondent had examined herself as RW.1 and 5 other witnesses. Three of the witnesses were bank officials from the banks where the appellant/complainant and the respondent had their respective accounts. From their deposition, it can be seen that the complainant did not maintain sufficient balance in his account to lend Rs.5,00,000/- to the respondents and also the cheque leaf series consisting of Ex.P1, which was issued by the bank to the respondent as in the year 2004 and the cheque bearing Nos.44520 and 44521 were encashed in March 2004 itself and also there were no transactions in the account after 2004 as evidenced by the statement of accounts.

6. Mr.Surendhrakumar Jain was taking care of the business of the accused as Manager. This is also evidenced by various correspondences addressed to him. These correspondence are marked as Ex.R8 to Ex.R11. Moreover, Ex.R19 which is a copy of the First Information Report and Ex.R20 is the death certificate of Mr.Surendrakumar.

7. The appellant/complainant during the course of cross examination had admitted that his annual income was Rs.1,50,000/- and that he is not an Income Tax assessee. Furthermore, he has also stated that he does not remember as to how he knew the respondent much in contradiction to the

averments in his complaint. The respondent on her part has also adduced evidence for medical treatment which she had undergone in Ganga hospital for a period of four years as evidenced by Exs.R.25 to Ex.R.30.

8. The learned District Munsif cum Judicial Magistrate, Perundurai, found the contentions of the respondent/accused very consistent and cogent and thereby concluded that the onus to prove the liability got shifter to the complainant. According to the learned District Munsif cum Judicial Magistrate, Perundurai, the appellant/complainant had failed to prove that the cheque was issued to him to liquidate a legally enforceable debt as envisaged in the Act. The Trial Court also did not find any valid business transaction between the complainant and the accused and also doubted the financial capacity of the complainant to have lent such a huge sum of Rs.5,00,000/- to the accused. These factors along with the evidentiary value of the documentary and oral evidence adduced by the accused tilted the decision in favour of the accused by the trial Court.

9. It is true that the appellant/complainant has contradicted his own statement and has not attempted to substantiate his contentions. It is trite law that the presumption in favour of the complainant can always be rebutted by the accused and that the nature of evidence for the rebuttal is based on the principles of preponderance of probabilities unlike in other criminal case wherein, the proof has to be beyond reasonable doubts.

10. In the instant case, it is true that there are many unanswered questions in the evidence adduced by the accused which are as follows:

(i) The accused has claimed that it was only during the period of four years of her medical treatment that she had to depend on her Manager Mr.Surendrakumar Jain to take care of her business. The medical records do not indicate the duration and it is notable that the period was only as an out-patient and why she could not take care of her business is not clear.

(ii) The reply notice (Ex.R.15) has been issued by the accused after a lapse of seven months.

(iii) The Manager of the accused died on 15.05.2006 but the notice about the misuse of cheques was given only on 23.06.2007 as evidenced by Ex.R19. No reason is assigned for such an inordinate delay when the cause of the death of the Manager was said to be pressure brought on him for his act of misappropriation and cheating.

(iv) The accused has claimed to have given a letter dated 16.06.2006 for stop payment of the cheque to the bank. But the cheque has been returned for insufficient funds and not for the reason of "Check countermanded".

11. Mr.N.Manoharan, learned counsel appearing for the appellant relied on the decision in Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Payrelal reported in (1999) 3 SCC 35 and contended that the initial burden lies on the accused to prove the nonexistence of consideration by bringing on record such facts and circumstances which may lead the Court to believe the nonexistence of consideration and that only if this burden is discharged by the accused, the onus of proof of passing of consideration would pass on to the complainant. Reliance was also placed on the decision in B.M.Basavaraj Vs. Srinivas S.Datta reported in CDJ 2016 SC 1007, wherein it has been held thus:

"10. Once the appellant filed a compliant 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."

12. However, in the instant case, the complainant has categorically admitted that his annual income is only Rs.1,50,000/- and that he is not an income tax assessee. As already pointed out, the complainant could not state during the course of cross examination as to how he knew the accused though in his compliant he had contended that he knew the accused for quite a long time. The cheque leafs containing the cheque in issue was issued by the bank during the year 2007 itself and it is also found from the evidence adduced on the side of the respondent/accused that there were no transactions in the said account of the accused. The complainant has not stated by adducing acceptable evidence to show his wherewith to lend such a huge amount of Rs.5,00,000/- to a person who is not known to him. He has not also obtained any document from the respondent/accused as a security for such a huge amount, in the facts of the present case. As rightly pointed out by the learned counsel for the accused the standard of proof in discharge of the burden in terms of Section 139 of the Negotiable Instruments Act, being preponderance of

probabilities, the inference there for can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon.

13. Keeping in view the peculiar factual situation in the present case, it cannot be said that the judgment passed by the learned trial Judge was perverse or suffer from any infirmity. Though, there are certain inconsistencies on the side of the accused, the fact that the complainant has not substantiated satisfactorily the presumption that the cheque was given for liquidation of a legally enforceable debt on the face of a rebuttal with reasonably good evidence by the accused, the appeal is liable to be dismissed.

14. In the result, the appeal is dismissed.

Sd/-  
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To

The District Munsif-cum-Judicial Magistrate,  
Perundurai.

+ 1 cc to M/s. N. Manokaran, Advocate SR.8167

Cr1.Appeal No.314 of 2009

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