IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.378 of 2009

MacNels Shipping Madras (P) Ltd.,
Represented by its Senior Executive
G.Sivasubramaniam,
No.157, Lingi Chetty Street,
Chennai - 600 001. .. Appellant / Complainant

versus

1.M/s.Rayalu & Co.,
Represented by its Proprietor
Venkatarayalu,
31, Chinnathambi Street,
Chennai - 600 001.

2.Venkatarayalu,
Proprietor of M/s.Rayalu & Co.,
AK.89, Area - 1,
10th Main Road, Anna Nagar,
Chennai - 600 040. .. Respondents / Accused 1 & 2

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, against the order of conviction and sentence dated 12.02.2009 in C.C.No.638 of 2002 on the file of XV Metropolitan Magistrate, George Town, Chennai - 600 001.

For Appellant : Mr.V.S.Ilango for M/s.Kanna Associates

For Respondents : Mr.M.Marudhachalam [Legal Aid Counsel]

J U D G M E N T

This appeal is directed against the order dated 12.02.2009 in C.C.No.638 of 2002 on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, in which, the case has been filed by the appellant against the respondents for the offence under Section 138 of the Negotiable Instruments Act, 1881. After elaborate trial, the learned Magistrate dismissed the complaint and acquitted the respondents. Now in order to set aside the said order of acquittal, the appellant/complainant is before this Court.

2. The case of the appellant/complainant in brief, is as follows:-

2.1. The appellant company is registered under the Companies Act, 1956 and carrying on the business interalia of shipping agents. The first respondent [M/s.Rayalu & Co.] is the proprietorship concern. The second respondent is the proprietor of the first respondent company. According to the appellant, the respondents approached them for rendering the service of exporting onion. After rendering the service as agreed, the respondents had issued a cheque in favour of the appellant for Rs.66,757/- bearing Sl.No.015702 dated 14.10.2000 drawn on United Bank of India, Anna Nagar Branch, Chennai [Ex.P.2]. Subsequently, on 14.03.2001, the appellant presented the said cheque in his account for encashment stands in Centurion Bank Limited, Chennai. But, the said cheque has been dishonoured and returned as unpaid for the reason “insufficient funds”. The particulars of the Return was intimated to the appellant through Memo dated 15.03.2001 (Ex.P.3). Therefore, on 29.03.2001, the appellant through his advocate issued a statutory notice [Ex.P.4] calling upon the respondents to pay the cheque amount within 15 days from the date of receiving the said notice. The said notice was served upon to the second respondent on 30.03.2001. Thereafter, the respondents neither repaid the cheque amount nor issued any reply notice. So, the appellant filed a complaint before the learned XV Metropolitan Magistrate, chennai, for punishing the respondents under Section 138 of the Negotiable Instruments Act.

2.2. After taking cognizance in the trial Court, on the side of the complainant, the power of attorney holder, G.Sivasubramaniam, was examined as P.W.1, besides 6 documents were exhibited as P.1 to P.6. On the side of the respondents, none have been examined and no document is exhibited.

2.3. After concluding the trial, the learned XV Metropolitan Magistrate, Chennai, came to the conclusion that the respondents are not found guilty under Section 138 of the Negotiable Instruments Act and acquitted them.

2.4. Against which, now the appellant approached this Court by way of this appeal praying to set aside the order of acquittal.

3. Today, when the appeal is taken up for consideration, I have heard the arguments of Mr.V.S.Ilango, learned counsel appearing for the appellant, Mr.M.Marudhachalam, learned counsel appearing for the respondents and also perused the records carefully.

4. Now, on going through the findings arrived at by the learned Magistrate it appears that, prior to the issuing of cheque respondents had contacted the appellant and requested the service of the appellant for exporting onion. Subsequently, it was mentioned in the judgment that the onion exported by the respondents had not reached the destination. Accordingly, the service rendered by the appellant is insufficient. So, the respondents are not having any liability to pay the amount now claimed by the complainant. Only for the above said reason, the learned Magistrate acquitted the respondents. In this aspect, on going through the averments made in the complaint, the evidence given by P.W.1, and the documents submitted by P.W.1, the respondents had not disclosed the particulars of transaction with regard to the export of onion.

5. In the said situation, only based on the arguments advanced by the learned counsels, the learned Magistrate came to the above conclusion and acquitted the accused. In fact, with regard to the liability, P.W.1 has stated in the proof affidavit as in order to pay the freight charges, the respondents had issued the cheque. Except the said evidence, he did not mentioned anything about the date of consignment sent by the respondents, the particulars with regard to the export of onion and about the rendering of service given to the respondents.

6. In the said circumstances, the learned counsel appearing for the appellant relied on the judgment of our Honourable Apex Court in KRISHNA JANARDHAN BHAT vs. DATTATRAYA G.HEGDE reported in 2008 (1) CTC 433 wherein, it has held as follows:-

> "21. The Proviso appended to the said section provides for compliance of legal requirements before a Complaint

> Petition can be acted upon by a Court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability."

7. Now considering the said principle with the facts of the case, the said verdict was overruled by the Full Bench of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in AIR 2010 SC 1898 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."
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> 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.”

8. So, according to the principles laid down by our Honourable Apex Court, in this case the respondents had not showing the probable defence for rebutting the presumption mandated under Section 139 of the Negotiable Instruments Act. In this case, except to admit the signature found in the cheque in order to rebut the presumption, the respondents had not placed any records, even they have not sent a reply to the statutory notice issued by the appellant. Even though, the evidence of the respondents are not necessary for placing the probable defence, on going through the cross-examination of P.W.1, he has not created a suspicious circumstances for disbelieving the case of appellant. So, the said circumstances is against the case of the respondents. Accordingly, due to the non-submitting of contra evidence by the respondents had proved that they alternatively admitted the liability.

9. In the instant case, the trial Court without considering the said aspect in perspective manner arrived at the conclusion that the respondents had not found guilty. Furthermore, in order to dispute the evidence given by P.W.1, no contra evidence is let in on the side of the respondents. Even the respondents have not sent any reply to the appellant, shows the evidence given by P.W.1 is true and genuine one.

10. In the above said circumstances, the trial Court without discussing these aspects, acquitted the respondents. Therefore, the findings arrived at by the trial Court is not in accordance with law and this Court holds that the respondents are found guilty of the offence under Section 138 of the Negotiable Instruments Act.

11. In fine, the Criminal Appeal is allowed. The respondents are convicted for the offence under Section 138 of Negotiable Instruments Act. Since the first respondent is a private concern, separate sentence is not necessary. The second respondent is convicted and sentenced to undergo three months simple imprisonment and to pay a sum of Rs.5,000/- (Rupees Five Thousand only) as fine, in default, to undergo one month simple imprisonment. Further, the trial Court is directed to secure the accused and send him to jail for serving the sentence.

Sd/-
Assistant Registrar(CS viii)

//True Copy//

Sub Assistant Registrar

at / sri

To

1.The XV Metropolitan Magistrate,
George Town,
Chennai - 600 001.

2.The Section Officer,
V.R. Section,
Madras High Court,
Chennai. (2 copies)

+1cc to M/s.Kanna Associates , Advocate SR.No. 43516

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ASK(20/09/2018)