

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 18.06.2018

JUDGMENT PRONOUNCED ON : 25.06.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.536 of 2009

J.Vijayabaskar .. Appellant/ Complainant

versus

M.Dhasskand .. Respondent / Accused

Prayer: Criminal Appeal filed under Section 378(4) of the Code of Criminal Procedure, to set aside the judgment passed by the learned Judicial Magistrate No.V, Salem dated 10.07.2009 in C.C.No.13 of 2008 and to allow the appeal.

For Appellant : Mr.V.Sairam
For Respondent : Mr.K.Ramamoorthy

J U D G M E N T

This Criminal Appeal is directed against the judgment rendered by the learned Judicial Magistrate No.V, Salem in C.C.No.13 of 2008 dated 10.07.2009, wherein, the learned Magistrate acquitted the respondent for the offence under Section 138 of the Negotiable Instruments Act, against which, the appellant being the complainant in the said case has preferred this appeal to set aside the same as erroneous one.

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

2.1. Admittedly, the respondent / accused is the brother-in-law of the appellant / complainant. On 03.09.2007, the respondent had borrowed a sum of Rs.5 lakhs from the complainant. In order to discharge the said loan, he issued a cheque dated 03.10.2007 drawn on Federal Bank Limited, Thiruppur, in favour of the appellant. On the same day, the appellant presented the cheque for collection through Canara Bank, Ammapettai, but the same was returned unpaid as "account closed". Thereafter, on 31.10.2007, the appellant issued a statutory notice, in which, he demanded the respondent to pay the cheque amount within 15 days. Despite of receiving the said notice, the accused neither paid the cheque amount nor sent any

reply. Thus, the appellant made a complaint before the learned Judicial Magistrate No.V, Salem by saying that the respondent committed the offence under Section 138 of the Negotiable Instruments Act.

2.2. In the Trial Court, the appellant had himself examined as P.W.1, the Bank Manager from Thiruppur Federal Bank Limited and the Manager of C.R.R. Auto situated in Thiruppur were examined as P.W.2 and P.W.3 respectively. Besides 10 documents were exhibited as Ex.P.1 to Ex.P.10. On the side of the defence, one Suresh, who was the Manager in Radhika C.M.R. Textiles and the respondent were examined as D.W.1 and D.W.2 respectively. Besides 14 documents were marked as Ex.D.1 to Ex.D.14. After considering the evidence let in by either side and after analysing the documents, which were exhibited by both sides, the learned Judicial Magistrate No.V, Salem came to the conclusion that the respondent had not found guilty for the offence under Section 138 of the Negotiable Instruments Act, thereby, being the complainant, the appellant preferred this appeal.

3. Today, when the appeal is taken up for hearing, Mr.V.V.Sriram, learned counsel appearing for the appellant and Mr.K.Ramamoorthy, learned counsel appearing for the respondent advanced their arguments in their favour.

4. Before discussing the merits and demerits of the case, the significant factor found in the evidence given by D.W.2 is he admitted in his cross-examination as the cheque pertaining to this case relates to his account. Further, he admits that the signature found in the cheque belongs to him. Since, the signature found in the cheque has admitted by the respondent naturally Section 139 of the Negotiable Instruments Act comes into play.

5. The first defence which was raised by the respondent is that the notice sent by the appellant is defective one, since at the time of issuing the statutory notice, he has not resided in Thiruppur. In this aspect, on going through the evidence given by the appellant in the Trial Court as P.W.1, he stated that as notice was issued to the official address as well as the residential address. Further, he stated that both the addresses are situated only in Thiruppur.

6. In this regard, the learned counsel appearing for the respondent would submit that at the time of issuing the notice, the respondent has not resided in Thiruppur, due to the business loss, he shifted his family to Salem. It is true on going through the acknowledgment signed by the respondent dated

01.11.2007, the address of the respondent was mentioned as Radhika G.M.R. Tex, 42/C Industrial Estate, Thiruppur - 2. So, it is necessary to find out whether the respondent was working in the said address at the time of receiving the notice. In this regard, D.W.1 [Viswanathan] stated in his evidence that he was working as a Manager in Radhika C.M.R. Textiles and as per the attendance register dated 02.09.2007 and 03.09.2007, the respondent was working in the above said Company. Since the acknowledgment was signed on 01.11.2007, it is probable that the respondent was working as a Project Manager when at the time the statutory notice was issued to him. So, the first stand taken by the respondent is not substantiated by the relevant documents.

7. In the said occasion, the learned counsel appearing for the appellant would submit that in order to defraud the appellant, the respondent used the cheque pertaining to the Partnership Firm as mentioned that the cheque belongs to the proprietary concern. Now, considering the said submission with the records available in this case, it is true that in the cheque it was mentioned as the respondent is the proprietor for Mandolins Knit Garments. On the other hand, during the time of giving evidence as D.W.2, he stated that from the year 1998 he runs the Partnership Firm in the name of "Mandolins Knit Garments". Further, he admitted the Partnership Deed under Ex.P.10 is true one, it shows the Mandolins Knit Garments is a Partnership Firm. In this regard, the respondent has not offered any explanation as under what circumstances the cheque has been issued by him in the capacity of the Proprietor. So, the attitude of the respondent shows that he had an intention to cheat the appellant. Further, he forged the cheque pertaining to the Partnership Firm and issued the same for discharging the loan availed from the appellant. The said aspect alone shows the respondent had not approached this Court with clean hands.

8. The next contention raised by the respondent in this appeal is that the cheque now in question has been issued to KRR Auto as a security for purchasing the vehicles. In this regard, on the side of the appellant, the Manager of KRR Auto was examined as P.W.3. He produced a copy of the invoice under Ex.P.9 pertaining to the purchase of the vehicle by the respondent company. Further, in his evidence, he categorically mentioned that if any cheque is received as a security it should be noted on the back side of the invoice. But in this case, no such endorsement is made. Finally, he concluded in his evidence that the cheque has not been issued as a security. In the said circumstances, this Court cannot hold that the cheque has been issued as a security in favour of the appellant. In this aspect, the judgment of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in AIR 2010 SC 1898 has held as follows :

"7....."6. Once the cheque relates to the

account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under the given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered..."

So, as per the observation of our Honourable Apex Court, the duty to establish the cheque has not been issued for discharging the debt is cast upon the respondent. The fact that the cheque was issued as a security is not proved through sufficient materials, the respondent goes to the position that he has lost the right to take any other defence. In this case also, the said defence taken by the respondent is not substantiated as discussed above.

9. The last contention raised by the respondent is that the appellant is not having any capacity to lend Rs.5 lakhs as loan, for which, the appellant at the time of giving evidence as P.W.1 clearly narrated as from the income derived from the cable TV business and due to the pledge of 40 sovereigns of gold ornaments and from the amount lying in his savings account, the loan amount was paid to the respondent. In this regard, the evidence given by P.W.1 is not denied by the respondent. Moreover, after receiving the statutory notice in this case, the respondent had not issued any reply notice by stating the entire defence taken in the Trial Court. It is his duty to deny the entire allegation at the earliest point of time. But in this case nothing was disputed at the earliest point, only during the

time of trial the defence raised as above and thereafter, the Trial Court has also misconstrued Section 138 of the Negotiable Instruments Act and acquitted the accused, which is nothing but erroneous. So, the order of acquittal passed by the trial Judge is set aside and this Court came to conclusion that the respondent is found guilty for the offence under Section 138 of the Negotiable Instruments Act.

***10. In the light of the above discussion, the Criminal Appeal is allowed. The order passed by the learned Judicial Magistrate No.V, Salem, in C.C.No.13 of 2008 dated 10.07.2009 is set aside. The respondent is found guilty for the offence under Section 138 of Negotiable Instruments Act and sentenced to undergo six months simple imprisonment and to pay a fine of Rs.5,000/-, 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.**

-s/d-

Assistant Registrar (CS-IV)

dt.23.7.2018

*Corrected as per order dated 09.08.2017

made in CrI.A.No.536/2009

Sd/-

Assistant Registrar (IV)

dt.16.8.2018

True Copy

Sub-Assistant Registrar

sri
To

- 1.The Judicial Magistrate No.V,
Salem.
- 2.The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

To be substituted the order
already despatched on
9.8.2018

+1 CC to Mr.V. Sairam, Advocate sr 39805.

+1 CC to Mr.K. Ramanamoorthy, Advocate sr 39717.

CrI.A.No.536 of 2009

SP(27/07/2018)

EU:20.8.2018