IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Criminal Appeal No.54 of 2009

K.Sivasubramani .. Appellant/Complainant

Vs

K.Subramaniam .. Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of the Code of Criminal Procedure, to set aside the order dated 06.11.2008 made in C.C.No.151 of 2005 on the file of the learned Judicial Magistrate, Kangayam, Erode District.

For Appellant : Mr.R.Ezhilarasan for Mr.V.Ragunathan

For Respondent : Mr.J.Franklin

J U D G M E N T

This appeal has been filed by the appellant to set aside the order passed by the learned Judicial Magistrate, Kangayam, Erode District in C.C.No.151 of 2005 dated 06.11.2008.

2. The appellant is the complainant in C.C.No.151 of 2005 on the file of the learned Judicial Magistrate, Kangayam, Erode District. In the year 2005, he filed a complaint against the respondent for the offence punishable under Section 138 of Negotiable Instrument Act, 1881. After concluding the trial, the learned Magistrate came to the conclusion that the appellant has not proved the case and acquitted the respondent for the charges.

3. Against which, the appeal has been preferred before this Court for convicting the respondent.

4. The case of the appellant before the trial Court is as follows:

The appellant K.Sivasubramani is residing at Pekkattu Thottam, Nadarpalayam, Paranchervazhi Post, Kangayam Taluk. The respondent is residing at No.19, Kumarasamy Colony, 4th Street, Kangayam Cross Road, Tiruppur. The respondent is running Banian Business in the name and style of “Kangeyam Textiles”. On 15.09.2003, he received a loan of Rs.5,00,000/- from the appellant and promised him to repay the same with 12% interest per annum. For which, pro-note has been executed by the respondent in favour of the appellant. On 10.06.2005, after paying the interest, in order to repay the loan amount, the respondent had issued the cheque in favour of the complainant for Rs.5,00,000/- bearing Sl.No.422950 drawn on Karur Vysya Bank, Tiruppur Branch (Ex.P.1). At the time of giving the cheque, he received a promissory note executed already in favour of the appellant. After receiving the cheque on 11.06.2005, the appellant presented the same for encashment in District Central Co-operative Bank, Kangeyam Branch. But, the said cheque was returned as unpaid for the reason "exceeds arrangement". The particulars of the Return was intimated to the appellant through Debit advise dated 14.06.2005 (Ex.P.3). Therefore, on 27.06.2005, the complainant through his advocate issued a statutory notice (Ex.P.4) to the respondent. The said notice was returned on 07.07.2005 with an endorsement "door locked". The returned cover was exhibited in the trial Court as P.5.

5. After returning the cheque as unpaid, the complainant adopted the legal formalities stipulated in Section 138 of the Negotiable Instruments Act and filed a complaint against the respondent under Section 138 of the Negotiable Instruments Act, in Judicial Magistrate, Kangayam.

6. Before the trial Court, the respondent questioned with the averments made in the complaint. The same was denied by the respondent as false and opted for trial. So, in order to prove his case, the appellant himself was examined as P.W.1 and marked 5 documents as Exs.P.1 to P.5. Subsequent to that, the respondent was examined under Section 313 Cr.P.C. about the incriminating substances available in the evidence of P.W.1, for which, he pleaded not guilty. Subsequently, on the side of the respondent, 4 witnesses were examined as R.W.1 to R.W.4 and 4 documents were marked as Exs.R.1 to R.4.

7. After concluding the trial, the learned Judicial Magistrate, Kangayam came to the conclusion that the respondent is found not guilty under Section 138 of the Negotiable Instruments Act and acquitted him.

8. Against the said order of acquittal, now the appellant preferred this appeal praying to set aside the

order and for punishing the respondent under the said offence.

9. Today, when the appeal is taken up for hearing, I have heard the arguments of Mr.R.Ezhilarasan, learned counsel appearing for the appellant and Mr.J.Franklin, learned counsel appearing for the respondent.

10. The first and foremost contention raised by the learned counsel appearing for the appellant is that, since the signature found in the cheque is admitted by the respondent, Section 139 of the Negotiable Instrument Act comes into play. So, it is the duty for the respondent to place a probable defence for rebutting presumption.

11. On the other hand, learned counsel appearing for the respondent submitted that the cheque has not been issued in favour of the appellant, actually, one Sekar stolen away the cheque and handed over it to the brother-in-law of the respondent. Due to dispute arose between the respondent and his brother-in-law by using the said cheque, the brother-in-law of the respondent availed loan from one Muthukumarasamy, for which, on 20.05.2005 itself, the respondent issued a notice to the said Muthukumarasamy and a copy of the same is marked to one Baskaran, thereby, he made a submission that the present cheque has not been issued in order to discharge the liability as stated in the complaint filed by the appellant.

12. Considering the submissions made by the learned counsel on either side, during the time of giving evidence as R.W.1, the respondent admitted his signature found in the cheque. Since the signature found in the cheque is admitted, Sections 139 and 118-A of the Negotiable Instruments Act comes into play. Further, it is the duty of the respondent/accused to rebut the presumption raised under Section 139 of the Negotiable Instrument Act. In the said situation, on the side of the respondent, the manner, in which, the complaint is lodged before the learned Magistrate, is not disputed, thereby, it is concluded that the complaint filed before the learned Magistrate as stipulated under Section 138-B of the Negotiable Instrument Act.

13. Now, on going through the particulars mentioned in the returned cover (Ex.P.5), the address of the respondent is mentioned as No.19, Kumarasamy Colony, Kangayam Cross Road, Tiruppur. In this regard, at the time of giving evidence as R.W.1, the respondent admitted that, he is residing in Kumarasamy Colony, Kangayam Road, Thiruppur. The appellant has issued statutory notice to the

very same address, in which, the respondent is residing. Accordingly, the appellant proved that the service of statutory notice was properly effected.

14. So, the only question now before this Court is as to whether the cheque is stolen away from the custody of the respondent or the cheque has been given to the appellant as stated in the complaint.

15. In this regard, in order to prove his defence on the side of the respondent, one Baskaran was examined as R.W.2. He has stated in his evidence that two years before from the date of giving evidence, he visited the respondent's company and told him that one Sekar availed a loan from Muthukumarasamy, for which, he has given a cheque pertaining to this case. Subsequent to that, the respondent issued notice under Ex.R.1 on 20.05.2005 prior to the date on which, the cheque has been presented for encashment. Further, the said notice was issued to the said Muthukumarasamy and to R.W.2.

16. Now, on going through the entire averments made in the notice, it is seen that the respondent has not mentioned the particulars [i.e. S.No.422950, dated 10.06.2005 for Rs.5,00,000/-] of the cheque. Being a business man, the respondent may be having the loan transactions with various persons. In the said circumstances, without mentioning the particulars of the cheque in the advocate's notice, this Court cannot came into the conclusion that the said advocate's notice was issued only to show the issues now raised by the respondent. In this case, thereby, the defence taken up by the respondent is not substantiated.

17. Accordingly, the respondent had not proved his probable defence (i.e) the cheque is stolen away with the relevant documents. Furthermore, in the cross examination, the respondent has admitted and gave evidence as follows:

> "vd;Dila tpahghu tut[bryt[f;fhf ehd; ifbaGj;J kl;Lk; nghl;L g{h;j;jp bra;ahj fhnrhiyia ahUf;Fk; bfhLj;jJ , y;iy/ vd;Dila Kjy; tprhuizapy; jhth fhnrhiyapy; cs;s ifbaGj;ij ehd; kWf;ftpy;iy/"

18. So, the said evidence proved that there is no scope to the complainant for misusing the cheque which belongs to the respondent. So, the evidence let in by the respondent above is in contradictory nature.

19. Accordingly, the respondent has not rebutted the presumption by way of putting the probable defence. On the other hand, the complainant proved the initial burden that there was a legally enforceable debt, for which, the appellant, when at the time of giving evidence as P.W.1 before the trial Court, has stated in his proof affidavit that as on 15.09.2003, the respondent availed a loan of Rs.5,00,000/- after executing a pro-note. Subsequently, on 10.06.2005, by way of repaying the loan, he issued a cheque, which is marked as an exhibit in this case. The said evidence is corroborated through Ex.P.1 [cheque] and Ex.P.4 [copy of the legal notice].

20. In this regard, reliance is placed on the judgment of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in AIR 2010 SC 1898 wherein, it has held 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."

21. The trial Court, without considering these aspects, believing the contents of Ex.R.1 (notice issued by the respondent to Muthukumarasamy and Bhaskar [R.W.2]) came to the conclusion that the respondent is not guilty under Section 138 of the Negotiable Instruments Act, which is legally not sustainable.

22. In the light of the above discussions, this Court holds that the respondent is guilty of the offence

under Section 138 of the Negotiable Instruments Act.

23. In fine, the appeal is allowed. The respondent is convicted for the offence under Section 138 of Negotiable Instruments Act and sentenced to undergo six months simple imprisonment and to pay a sum of Rs.5,000/- (Rupees Five Thousand only) as fine, in default, to undergo six months simple imprisonment. Further, the trial Court is directed to secure the accused and send him to jail for serving the sentence. It is ordered that the sentence already undergone by the accused shall be set off under Section 428 Cr.P.C.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

cla/sri

To

1.The Judicial Magistrate,
Kangayam,
Erode District.

2.do thro The Chief Judicial Magistrate
Erode dt.

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

+1 cc to MR.V.RAGUNATHAN Advocate SR.NO. 41288

Crl.A.No.54 of 2009

KK(CO)
ASK(20/08/2018)