

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.07.2018

PRONOUNCED ON : 16.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.No.348 of 2010

M.Sivakumar

S/o. Masi Chettiyar

... Appellant/Complainant

Vs

S.Ravi

S/o. O.M.Sevana Gowder

... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., to call for the records and set aside the judgement rendered in C.A.No.26 of 2009 on the file of the learned Sessions Judge, Nilgiris Udhagamandalam dated 31.03.2010 and confirmed the judgement passed in S.T.C.No.101 of 2006 on the file of the learned Judicial Magistrate, Kotagiri dated 07.12.2009 by allowing this appeal.

For Appellant : Mr.V.Rajesh Babu
for S.Kadarkarai

For Respondent : Mr.A.Bobblie

J U D G M E N T

This appeal has been preferred against the judgement in Crl.A.No.26 of 2009 dated 31.03.2010, on the file of the learned Sessions Judge of the Nilgiri District at Uthagamandalam, reversing the conviction and sentence imposed on the respondent/accused, by the judgement dated 07.12.2009 made in S.T.C.No.101 of 2006 on the file of the learned Judicial Magistrate, Kothagiri, Nilgiri District, thereby convicting the respondent for the offence under Section 138 of Negotiable Instruments Act and sentenced him to undergo simple imprisonment for one year and pay fine of Rs.3,000/- in default, simple imprisonment for six months.

2. The facts of the private complaint preferred under Section 200 of Cr.P.C. for the offence punishable under Section 138 of Negotiable Instruments Act are as follows :- The accused issued cheque to the tune of Rs.2 lakhs dated 19.12.2005, drawn on Canara Bank, Aravenue branch towards and discharge of his liability. The complainant presented the cheque for collection and it was returned dishonoured as "Insufficient funds". The

complainant issued statutory notice on 31.12.2005 and the same was received by the accused on 02.01.2006. Even though after receipt of the notice, the accused did not make the payment and as such the complainant filed a complaint before the trial Court. After filing the complaint, the accused issued reply notice on 27.02.2006 denying the averments made in the statutory notice. The complaint was taken on file and copies of the same furnished to the accused and when the offence was explained to the accused, he pleaded not guilty.

3. The complainant examined as P.W.1 and the cheque in dispute was marked as Ex.P.1; the return memo marked as Ex.P.2; the advise memo marked as Ex.P.3; the statutory notice was marked as Ex.P.4; the acknowledgement of the notice was marked as Ex.P.5; postal receipt of the said notice was marked as Ex.P.6; and the reply notice issued by the accused was marked as Ex.P.7.

4. According to the complainant, the accused issued cheque Ex.P.1 towards discharge of his liability. On presentation of the same, it was returned dishonoured as "Insufficient funds". After statutory notice, the accused neither paid the cheque amount nor issued any reply notice till the filing of the complaint. After filing the complaint, the accused issued reply notice on 27.02.2006 denying the averments made in the statutory notice.

5. On the side of the accused D.W.1 and D.W.2 were examined and marked two documents as Ex.D.1 and Ex.D.2. The accused was examined himself as D.W.1 and one Mr.J.K.Johee was examined as D.W.2. D.W.2 is known to P.W.1, parted a sum of Rs.10,000/- towards his medical treatment from the complainant. At that time, the complainant requested a cheque for the purpose of security for repayment. Therefore, D.W.2 obtained the alleged blank cheque from the accused and parted the same with the complainant. Therefore, pleaded that the alleged cheque Ex.P.1 is without consideration and not issued for any legally enforceable debt.

6. The trial Court after considering all these facts and circumstances, found the accused guilty and convicted and sentenced him as stated above. As against the said conviction, the accused preferred an appeal and the appellate Court reversed the conviction and sentence and acquitted the accused. Hence, the complainant preferred this appeal as against the acquittal of the accused.

7. Heard the rival submissions made by Mr.V.Rajesh Babu, learned counsel for the appellant and Mr.A.Bobbie, learned counsel for the respondent.

8. The learned counsel appearing for the appellant would submit that the issuance of cheque and signature of the

cheque were not denied by the accused. It was issued only for the legally enforceable debts for the loan borrowed by the accused. As such the learned Magistrate rightly convicted the accused and sentenced him. Without considering the facts and circumstances of the cases, the first appellate Court acquitted the accused and as such prayed for restoration of the conviction made by the trial Court.

9. On the other hand the learned counsel appearing for the respondent would submit that the accused never known to complainant and he never issued cheque to the complainant. Even though he signed the cheque, it was handed over to D.W.2 as security purpose for the loan borrowed by him from the complainant. Further, the accused has no need to borrow any amount as alleged in the complaint and that too the said borrowal on 18.02.2005 and the alleged cheque was issued on the next date i.e., 19.02.2005. It is unheard of namely immediately after the borrowal of the amount, very next day to repay the said borrowal the cheque made. Therefore, the first appellant Court is rightly acquitted the accused and prayed for dismissal of the present appeal.

10. It is seen from the records that according to the complainant, the accused borrowed a sum of Rs.2 lakhs on 18.12.2005 and on the same day he issued cheque and it was presented on next day namely 19.12.2005. It is pertinent to note here that the said details had not been mentioned in the statutory notice or the complaint given by the complainant. Further, the accused to rebut the case of the complainant, examined D.W.2. D.W.2 in his evidence deposed that he borrowed a sum of Rs.10,000/- from the complainant for which, he obtained a blank signed cheque from the accused and handed over the same to the complainant as security. The said cheque was misused by the complainant and as such there is absolutely no legally enforceable debt by the accused. The accused also issued reply notice dated 27.02.2006, by endorsing the said contention. Even though, it was issued belatedly, the accused rebutted the presumption under Section 138 of Negotiable Instruments Act.

11. The learned counsel appearing for the respondent relied upon the judgment reported in "2008(1) CTC 433 - Lrisha Janardhan Bhat Vs. Dattatraya G. Hedge" and the Hon'ble Supreme Court held that as follows:-

"Negotiable Instruments Act, 1881 (26 of 1881), Sections 138 & 139 - Ingredients of offence and nature of presumption arising under Section 139 - Section 138 has three ingredients viz. (a) that there is legally enforceable debt (b) that cheque was drawn

for discharge in whole or in part of any debt or other liability which presupposes legally enforceable debt, and (c) that cheque so issued had been returned due to insufficiency of funds - Proviso appended to said Section provided for compliance of legal requirements before Complaint Petition can be acted upon by Court of law - Section 139 merely raised presumption that cheque was drawn in discharge of debt or other liability and presumption cannot be that there is legally enforceable debt."

12. In this judgement, the Hon'ble Supreme Court of India cited the judgement reported in "2007 (12) Scale 96 - K.Prakashan Vs. P.K.Surenderan" and held as follows :-

"12. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

13. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."

In John K. John v. Tom Varghese & Anr. [JT 2007 (13) SC 222], this Court held:

"10. The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant

question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken."

31. Mr. Bhat relied upon a decision of this Court in *Hiten P. Dalal v. Bratindranath Banerjee* [(2001) 6 SCC 16] wherein this Court held:

"22. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either

believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

In the same judgment, the Hon'ble Supreme Court of India cited another judgment reported in "2006(6) SCC 39 - M.S.Narayana Menon Alias Mani Vs. State of Kerala and Another", it was held that the once the accused is found to discharge his initial burden, it shifts to the complainant.

13. In the case on hand, the accused by examining D.W.2, discharged his initial burden to rebut the case of the complainant. But the complainant failed to rebut the evidence of D.W.2 to prove his case. More over, the complainant admitted except in his evidence that no where stated in the complaint or in the statutory notice, about the date of borrowal and date of issuance of cheque, that too the said amount allegedly borrowed on 18.02.2005 and to discharge the said liability, the accused issued a cheque on the same day and it was presented on the next day i.e, 19.02.2005. Therefore, there was no legally enforceable debts by the accused towards discharge of liability.

14. It is also seen that the complainant lend the amount of Rs.2 lakhs to the accused without any records. Admittedly, the accused is not known to him and he is not his friend also. Therefore, there is no necessity for such transaction between the complainant and the accused that too without any records. As such the complainant failed to prove that Ex.P.1, the alleged cheque was issued for legally enforceable debt.

15. In view of the above discussions, the complainant failed to prove the offence under Section 138 of Negotiable Instruments Act against the accused and the first appellate Court rightly appreciated the evidence on records and acquitted the accused. Therefore the judgement dated 31.03.2010, passed by the learned Sessions Judge, Nilgiris Udhamandalam in C.A.No.26 of 2009, does not warrant any interference from this Court and hence the present appeal is liable to be dismissed. Accordingly, this criminal appeal is dismissed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

rts

To

1. The Presiding Officer
The Sessions Judge,
Nilgiris,
Udhagamandalam.
2. The Presiding Officer
The Judicial Magistrate,
Kotagiri.

+1cc to Mr.S.Kadarkarai, Advocate Sr.No.46775

GP(CO)
sm:27.7.2018

JUDGMENT IN
CRL.A.348 OF 2010



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