IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Criminal Appeal No.359 of 2010

C.Dharman .. Appellant/Complainant

Vs

R.Shankar .. Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C, to set aside the judgment dated 16.09.2009 passed in C.A.No.12 of 2009 on the file of the learned Principal Sessions Judge, Dharmapuri reversing the judgment dated 16.06.2009 made in C.C.No.46 of 2005 on the file of the learned Judicial Magistrate, Harur.

For Appellant : Mr.V.Rajesh

For Respondent : Mr.R.Arundattan

J U D G M E N T

This appeal has been filed against the order of acquittal dated 16.09.2009 in Criminal Appeal No.12 of 2009 passed by the learned Principal Sessions Judge, Dharmapuri.

2.The appellant herein is the complainant in C.C.No.46 of 2005 on the file of the learned Judicial Magistrate, Harur. He filed a complaint against the respondent/accused alleging that the accused committed an offence punishable under Section 138 of Negotiable Instruments Act, 1881. After elaborate enquiry, the accused was convicted by the learned Judicial Magistrate, Harur and sentenced to undergo Simple imprisonment for 6 months and to pay the cheque amount as compensation to the appellant, against which, the respondent preferred an appeal before the learned Principal Sessions Judge, Dharmapuri. After elaborate enquiry, the learned Principal Sessions Judge,

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Dharmapuri allowed the appeal and set aside the order of conviction passed by the learned Judicial Magistrate, Harur in C.C.No.46 of 2005. Against the judgment passed in Crl.A.No.12 of 2009, the appellant has approached this Court by way of filing this appeal.

3.The case of the appellant/complainant in brief as follows:

The respondent was a Horlicks dealer, running an agency in the name and style of Tirumala Agency. The appellant ran a grocery shop at Harur. Prior to six months from the date of filing the complaint, the respondent borrowed a sum of Rs.2,00,000/- from the appellant for his business needs. Subsequently, in order to repay the said debt, the respondent issued a cheque bearing No.899182, dated 10.12.2004 drawn on Indian Bank in favour of the appellant for Rs.2,00,000/-. Further, at the time of handing over the cheque, the respondent requested the appellant to present the cheque for collection after 10 days. After complying the request made by the respondent, the appellant presented the cheque for encashment in Indian Bank, Harur in which, he had an account. But, the said cheque was returned to the appellant as unpaid by mentioning the reason "exceeds arrangement". The particulars of dishonour was intimated to the appellant under Ex.P.2. Hence, on 24.12.2004, the appellant issued a legal notice to the respondent, demanding the respondent to pay the cheque amount within 15 days from the date of receiving the notice. Ex.P.3 is a legal notice. The respondent received the said notice on 29.12.2004. Ex.P.4 is an acknowledgment card. After reading the notice, on 31.12.2004, the respondent sent a reply to the appellant, in which, he denied the allegations mentioned in the statutory notice. The said reply notice was marked as Ex.P.5.

4.In the trial Court, after examining the two witnesses as P.W.1 and P.W.2 and after marking 5 documents as Ex.P.1 to P.5, the respondent was examined under Section 313 Cr.P.C with regard to the incriminating materials available in the evidence of P.W.1 and P.W.2, for which, he denied and stated that the evidence given by the appellant is false.

5.Subsequent to that, the respondent examined himself as D.W.1 and marked the unregistered xerox agreement deed dated 27.11.2004 executed between the appellant and the respondent as Ex.D.1. Further, he marked the copy of the Bank statement pertaining to his account for the period from 4th August to 7th February as Ex.D.2. After

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concluding the trial, the learned Judicial Magistrate, Harur convicted the respondent as above. Against which, the respondent approached the learned Principal District and Sessions Judge, Dharmapuri by way of filing criminal appeal No.12 of 2009. The learned Principal District and Sessions Judge allowed the said appeal and set aside the judgment of conviction passed by the learned Judicial Magistrate, Harur in C.C.No.46 of 2005, dated 16.06.2009.

6.Now, on going through the judgment rendered by the first appellate Court, it appears that the appeal filed by the respondent has been allowed on the following grounds:

> "(i)Signature found in the cheque has not been proved.
>
> (ii)The cheque pertaining to the case is not having the seal of the Bank.
>
> (iii)The cheque had not been issued for discharging the legally enforceable debt."

7.With regard to the first point, the learned counsel for the appellant submitted that in the cross examination of P.W.1, the respondent took the defence that the cheque under dispute has been issued only as security, thereby, the respondent alternatively admitted the signature found in the cheque. So the findings arrived at by the first appellate Court is legally not correct.

8.Now, on going through Ex.P.5, the reply notice issued by the respondent, in which, the respondent had admitted that he had received a sum of Rs.1,80,000/- as a loan amount from the appellant. Further, he specifically admitted in paragraph No.3 as the present cheque has been issued to the appellant during the course of business transactions. So, in the said circumstances, the respondent had alternatively admitted the signature found in the cheque.

9.Even assuming that if the cheque has been handed over to the appellant as a blank cheque, according to Section 20 of the Negotiable Instruments Act, it presumes that the respondent authorised the appellant to fill the cheque. In the said circumstances, allowing the appeal by the learned first appellate Court based on the ground that the signature found in the cheque is not proved is factually incorrect.

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10.Secondly, at the time of allowing the appeal, the first appellate Court came to the conclusion that, since the cheque Ex.P.1 is not having any bank seal, it would create a doubt as to whether the cheque has been presented before the bank for collection or not. In this regard, before the trial Court, the Bank Manager, who returned the cheque as unpaid, was examined as P.W.2, in his evidence, he has clearly stated that the appellant had presented the cheque for collection and the same was returned on 20.12.2004 for the reasons "exceeds arrangement". So, against the said evidence, the first appellate Court took a stand that non affixing of the seal in the cheque is fatal to the case of the appellant. So in this area also, the decision rendered by the first appellate Court is legally not sustainable.

11.Finally, at the time of disposing the appeal filed by the respondent, the first appellate Court came to the conclusion that the appellant has not proved the existing liability of the respondent. Accordingly, held that the cheque has not been issued for legally enforceable debt and finally, allowed the appeal.

12.In the said situation, in this case, it is an admitted fact that the signature found in the cheque belongs to the respondent. Hence automatically Section 139 of the Negotiable Instruments Act comes into play. In the decision of the Hon'ble Apex Court in Rangappa vs. Srimohan [2010 (11) SCC 441], the Hon'ble Apex Court has held as follows:

> "The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No.0886322 dated 08.02.2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."

13.Accordingly, in this case also since the signature found in the cheque is admitted by the respondent, it is

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the duty of the appellant to place probable defence particularly for creating a doubt about the existence of legally enforceable debt.

14.In this regard, in the trial Court, after closing the prosecution side evidence, the respondent has been examined as R.W.1. Further, during the time of giving evidence, the respondent has produced one unregistered document and the same was marked as Ex.R.1. In respect to the said document, the appellant at the time of giving evidence as P.W.1, admitted the contents of the document that the particulars, which are all available in Ex.R.1 are true one. Further, the appellant had admitted that the original document was with him. Apart from that, the copy of the account statements pertaining to the account stand in the name of the respondent was marked as Ex.R.2.

15.Now, on going through the contents of Ex.R.1, it was mentioned that prior to the execution of the said document, the respondent availed Rs.2,00,000/- as loan from the appellant. Further, it was mentioned on 27.11.2006, Rs.1,30,000/- was repaid by way of handing over gold jewels weighing about 200 grams. So, on 27.11.2006, the balance, which has to be paid to the appellant is only Rs.70,000/-. The said fact was admitted by the appellant through the said document.

16.But, in this case, in the month of December 2004 itself, the cheque under dispute has been presented in the bank for encashment. Accordingly, on going through the entire evidence put forth by the appellant and respondent, it is clearly established that during the time of pending proceedings in the Court, majority of the loan amount was repaid by the respondent. Furthermore, in the cross examination, P.W.1 had admitted that he had lent Rs.2,00,000/- as loan to the respondent for meter interest. Further, he admitted that the respondent herein stood as witness for the loan availed by him in Tata Finance. The said aspects clearly established the fact that the appellant has approached the trial Court not with the clean hands.

17.In the trial Court even after receiving a sum of Rs.1,30,000/- from the respondent, the appellant has stated in his evidence that Rs.2,00,000/- is the balance amount, due from the respondent. The said circumstances shows that after receiving the meter interest for the loan given to the respondent and in order to receive the exorbitant amount, the appellant approached this Court. Even though the account statements submitted by the respondent are not

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relevant to this case, the other particulars, which were already discussed above are in favour of the respondent.

18.The last point, which have been taken into account by the trial Court for allowing the appeal is that the cheque has not been issued for discharging the legally enforceable debt.

19.In this regard, during the time of trial proceedings, it was suggested by the respondent that the appellant is not having any source to lend Rs.2,00,000/- as loan to the respondent. So, in the trial proceedings itself the respondent took a stand that the debt, which was mentioned by the appellant is not in existence.

20.In this regard, reliance has been placed in the decision in Subramani vs. Damodara Naidu [2015 (1) SCC 99], in which it was held as follows:

> "On a consideration of entire oral and documentary evidence the trial Court came to the conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him."

Accordingly, the view taken by the Hon'ble Apex Court is that the complainant is having the duty to show his source. In this aspect also the case of the appellant fails because he has not produced any document to show the source.

21.In general, in an appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him and the fundamental principle of criminal justice delivery system is that that every person, accused of committing an offence shall be presumed to be innocent, unless his guilt is proved by a competent Court of law. Secondly, if the accused has secured an order of acquittal, the presumption of his innocence is reaffirmed and strengthened by the trial Court. Even if two reasonable conclusions are possible on the basis of evidence on record, the appellate Court should not disturb the finding of the acquittal recorded by the trial Court.

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22. In the above said circumstances, I find no reason to interfere with the impugned order of acquittal passed by the trial Court. Hence, the appeal fails and the same deserves to be dismissed.

Sd/-
Assistant Registrar(CS ix)

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Sub Assistant Registrar

cla

To

1.The Principal District and Sessions Judge,
Dharmapuri.

2.The Judicial Magistrate,
Harur.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr. V.Rajesh, Advocate SR.No. 47404
+1cc to Mr.R.Arundattan , Advocate SR.No. 47368

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