

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2017

Delivered on : 23.01.2018

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRL.A.No.241 of 2008

Raja Sampathkumar : Appellant/Complainant

Vs.

1.Arumugam

2.A.Mahalakshmi

: Respondents/Accused 1 & 2

PRAYER: Appeal is filed under Section 378 of the Code of Criminal Procedure praying to set aside the order of acquittal dated 14.02.2008 made in C.A.No.226 of 2007 on the file of the Additional District and Sessions Court / Fast Track No.III, Dharapuram reversing the order of conviction and sentence passed in the judgment dated 11.10.2007 made in C.C.No.100 of 2006 on the file of the Judicial Magistrate Kangayam.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.A.Nagarathinam

JUDGMENT

This is a second appeal against the order of acquittal passed by the learned Additional District and Sessions Judge, Dharapuram in C.A.No.226 of 2007 dated 14.02.2008.

2.The respondents / accused are husband and wife working in Salem Government Press. On 02.10.2005, they have obtained a loan of Rs.1,55,000/- from the appellant / complainant and gave a cheque dated 31.10.2005 (Ex.P.1) for Rs.1,55,000/- drawn on Corporation Bank, Alagapuram Branch, Salem. When the appellant / complainant presented the said cheque on 02.11.2005, in his bank account with Laxmi Vilas Bank, the same got returned unpaid on 07.11.2005 as evidenced by the cheque return memo (Ex.P.3) and debit advice (Ex.P.4). The reason stated for the return was "account closed". Subsequently, a notice dated 18.11.2005 (Ex.P.5) was given by the appellant / complainant and the same was received by the respondents / accused on 21.11.2005, as evidenced by the postal acknowledgment card (Ex.P.6). The respondents / accused sent a reply notice dated 02.12.2005 (Ex.P.7) which according to the

appellant / complainant contained false allegations. The further contention of the appellant / complainant is that the respondents / accused did not come forward to make good the payment and therefore, he filed a private complaint before the Judicial Magistrate, Kangayam, under Section 200 of the Code of Criminal Procedure, against the respondents / accused for the offences punishable under Sections 138 and 142 of the Negotiable Instruments Act, 1881 in C.C.No.100 of 2006.

3.The respondents / accused contended that they had approached one Muthukumar of Erode for financial assistance to tide-over their financial needs and that the said Muthukumar took ten cheques from them promising that he would get the required finance from one M.L.Rathnasamy of Erode, the Financier through one Panchanathan. In the meanwhile, the respondents got transferred to Salem, and when they demanded the blank cheques given to the said Muthukumar back, the latter had stated that the ten cheques were handed over to the financier and that only on payment of some amount, the cheques can be taken back. However, the said Panchanathan filed a criminal case in C.C.No.96 of 2004, before the Judicial Magistrate, Kodumudi, against the respondents / accused using one of the cheques.

4.According to the respondents / accused, the said case got dismissed. Apprehending the misuse of the remaining cheques, the first respondent / first accused also issued a notice dated 31.10.2005 (Ex.R.1) to the said Panchanathan and Rathnasamy that the cheques issued by him and his wife shall not be misused to file false cases. The said notice was returned unclaimed by Panchanathan as evidenced by the returned postal cover (Ex.R.2). The reason stated in the returned cover is "un-delivered". Further enquiries by the respondents / accused revealed that there was no such address as mentioned by the appellant / complainant. The respondents / accused also contended that the complainant was not known to them and that they had not taken any loan from him nor issued any cheque to him.

5.The learned Judicial Magistrate, Kangayam, relying on the decisions in (i)Hiten P.Dalal Vs. Bratomdramatj Banerjee reported in 2001 (3) CTC 243 and (ii)K.N.Beena Vs. Muniappa and another reported in 2001 (4) CTC 382, observed that the appellant / complainant had satisfactorily substantiated that the cheque for Rs.1,55,000/- was issued by the respondents / accused from their joint account and that the signatures of the accused were never disputed. He has further observed that the presumption under Section 118 of the Negotiable Instruments Act perfectly applied in this case and it is for the accused to rebut it as the onus lies with them. The accused on their side claimed that the said cheque was one of the ten cheques given by them to one Muthukumar of Erode and that the loan was to be arranged by one Panchanathan from the financier Rathnasamy of Erode. None of these persons have been

examined by the accused. The further contention of the accused as to the very existence of the address given by the appellant / complainant was negated by the trial Court as the returned cover did not find such an endorsement. It was also observed by the trial Court that the reply notice by the accused did not mention about one Muthukumar of Erode to whom the accused claims to have given the cheque. While, the averment of the respondents / accused during the course of cross examination was that one Muthukumar was handed over ten cheques, in the reply notice, (Ex.P.7), Panchanathan's name find a place. It is also stated by the accused that the said ten cheques were handed over to Panchanathan. Such contradictory statements did not bring any clarity and instead created further confusion and the accused ought to have brought in evidence to clarify as to why such glaring contradictions were made. Similarly, the respondents / accused have claimed in their reply notice (Ex.P.7) that the complainant was not known to them, while during the course of cross examination it is stated that the appellant / complainant was an employee of one M.L.Rathnasamy, the financier. This is also incomprehensible. No evidence was let in by the respondents / accused for this contention too.

6.The trial court had held that the allegation raised by the respondents / accused regarding the address of the appellant / complainant also failed in the light of the deposition of the Bank Manager who opened the Savings Bank account of the appellant / complainant. The same address finds a place in the account opening form with the bank which implies that a valid address proof was given by him. It was also contended by the respondents / accused that the complainant had no financial capacity to lend such a huge amount of Rs.1,55,000/-. This fact was not substantiated by the respondents / accused and was found unacceptable by the trial Court. Therefore, the learned Judicial Magistrate, Kangayam, found the respondents / accused guilty of the offence under Section 138 of the Negotiable Instruments Act and sentenced both the accused to simple imprisonment for one year and also to pay a fine of Rs.5,000/- each and in default to undergo simple imprisonment for three months.

7.The appellate Court (Fast Track Court No.III, Dharapuram took up the appeal in C.A.No.226 of 2007 and observed as under:

"The Apex Court had laid down three pre-requisites for any case under Section 138 to be initiated. In 2008 (1) CTC 433 (Krishna Janardhan Bhat Vs. Dattatraya G.Hegde) it was held that three pre-requisites to initiate proceedings under Section 138 are

- a)that it should be legally enforceable.
- b)that the cheque was issued to liquidate the debt.

c)that the cheque ought to have got returned unpaid for "insufficiency of funds".

8.The learned Additional Sessions Judge opined that the onus for the above three lies with the appellant / complainant and that in the instant case, the first pre-requisite itself was not fulfilled by the appellant / complainant. The appellate Court also faulted with the procedure adopted by the trial Court in interpreting the presumption clause of Section 118 of the Negotiable Instruments Act and held that the complainant ought to have substantiated satisfactorily how he in Kangayam had lent money to the accused in Salem.

9.The learned Additional Sessions Judge also raised doubts on the existence of the address of the appellant / complainant. According to him, the fact that there was no such address was proved effectively by the accused. The appellate Court has also considered the judgment in C.C.No.96 of 2004 before the Judicial Magistrate, Kodumudi, in which the respondents / accused were acquitted in a similar case filed by one Panchanathan using one of the ten cheques given by the accused to Muthukumar.

10.The appellate Court had relied on the contentions of the accused that the accused and the complainant did not know each other and that no such cheque was issued by the complainant, that there was no legally enforceable debt, that the complainant has given a false address since the police themselves investigated and declared so and that a similar case before the Judicial Magistrate, Kodumudi against the accused got dismissed. The appellate court had also reasoned that presumption cannot be automatic and it is for the appellant / complainant to prove that the three pre-requisites are fulfilled and that the accused had no role to play.

11.The learned Judicial Magistrate, Kangayam, has in my opinion made certain valid points in this case. The learned Judicial Magistrate has admitted that the address of the complainant was found not occupied by the complainant at that point of time but however, did not subscribe to the theory that no such address was there. The accused who have claimed that the cheque was not issued to the complainant have admitted issuance of ten cheques to one Muthukumar of Erode. Other than the said Muthukumar, two other persons namely, one Rathnasamy and one Panchanathan were named by the accused. However, the accused had not substantiated all these contentions by acceptable evidence. They did not also make any attempt to examine any of those persons. On the other hand, the appellant / complainant had let in acceptable and cogent reasons to substantiate his contentions. The bank account of the appellant / complainant contains the address of the complainant to which the accused had sent the notice (Ex.R.1). The appellant / complainant had discharged his initial

burden of proof by adducing acceptable evidence and therefore, there is a presumption under Section 118 of the Negotiable Instruments Act in favour of the appellant / complainant.

12.The question as to why ten blank signed cheques were parted with for getting a loan is not explained by the respondents / accused. On the other hand, it is crystal clear that the cheques were given only for the purpose of availing loan. This is not a case of lost cheque. The contention that the accused / complainant and Panchanathan are employees of one Rathnasamy, financier also goes unsubstantiated. The appellate Court has conveniently forgotten to address these issues. Shifting the onus on the appellant / complainant is necessary only if there is a dispute on the veracity of the cheques or the cheques being given for some other purpose which the accused has to prove. Even assuming that the cheques were given to an unrelated person, it is not known as to why the accused had given ten cheques. The genuineness of the address of the appellant / complainant has been given more importance by the appellate Court instead of addressing the major deficiencies on the side of the respondents / accused. Similarly, the reasons spelt out by the appellate Court was on the financial capacity of the complainant to lend a loan of Rs.1,55,000/-. The appellant / complainant never claimed that the said amount was given from his bank account and therefore, could not be accorded much importance that the accused have not made good the amount due to the appellant / complainant and had deliberately closed the savings bank account to avoid payment of the cheque are all clear and need no further explanation. The intent of the Act was to curb the misuse of the issue of cheques and the perpetrators of these offences have been finding ways and means of escaping the clutches of law. This is one such instance where the accused did not counter the case with clean hands and had the intention not to repay the amount of dishonoured cheque. The learned Judicial Magistrate was right in finding the accused guilty of the offence under Section 138 of the Negotiable Instruments Act. Therefore, the judgment dated 14.02.2008 in C.A.No.226 of 2007 passed by the learned Additional Sessions Judge, Fast Track Court No.III, Dharapuram, is set aside and the finding of the trial Court that the accused are guilty of the offence under Section 138 of the Negotiable Instruments Act is confirmed.

13.However, the sentence is modified to the extent that the accused shall pay a fine of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only) each and in default to pay the fine amount shall undergo simple imprisonment for a period of six months. Total fine amount is Rs.3,20,000/- (Rupees Three Lakhs Twenty Thousand only). From out of the fine amount, a sum of Rs.3,00,000/- is directed to be paid to the appellant / complainant under Section 357 of the Code of Criminal Procedure.

14.With the above observations, the Criminal Appeal is allowed. No order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

MR

To

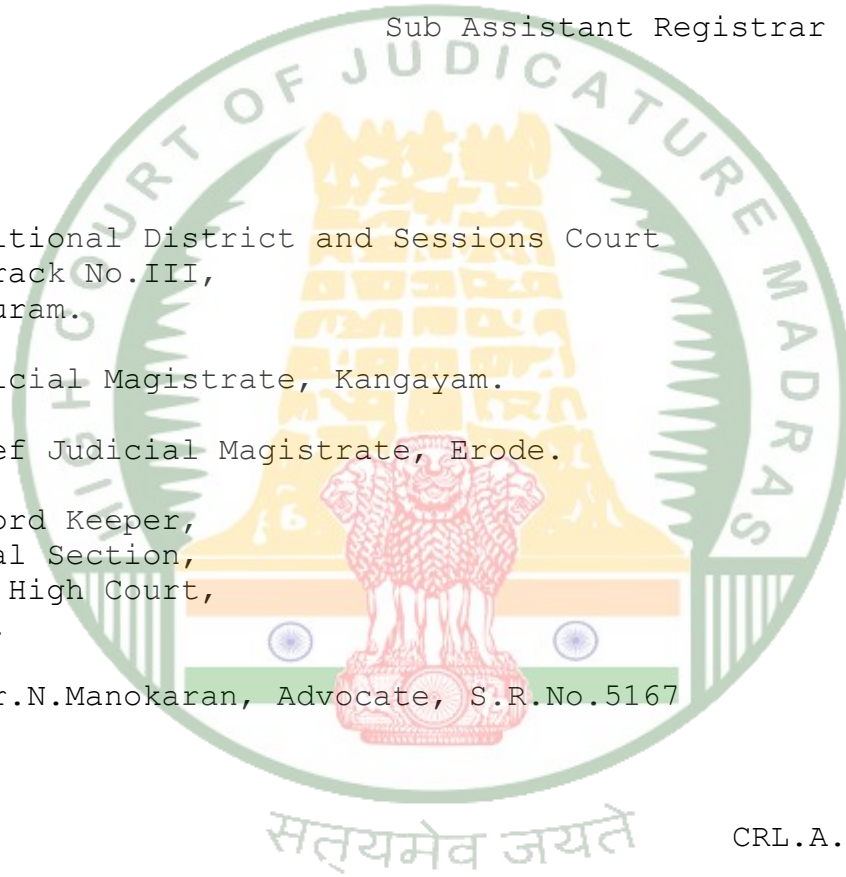
1.The Additional District and Sessions Court
Fast Track No.III,
Dharapuram.

2.The Judicial Magistrate, Kangayam.

3.The Chief Judicial Magistrate, Erode.

4.The Record Keeper,
Criminal Section,
Madras High Court,
Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.5167



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