IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2018

CORAM

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.742 of 2009

Sri Shakthi Tyres,
Rep. by its Partner
Mahalingam,
115-a, Lawley Road
Coimbatore. .. Appellant / Complainant

Versus

R.Prabhu .. Respondent / accused

Prayer : Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment dated 09.01.2009 in Crl.A.No.373 of 2008 on the file of the Additional District and Sessions Judge [Fast Track Court No.III], Coimbatore in reversing the order dated 13.10.2008 in S.T.C.No.25 of 2007 on the file of the Judicial Magistrate No.VII, Coimbatore.

For Appellant : Mr.S.Gunalan

For Respondent : Mr.V.Anandha Moorthy

J U D G M E N T

This Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure against the judgment dated 09.01.2009 in Crl.A.No.373 of 2008 on the file of the learned Additional District and Sessions Judge [Fast Track Court No.III], Coimbatore in reversing the order dated 13.10.2008 in S.T.C.No.25 of 2007 on the file of the Judicial Magistrate No.VII, Coimbatore.

2. Challenging the judgment passed by the learned Additional District and Sessions Judge [Fast Track Court No.III], Coimbatore in Crl.A.No.373 of 2008 dated 09.01.2009, acquitting the accused by reversing the order of conviction passed by the trial court, the present appeal has been filed.

3. Initially, the appellant filed a complaint against the respondent before the learned Judicial Magistrate VII, Coimbatore, alleging that the respondent had committed an offence under Section 138 of the Negotiable Instruments Act. After concluding the trial, the learned Judicial Magistrate No.VII, vide order dated 13.10.2008, convicted the respondent and sentenced him to undergo simple imprisonment for one year, but no fine was imposed. As against the same, the respondent preferred an appeal before the learned Additional District and Sessions Judge [Fast Track Court No.III], Coimbatore in

Crl.A.No.373 of 2008. By the judgment dated 09.01.2009, the conviction imposed upon the respondent by the learned Judicial Magistrate No.VII, was set aside and the respondent was acquitted of the charges under Section 138 of the Negotiable Instruments Act. Against the said judgment of the Appellate Court, the appellant / complainant is before this Court.

4. For the sake of convenience, hereinafter, the appellant is called as "complainant" and the respondent is called as "accused".

5. The complainant was running a business in the name and style of "Sri Shakthi Tyres" in Coimbatore. During the course of business, on 29.09.2006, the accused purchased tyres and flaps from the complainant for a sum of Rs.46,000/-, for which, he issued a cheque [Ex.P.2] dated 11.10.2006 drawn on Post Office Savings Bank, Coimbatore. The complainant presented the same in the Syndicate Bank, Coimbatore for encashing. But, it was returned as "insufficient funds" and the said fact was intimated to the accused through a statutory notice [Ex.P.4] dated 18.10.2006, which was returned as unclaimed. Thereafter, the complainant has filed a complaint against the respondent for the offence under Section 138 of the Negotiable Instruments Act, before the learned Judicial Magistrate VII, Coimbatore.

6. After taking cognizance in the trial Court, summons were issued to the accused for appearance. On his appearance, the accused was questioned as regards the incriminating materials made available and he pleaded not guilty of the alleged offence under Section 138 of the Negotiable Instruments Act. So, in order to prove the case of the complainant, the Proprietor of Sri Shakthi Tyres was examined as P.W.1 and at the time of evidence of P.W.1, Ex.P.1 to Ex.P.6 were marked and they are as follows:

"Ex.P.1	29.09.2006	Credit bill No.2110
Ex.P.2	11.10.2006	Cheque drawn on Post Office Savings Bank account for Rs.46,000/-.
Ex.P.3	14.10.2006	Cheque return Memo
Ex.P.4	18.10.2006	Office copy of the notice
Ex.P.5		Unserved postal cover
Ex.P.6	07.12.1999	Partnership deed of Sakthi Tyres."

7. After closing the prosecution side evidence, the accused has not chosen to examine any witness on his side. Further, he did not produce any documents to prove his defence.

8. After concluding the trial, the learned Judicial Magistrate VII, Coimbatore, convicted the accused as stated in the earlier part of this judgment. Against which, the accused filed Crl.A.No.373 of 2008 and the learned Additional District and Sessions Judge allowed the appeal and set aside the conviction.

9. The learned counsel appearing for the appellant would contend that the First Appellate Court acquitted the accused under the following two grounds:

"(i) The statutory notice issued by the complainant is defective one, and

(ii) The liability of the accused has not been proved by the complainant."

10. The learned counsel appearing for the complainant would contend that the liability of the accused was proved by producing credit bills issued on 21.10.2006 and 29.10.2006 by the complainant. Further, at the time of availing loan by the accused, one Mahalingam was the Proprietor of the complainant company. Subsequently, the Proprietorship firm was changed as partnership concern, for which, appropriate notice was sent to the accused by the management. But without considering the said aspect, the First Appellate Court set aside the order of conviction passed by the learned Judicial Magistrate VII, Coimbatore and it is erroneous in law.

11. On the other hand, the learned counsel appearing for the accused would contend that in the cross examination of P.W.1, he admitted in respect of transactions alleged in this case and there is ledger and account books maintained in the office of the complainant. During the time of trial without any reason, the said documents have not been produced to show the liability of the accused. Further, he contended that the credit bill was signed by one Uma, who is the representative of the accused and she was also not examined as witness in the case. According to the learned counsel appearing for the accused, P.W.1 is not having any relationship with the complainant company. Further, the cheque has not been drawn in order to discharge the debt of the accused.

12. I have considered the submissions made on either side and also perused the materials available on records.

13. With regard to the status of the complainant company, on going through the complaint filed by the complainant before the trial Court, it appears that initially, at the time of filing complaint, the same has been filed by one Mahalingam, proprietor of Sri Shakthi Tyres. Subsequently, during the pendency of the case, proprietor concern was changed into partnership concern. Since the said change have been suitably brought to the notice of the Court, so the statements made by the learned counsel appearing for the accused is not having any merits.

14. In the Trial Court, believing the Ex.P.1 [credit bill] held that the complainant has proved the liability of the accused. Per contra, in the judgment rendered by the First Appellate Court, it was concluded that the non-production of the documents, which are all admitted in the cross examination of P.W.1 shows the accused is not having any liability to pay

the cheque amount. In this regard, it is necessary to see the judgment of our Honourable Apex Court in RANGAPPA vs. SRI MOHAN reported in AIR 2010 SC 1898 wherein, it has observed 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."
>
> 27. ....
>
> 28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

15. So, in order to rebut the presumption, the accused is having the duty to place the probable defence to disprove the case of the complainant. It is settled position in order to prove the case of defence, entering into the witness box by the accused is not necessary. In this case, it is an admitted fact that the complainant was running a business of selling tyres and flaps. According to him, the accused purchased tyres to the worth of cheque amount, for which, a credit bill has been issued by the complainant company after signing by one Uma.

16. In the Trial Court, the reliability of the said document was disputed on the side of the accused. So, the duty is cast upon the complainant to examine the said Uma, in order to prove the contents of the document. On the other hand, during the time of cross examination, P.W.1 has admitted with regard to the business transaction, account books, ledgers and day books were maintained. Further, he admitted that he filed income tax returns. In the said situation, since the liability was questioned by the accused, it is very easy to the complainant to produce the said documents. But without producing the said documents, the evidence of the complainant was closed in the trial Court.

17. In the Trial Court, the case of the accused is that when at the time his brother and the accused are running a company, the signed cheque of the accused was taken away by his brother and after using the same, the tyres were purchased from the complainant company. In the said circumstances, it is probable for the complainant for selling the tyres, after receiving the signed cheque. Accordingly, the accused raised a probable defence that the tyres were not purchased by him from the complainant. In the said circumstances, there is no explanation offered by the complainant for non-submitting the said records. Withholding the said documents is nothing but against the case of the complainant. Accordingly, this Court holds that there is no infirmity in the judgment rendered by the First Appellate Court.

18. 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 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.

19. 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 is deserves to be dismissed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

sri / klt
To

1.The Additional District and Sessions Judge
[Fast Track Court No.III],
Coimbatore.

2.The Judicial Magistrate No.VII,
Coimbatore.

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

+1cc to Mr.S.Gunalan, Advocate SR.NO.51546
+1cc to Mr.V.Anandhamurthy, Advocate SR.NO.51952

KS(CO)
sm:19.9.2018

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