

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.03.2018

Pronounced on: 05.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.377 of 2007

V.S.Sankar,
Prop. Chockanachiamman Bankers
Main Road, Vattkral Valasu,
Erode Taluk. Appellant/Complainant

Vs.

R.Elango Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., against the Order of Acquittal dated 21.02.2007 made in C.C.No.213 of 2004 passed by the learned District Munsif-cum-Judicial Magistrate at Kodumudi.

For Appellant : Mr.A.Thiyagarajan

For Respondent : Mr.N.Manokaran

JUDGMENT

The petitioner has filed the criminal appeal under Section 378 of Cr.P.C., to set aside the order of acquittal dated 21.02.2007 made in C.C.No.213 of 2004 passed by the District Munsiff-cum-Judicial Magistrate, Kodumudi, and acquit the respondent/accused for the offences charged.

2.The appellant herein is the complainant in C.C.No.213 of 2004 on the file of the learned District Munsiff-cum-Judicial Magistrate, Kodumudi, challenging the acquittal of the respondent herein/accused under Section 138 read with 142 of the Negotiable Instruments Act.

3.The case of the appellant is that the accused had financial transaction with the appellant and in the said transaction, he had borrowed Rs.9 Lakhs on 10.12.2003 after executing a promissory note, and to discharge the said liability, the respondent/accused issued a cheque dated 04.08.2004 for Rs.10,04,850/-. The appellant herein has presented the said cheque for collection on 04.08.2004, which was returned unpaid as "not arranged for" on 06.08.2004. The appellant caused a legal notice to the accused on 01.09.2004.

Despite receipt of legal notice, the respondent herein neither sent any reply nor paid the cheque amount, hence the appellant herein filed the above private complaint under Section 138 of the Negotiable Instruments Act.

4. According to the appellant, the respondent/accused duly admitted the execution of cheque and further he has not chosen to send any reply to the statutory notice issued by him, and therefore the Learned Magistrate ought to have held that the appellant as the holder in due course of the cheque has proved the offence and it is for the respondent to prove the contra in the above complaint.

5. The learned counsel for the appellant would submit that the Learned Magistrate come to the conclusion that Ex-P1 cheque was presented for collection within the validity period and the same was not honoured due to insufficiency of funds and the statutory notice also was duly served as per Ex.P4 and Ex-P5 and that all Exs.-P1 to P5 are admitted by the accused. Such being the case, the learned Magistrate ought to have held that the respondent/accused has committed the offences under Sections 138 and 142 of Negotiable Instruments Act.

6. The Learned Magistrate also specifically recorded that the respondent/accused has not disputed the fact that the dispute cheque relates to his savings bank Account with Indian Overseas Bank and admitted his signature found in Ex-P1 cheque ought to have come to the clear conclusion that the cheque has been validly issued by the respondent/accused and that the dishonor of the said cheque is nothing but an offence under Section 138 of the Negotiable Instruments Act.

7. The learned counsel for the appellant would submit that the Learned Judicial Magistrate erred in holding that the complainant is entitled to the statutory presumption available under Section 139 of the Negotiable Instruments Act to the effect that the cheque in question was issued towards the discharge of legally enforceable debt or liability. But, the presumption available under Section 139 is a rebuttable presumption and the accused can rebut the same only by letting in evidence and establishing his defence. Consequently the Learned Magistrate ought to have held that the respondent/accused neither produced any proof for payment regarding the cheque amount due by way of receipt nor by adducing any other dependent evidence or materials. In order to prove the same, on the side of the appellant herein, he examined himself as PW-1 and marked Exs-P1 to P5.

8. Per contra, the learned counsel for the respondent would submit that he defended the complaint inter alia contenting that he borrowed Rs.2,50,000/- on 23.08.1994, Rs.2 Lakhs on 29.08.1994 and Rs.4,50,000/- on 01.10.1995 from the complainant's father who was running a finance company in the name and style of Chokkananachiamman Bankers. Accused was paying the interest regularly. On 11.07.2010, the complainant's father

died. Thereafter, a Panchayat was held in the house of one Ravi (D.W.4) at Perundurai. As per the Panchayat, the respondent/accused paid Rs. 9 Lakhs and interest of Rs.1,50,000/- was agreed to be paid by way of cheque dated 13.04.2004 issued for Rs.1,50,000/-. The said cheque was presented and honored. Therefore, the entire loan transaction was settled.

9.The learned counsel for the respondent would further submit that a cheque issued towards security in the year 1994 to the above said Chokkananachiamman Finance has been misused at the instance of the complainant in the year 2004. At the time of payment of Rs.9,00,000/- the accused sought for the return of pronotes and cheques and for that the appellant herein replied that all the documents were misplaced. During the course of the trial, the respondent/accused has examined D.W.1 to D.W.5 besides marking Ex-D1 to Ex-D7, Ex-C1, Ex-X1 and Ex-X2 to prove his defence. After considering the oral and documentary evidences, the learned Magistrate was pleased to acquit the accused/respondent on the grounds that admission of the signature does not amount to admission of liability by order dated 21.02.2007.

10.Being aggrieved over the acquittal of the respondent herein, the complainant/appellant herein filed the above criminal appeal.

11.It is seen from the records that the issuance of cheque in Ex-P1 is admitted by the accused/Respondent. However, it is stated by the respondent herein that at the time of settlement of entire loan transaction amount, in the presence of Panchayatars, the demand to return the cheque and pronote by the accused was answered by the complainant that it was misplaced. No prudent man would accept the above said submission made by the Respondent herein. Having paid a huge amount of Rs.9 lakhs and issued cheque for Rs.1,50,000/- by the accused in the presence of Panchayatars, definitely would have got some written acknowledgement for the reply given by the complainant regarding misplace of previous cheque and pronote given to the father of the complainant. That apart, if the above version of the accused is genuine, he would have given reply to the legal notice sent by the appellant herein. The non-issuance of reply to the legal notice is also a ground to fix the liability on the accused.

12.Further, this Court is not able to accept the above contention of the accused, since he has not examined any one of the Panchayatar to prove the above said alleged Panchayat took place. In view of the discussion made above this Court has no hesitation to hold that the subject cheque was issued by the accused/Respondent for the legally enforceable debt and the accused has not rebutted the presumption available to the complaint under Section 139 of Negotiable Instruments Act. In this context it is useful to refer the Judgment of this Court

reported in 2010 (4) CTC 118 wherein it is held that "When an accused has to rebut presumption under Section 139, standard of proof for doing so, is that of preponderance of probabilities. Complaint disclosed existence of a legally enforceable debt. Accused admitted his signature in cheque. Statutory presumption comes into play and the same has not been rebutted". In view of the settled principle of law, this Court is of the view that the finding regarding the issue that the accused has rebutted the presumption under Section 139 of Negotiable Instruments Act by the Learned Magistrate is not proper and the same is liable to be set aside.

13. Since this Court held that the accused has not rebutted the presumption, it is not necessary to go into the other aspects of the matter that the cheque issued by the accused for Rs.1,50,000/- was honored by his banker. Further, it is to be noticed that the said cheque was issued prior to the issuance of the subject cheque. That apart, the Learned Magistrate held that the evidence of DW-4 is not helpful to the case of the accused.

14. The finding of the Learned Magistrate that complainant has not produced proper accounts to prove the existing liability as on 2004 is immaterial. The learned Magistrate ought to have seen that whether the subject cheque in question was issued by the accused, if so, the same was issued for the legally enforceable debt. As discussed above, the accused has admitted the issuance of cheque and the same was also held to be issued for the legally enforceable debt.

15. In the result, this Criminal Appeal is allowed and the judgment and order of acquittal dated 21.02.2007 made in C.C.No.213 of 2004 passed by the learned District Munsiff-cum-Judicial Magistrate, Kodumudi, is hereby set aside. The accused should undergo six months Simple Imprisonment and was also directed to pay the cheque amount by way of compensation, in default to pay the amount, he should undergo Simple Imprisonment for one month.

सत्यमेव जयते

vs

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The District Munsiff-cum-Judicial Magistrate,
Kodumudi.

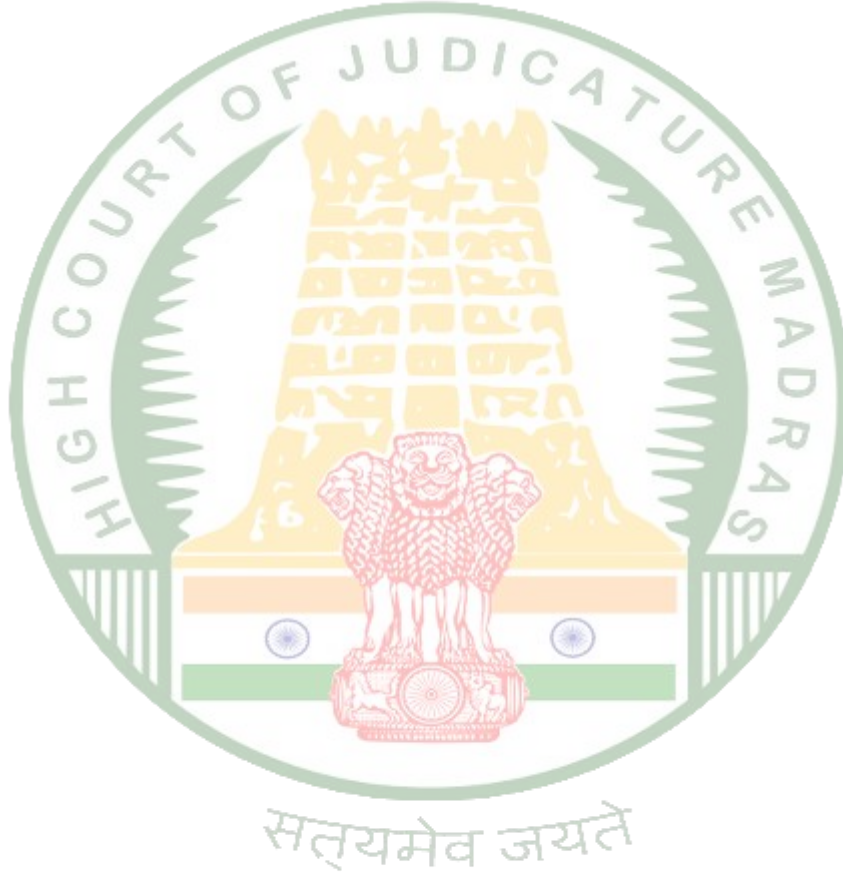
+1cc to Mr.A.Thiyagarajan, Advocate SR.NO.34737

+1cc to Mr.N.Manokaran, Advocate SR.No.35080

NA (CO)

sm:11.6.2018

Crl.A.No.377 of 2007



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