

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRL.A.No.509 of 2008

K.Thangaraj

..Appellant/Complainant

Vs

S.Sivaseelan

..Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C. against the Judgment in S.T.C.No.3218 of 2006 passed by the learned Judicial Magistrate No.1 at Coimbatore on 07.12.2007 and prays that this Court may be pleased to set aside the order of acquittal and convict the respondent for the offences with, which the respondent was charged.

For Appellant : M/s.S.Vinodha

for Mr.B.Nambiselvan

For Respondent : Mr.I.Abrar Md.Abdullah

JUDGMENT

Challenge made in this appeal is to the Judgment of the learned Judicial Magistrate No.1, Coimbatore.

2.For the sake of convenience the appellant and the respondent will be referred to as the complainant and the accused.

3.It is the case of the complainant that the accused borrowed a sum of Rs.7,50,000/- from the complainant on various occasions and thereafter accused issued a cheque No.033674 dated 27.05.2006 for a sum of Rs.7,50,000/- (Ex.P1) drawn on Bank of India, R.S.Puram Branch, Coimbatore, which was presented by the complainant on 19.08.2006 for collection through his bank viz., Syndicate Bank, Vysial Street Branch, Coimbatore. However, the said cheque was returned to the complainant along with Memo (Ex.P2) dated 22.08.2006 on the ground of "FUNDS INSUFFICIENT".

4. On 01.09.2006, the complainant issued statutory notice calling upon the accused to make payment, the said notice (Ex.P3) were acknowledged (Ex.P4) by the accused on 04.09.2006, the accused did not sent reply notice. The complainant initiated a prosecution in S.T.C.No.3218 of 2006 under Sec.138 of Negotiable Instruments Act against the accused Mr.S.Sivaselvan and the trial was held before Learned Judicial Magistrate No.1, Coimbatore.

5. On the appearance of the accused was questioned about the substance of accusation against him, which he denied and the complainant himself examined as PW-1 and marked 7 Exhibits, no defense witness was examined whereas defense documents were exhibited D-1 to D-3. The accused questioned about the incriminating circumstances appearing against him under Sec.313 of Cr.P.C., which he denied.

6. After hearing either side and considering the evidence on record, the Trial Court by Judgment dated 07.12.2007, acquitted the accused. Challenging the acquittal, the complainant is before this Court after obtaining special leave under Sec.378(4) Cr.P.C.

7. I heard M/s.S.Vinodha for Mr.B.Nambiselvan, learned counsel for the complainant and Mr.I.Abrar Md.Abdullah, learned counsel for the accused and paid anxious consideration.

8. Before going into rival submissions, it would be necessary to extract the following passage from Judgment of Hon'ble Supreme Court in Sampelly Satyanarayana Rao vs Indian Renewable Energy Development Agency Limited in Crl.A.No.867 of 2016 reported in MANU/SC/1021/2016

"Contention of the Appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonor of post-dated cheques given by way of security did not fall under Section 138 of the Act. The High Court held that when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that was they were cheques issued for a debt in present but payable in future and declined to quash the complaints."

Held, while dismissing the appeal:

- (i) The question whether a post-dated cheques is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheques liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.
- [10]

- (ii) Though the word "security" is used in Clause 3.1 (iii) of the agreement, the said expressions refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. Once the loan was disbursed and installments had fallen due on the date of the cheques as per the agreement, dishonor of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability. [11]"

9.The petitioner Mr.K.Thangaraj, PW-1, the complainant herein filed his proof affidavit before the Trial court which treated as his examination in chief, wherein he has sworn to the facts narrated in the complaint has stated that he is a businessman and the accused is his distant relative and as such he used to borrow hand loans on various occasions which in toto figured as Rs.7,50,000/- for his business and as well as for his family expenditure. The accused issued cheque bearing No.033674 (Exhibit - P1) drawn on 27.05.2006 for a sum of Rs.7,50,000/- (Ex.P1) drawn on Bank of India, R.S.Puram Branch, Coimbatore.

a.The cheque was presented by the complainant on 19.08.2006 for collection through his bank viz., Syndicate Bank, Vysial Street Branch, Coimbatore. However, the said cheque was returned to the complainant along with Memo (Ex.P2) dated 22.08.2006 on the ground of "FUNDS INSUFFICIENT".

b.The statutory notice dated 01.09.2006 is issued to the accused and the same was received by him on 04.09.2006 and the accused has not chosen to send a reply notice.

10.The Learned Counsel for Appellant would submit that the Learned Trial Judge has got completely carried away by technicality of the issues raised and does not considered the important submissions raised by the appellant. To canvas the case, he has submitted that the execution of the cheque has not been denied and once when the cheque has been executed validly, the burden to rebut the same would shift to the accused as per sections 118 and 139 of Negotiable Instrument Act and it also been submitted that no evidence has been let in by the accused to rebut the pursuance 139 of the act except some marking of Exhibit D-1 to D-3 and it is the categoric case of the appellants that once when the execution of the cheque has been

accepted and the signature found to be that of accused, there is no rhyme or reason for the Trial Court to believe the frivolous defence raised by the accused and the very purpose of the Negotiable Instruments Act is to ensure that a person issuing a cheque validly is to be made liable in the event of dishonour of the cheque and the same has not been considered by the trial Court and therefore, it has been prayed by the Learned Counsel for the appellant that the appeal shall be allowed.

11.The Learned Counsel for the respondent would submit that the claim made by the appellant is erroneous and the Learned Trial Court has correctly considered the fact that the burden is on the complainant to initially substantiate that the cheque was issued for a lawful purpose and the trial Court has rightly considered the important fact that the cheque was issued for security purpose.

12.Hence the finding of lower court that the cheque was not issued for legally enforceable debt cannot be held to be valid.

13.The learned counsel for the petitioner also placed reliance upon the decisions of the Hon'ble Supreme Court in *Sadanandan Bhadran V.Madhavan Sunil Kumar* reported in (1998) 6 SCC 514 and *C.C. Alavi Haji V.Palapetty Muhammed & Another* reported in 2007 (2) MWN (Cr.) DCC 100 (SC) to canvass his case.

14.It has been made clear in the above two decisions and also in several other decisions that the purpose of Section 138 is to assist the person who has suffered by virtue of dishonor of a cheque and to ensure that under the threat of prosecution, the accused is compelled to settle the payments at once. If at all, there is any technical infirmity in the procedure adopted by the complainant, the same shall affect the complainant only to a limited extent and it cannot demolish his very claim. The reason being, if there are two views possible, one in the favour of the complainant and other against, the Courts, after ensuring that the complainant has discharged his initial burden, the court would come to his rescue and not prejudice his interest.

15.In this case, the Trial courts finding that cheque is issued for security purpose cannot be held to be valid. Hence to this section a finding of Lower Court cannot withstand the rigor of law and accordingly the same deserves to be set aside.

16.In the result:

(a) this Criminal Appeal is allowed by setting aside the order in S.T.C.No.3218 of 2006, dated 07.12.2007 on the file of the learned Judicial Magistrate No.1, Coimbatore;

(b) the respondent/accused is convicted for one month imprisonment with fine of Rs.5,000/-;

(c) the respondent/accused is directed to pay a sum of

Rs.7,50,000/- as compensation with interest at the rate of 12% per annum, failing which the respondent/accused shall be sentenced to Simple Imprisonment for a period of one year.

Sd/-
Assistant Registrar(CS-II)

//True copy//

Sub Assistant Registrar

vs

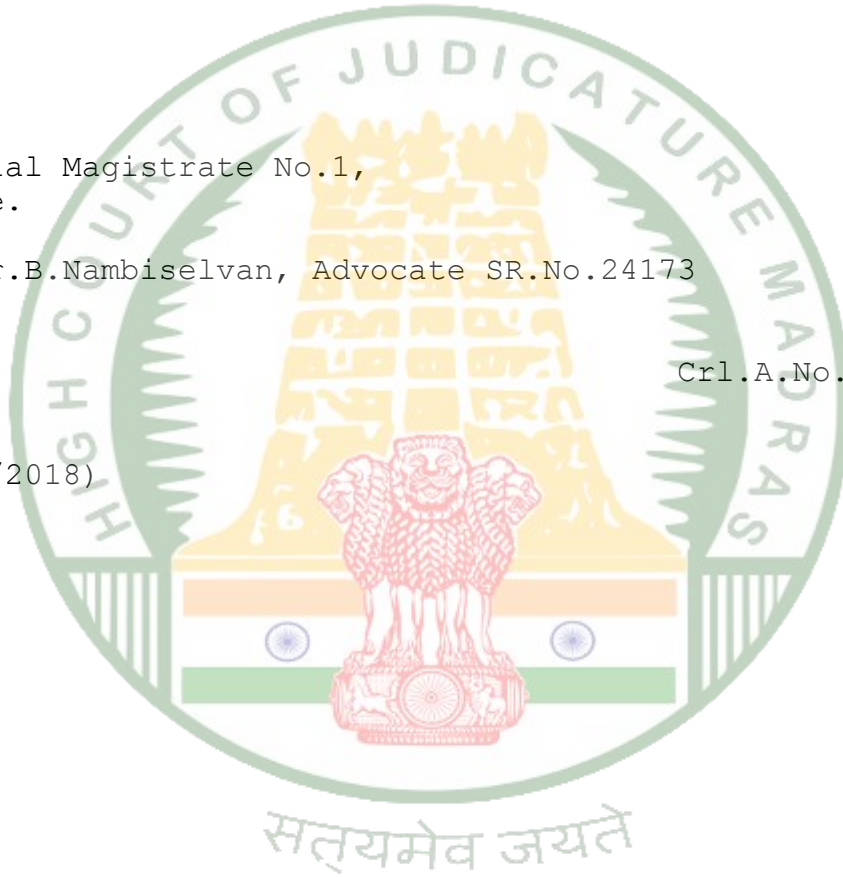
To

The Judicial Magistrate No.1,
Coimbatore.

+1cc to Mr.B.Nambiselvan, Advocate SR.No.24173

Crl.A.No.509 of 2008

GMV(09/10/2018)



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