IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :24.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL.A.No.474 of 2007

R.Venkatachalam ... Appellant/complainant

Vs.

1.K.Aruna

2.V.Shanmugam ...Respondents/Accused

PRAYER: The Criminal Appeal has been filed under Section 378 (1) of Cr.P.C., to set aside the order of acquittal dated 09.04.2007 in C.C.No.108 of 2004 on the file of the Judicial Magistrate No.1, Salem.

For Appellant : Mr. K. Selvaraj

For Respondents : Mr.T. Balaji

J U D G M E N T

This Criminal Appeal has been directed against the order of acquittal dated 09.04.2007, passed in C.C.No.108 of 2004, by the Judicial Magistrate No.I, Salem.

2. The case of the appellant/complainant, is as follows:

It is averred in the petition that on 11.08.2003, both the accused have borrowed a sum of Rs.3,00,000/-(Rupees Three lakhs only) from the complainant and to that effect, they executed a Pronote on the same day. Besides that, they had issued a cheque dated 18.11.2003 for a sum of Rs.3,00,000/- drawn on State Bank of Mysore, Salem Branch. When the above cheque was presented for encashment on 19.11.2003 through complainant bank, it has been returned as "funds insufficient" under Ex.P2. Therefore, on 20.11.2003, a legal notice-Ex.P3 was issued to the accused, but the same has been returned as "unserved". Since the accused have committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881, the present complaint has been filed for getting the relief sought for therein.

3. Before the trial court, on the side of the complainant, complainant was examined as PW1 and Exs.P1 to P5 were marked. Whereas on the side of the accused, three witnesses (DW1 to DW3) were examined and two exhibits (Exs.D1 & D2) were marked. The Trial Court, after completion of evidence, questioned the accused u/s.313 Cr.P.C., Accused denied complicity to the offence. After analysing the available

evidence on record, acquitted both the accused u/s.255 (1) Cr.P.C., Against the order of acquittal, the present Criminal Appeal has been preferred at the instance of the complainant as appellant.

4. The learned counsel appearing for the appellant/complainant has contended that the complainant advanced the loan amount in favour of the accused, in order to repay the loan amount, they issued cheque in favour of the complainant. The said cheque was presented before the concerned bank and the same was returned as "funds insufficient". The said complainant has been examined as P.W.1, he categorically stated before the Trial Court that the complainant has sufficient means to lend money to the accused and under these circumstances, the order of acquittal passed by the Trial Court is totally erroneous and the same is liable to be set aside and the respondent / accused shall be imposed maximum punishment u/s.138 of Negotiable Instruments Act and the appellant/complainant may be awarded compensation u/s.357 Cr.P.C.,

5. Per contra, the learned counsel appearing for the Respondent/Accused has contended that the Trial Court has look into the evidence adduced by the complainant and also by D.W.1. The specific evidence given by D.W.1-Boopathy, the Officer of Karur Vysya Bank, Salem, is that the accused Aruna is having Savings Bank Account in his Bank. The said account stands in the name of Aruna/first accused, the daughter of the second accused and the cheque was issued by the first accused in favour of the complainant. However, there is no money available in the account and hence, the said cheque is returned with an endorsement "funds insufficient", 1st accused/Aruna was examined as D.W.2 and she deposed that she did not know the complainant Venkatachalam and there is no transaction between D.W.2 and the complainant. In fact, her husband enrolled in the P.S.K.Finance Chit Company, as a Member and in order to give guarantee to the said company, her husband issued a blank cheque in favour of the Company. Except her husband, she did not have any transaction with the Bank as a guarantor. It is the version of DW2 that her husband collected the cheque from her for the purpose of the guarantee to the P.S.K. Finance Company and neither she commit any offence nor she had any transaction with the complainant P.S.K.Finance Company. In the said complaint, Aruna's father is arrayed as A2 who is also examined as D.W.3, and he denied that there is no transaction between them and P.S.K.Finance Company. However, he admitted that his son-in-law has participated in the Chit business of the Company, in order to give security, his son-in-law collected a cheque from his daughter and his signature has been forged in the cheque for the purpose of implicating him in this case.

6. Apart from the above, P.W.1 during the course of his cross-examination, has specifically admitted the fact that 1st Accused/Aruna did not have any transaction with the P.S.K.Finance Company, and there was a Chit transaction between her husband and P.S.K. Finance Company and she do not have any transaction with the P.S.K. Finance Company. Apart from the above, the transaction is only between the P.S.K.Finance Company and husband of the first accused and son-in-law of the second accused. However, the complainant has no sufficient means for lending money in favour of the accused or any other person.

7. It is an admitted fact that the present complaint has been filed under Section 138 of the Negotiable Instrument Act, 1881. For invoking Section 138 of the said Act, the cheque in question must be given in respect of an enforceable debt.

8. In the present case, a specific defence taken on the side of the accused is that the cheque in question is not supported by consideration and further the appellant/complainant has no means to advance loan of Rs.3,00,000/- to the accused. Therefore, the cheque in question is not supported by consideration and further, for the purpose of the Chit business, the cheque given as a guarantee, was mis-used by the Company by setting up the complainant by filing a case under Section 138 of the Negotiable Instrument Act against the accused persons.

9. At this juncture, it would be condign to look into the evidence adduced by the complainant. The complainant has been examined as P.W.1. P.W.1 said that the cheque was issued by the accused for repayment of loan obtained under pronote, but he did not establish in what consideration, the accused person borrowed the amount and what is the contents of the Pro-note and the same was not established through documentary evidence.

10. In view of the above, the Court can easily come to a conclusion that the alleged money transaction put forth by the complainant is nothing but farce.

11. On the side of the accused, the Bank Officer was examined as D.W.1 and accused were examined as DW2 and DW3 and their evidence clearly established that the accused do not have any transaction with the complainant. The specific contention put forth on the side of the appellant/complainant is that the accused have received a sum of Rs.3,00,000 by way of executing Pronote, but, for the scrutiny of the Court, the same has not been marked. P.W.1 has not purforth any evidence or documents to show that he has sufficient means to lend money in favour of the accused person.

12. Since on the side of the appellant/complainant, it has not been positively established that he had sufficient means for advancing loan on the date of issuance of the alleged cheque and since on the side of the respondents/accused, it has been established to the fact that the appellant/complainant has no sufficient means for advancing loan, this court is of the considered view that Ex.P1 has not been given in respect of any legally enforceable debt and therefore, Section 138 of the Negotiable Instruments Act 1881, is not attracted.

13. When the evidence of the accused probabilise the case that there is no privity of contract between the complainant and themselves, the burden shifted on the complainant to establish passing consideration. From the evidence of PW1, I am unable to find any material to substantiate

passing of consideration. The Trial court, on proper appreciation of evidence, has rightly arrived at a conclusion. Unless the Judgment of the trial court is either perverse or wholly unsustainable in law, the order of acquittal cannot be interfered with by the appellate court, as per the dictum laid down by the Hon'ble Supreme Court (2009) 10 SCC 206 (Arulvelu & Another Vs. State Represented by the Public Prosecutor & Another) which reads as follows:

> "Unquestionably, the appellate court has power to review and reappreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be a perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallised by the aforementioned judgments of this Court. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court."

14. On considering overall evidence available on record, the trial court has rightly come to the conclusion that the cheque in question is not supported by consideration and therefore, dismissal order passed by the trial court is legally correct and the same does not call for any interference.

15. Further, the presumption available under Section 118 of the Negotiable Instruments Act, 1881 is nothing but rebuttable and in the present case, on the side of the respondent/accused rebuttal evidence is available so as to disprove the case of the appellant/complainant.

16. The trial court, after considering the available evidence on record has rightly dismissed the complaint and there is no need to interfere with the order passed by the trial court.

In the result, the Criminal Appeal is dismissed and the order of acquittal dated 09.04.2007 in C.C.No.108 of 2004 on the file of the Judicial Magistrate No.1, Salem, is confirmed.

gv

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate No.1,
   Salem.

2. Do-Thro The Chief Judicial Magistrate, Salem

3. The Section Officer,
   Criminal Section, High Court, Madras

+1cc to M/s.A.Thiyagarajan, Advocate Sr.No.14210
+1cc to Mr.K.Selvaraj, Advocate Sr.No.14404

AK(CO)
sm:4.4.2018