IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

Criminal Appeal No.131of 2012

N.Sakunthala .....Appellant

Vs

N.Jaganathan ....Respondent

Prayer: Appeal filed under Section 378(4) of code of Criminal Procedure, against the judgment dated 29.12.2008 passed in C.A.No.308 of 2008 by the learned Additional District and Sessions Judge, (Fast Track Court II) Coimbatore, reversing the judgment passed in C.C.No.866 of 2007 respectively passed by the Judicial Magistrate No.3, Coimbatore dated 29.12.2008.

For Appellant : Mr. S. Thiruvengadam

For Respondent : Mr.P.M.duraisamy

JUDGMENT

This criminal appeal has been filed against the judgment dated 29.12.2008 passed in C.A.No.308 of 2008 on the file of Learned Additional

District and Sessions Judge, (Fast Track Court-II), Coimbatore, reversing the judgment passed in C.C.No. 866 of 2007 passed by the Judicial Magistrate No. III, Coimbatore.

The case of the prosecution is brief is as follows:

2. The appellant is running a chit company, in the name and style of Gayathri Devi, Chits private limited, in No.18 State Bank road, Subbu Plazza, Coimbatore. In the said company in a chit run by the appellant, the accused and his wife J.Premalatha are joined as members. In the mean while, in the year of 2006 the accused and his wife approached the appellant and requested to give Rs.6,00,000/- as a loan. Considering the request made by them on 22.08.2006, the appellant paid Rs.3,00,000/- as a loan to the accused and obtained a pro note and the original sale deeds stands in the name of accused as a security. At the time, of availing the loan the accused promised to repay the said loan with in a period of three months. But after completing three months period, on 05.12.2006 the accused, approached the appellant and requested further 2 months time for repay the loan amount. Further, in order to, settle the part due he issued a cheque for Rs.3,00,000/- drawn on Vijaya Bank, Coimbatore,

dated 06.02.2007 the serial number of the cheque is 633402.

3. Again on 19.12.2006 both the accused and his wife approached the appellant and requested to give further Rs.2,00,000/- as a loan for their urgent needs. Since, the appellant is refused to give further loan. The accused demanded the appellant for returning the one sale deed. Which was handed over to the appellant as a security at the time of availing loan on 22.08.2006. For which, the appellant refused to return the sale deed.

4. Due to which, on 22.12.2006 the accused and his wife published a news in Dinakaran, Daily news paper. Further, on 28.12.2006, they issued an advocate notice to the appellant stating that the cheque now under dispute was handed over to the appellant as a security in the year of 2001.

5. In the said circumstances, on 06.02.2007 the appellant presented the cheque in Bank of India, Soolur Branch, for enhancement. But, cheque have been returned as unpaid for the reason, "funds in sufficient". There after, the details of return was intimated to the appellant on 08.02.2007 by the bank authorities. So, on 05.03.2007 the

appellant/complainant issued a statutory notice, calling the accused to pay the cheque amount with in a period of 15 days. On receipt of the notice issued by the appellant / Complainant on 26.03.2007 the accused sent a replay notice denying the liability. Thereafter, the complaint has been instituted against the accused under Section 138 of Negotiable Instrument Act, before the Judicial Magistrate No.3, Coimbatore.

6. Before, the trial Court, the accused was questioned with regard to the averments made in the complaint for which he denied as false and opted for trial. In order to prove the case of the appellant. The appellant examined himself as P.W.1 and marked 9 documents as Ex.P1 to Ex.P9.

7. After, concluding the trial, the trial Court by the judgment dated 29.12.2018 convicted the accused and sentenced to undergo one year simple imprisonment and to pay a fine of Rs.2,000/-, in default to undergo one month simple imprisonment, against which the accused preferred an appeal, before the District and Sessions Court, Coimbatore, in C.A.No.308 of 2008.

8. After elaborate enquiry by the judgment dated 29.12.2018. The learned Additional District and Sessions Judge, Coimbatore, doubted about the genunity of the cheque allowed the appeal and set aside the order of conviction passed by magistrate. Now, challenging the said judgment, the complainant is before this Court by filing the present Criminal appeal.

9. Today, when the appeal is taken up for consideration, I have heard the arguments of Mr.S.Thiruvengadam, learned counsel for the appellant and Mr.P.M.Duraisamy, learned counsel for the respondent and also perused the records carefully.

10. The learned Counsel appearing for the appellant would contend that in the trial Court, the signature found in the cheque has not been disputed on the side of the accused. Thereby, Section 139 Negotiable Instrument Act, comes into play. Accordingly, duty is cost upon the accused to prove that the cheque under dispute is not issued for discharging the legally enforceable debt or for other liability. Further, he relied the judgment of our Honourable Apex Court reported in **2010 4 CTC**

118. in the judgment relied on him. The Honourable Apex Court has held as follows:

> *"6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the Negotiable Instruments Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption."*

11. So, it is true, since the accused admit the signature found in the cheque the statutory presumption is raised in favour of the appellant. However, the presumption raised in favour of the appellant is rebuttable. In this regard, our Honourable Apex Court observed in a case of **Kishan Rao Vs. ShankarGouda**, in criminal appeal **803 of 2008** in which, it was observed **in para No.21** as follows:

Another Judgment which needs to be looked into is ***Rangappa Vs. Sri Mohan, 2010 (11) SCC 441.*** *A three judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:*

> *"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-(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. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant – accused cannot be expected to discharge an unduly high standard or proof."

12. So, according to the verdict our Honourable Apex Court, the presumption raised by the 139 is rebuttable in nature. For which, the duty cast upon the accused is to raise the probable defence to show the

primafacie of case, as the cheque has not been issued for discharging the loan availed from the appellant. Further, the respondent is having the duty to create a doubt over the case of appellant by putting the probable defence.

13. In this regard, in the trial Court on the side of the accused, nobody was examined as a witness to the accused. However, in order to rebut the presumption entering into the witness box by the accused is not necessary. In this case, it is an admitted fact before the presentation of the cheque for enhancement, the accused made a paper publication on 22.12.2006 itself, stating that the cheque now under dispute was issued to the appellant only as a security for the chit run by Gayathri chit funds. Further, the copy of the publication was marked as Ex.P3 in the trial Court. Now on going through the said document, it was stated that the respondent had clearly mentioned the details of the chit and about the details of the cheque along with the serial number. The said paper publication is effected before presenting the cheque for enhancement, so it create a doubt whether, the contention raised by the appellant is true or not. Further, in the replay notice sent to the appellant the respondent took

the same stand, stating that the cheque under dispute was issued only as a security at the time of taking the chit.

14. In otherwise, on the side of the respondent, it was disputed that the appellant , is not having any source to lend a such huge amount as a loan.

15. In this case, on go through the judgment rendered by the trial Court, on the side of the appellant, in order to support the loan except the cheque, now under dispute, one promissory note was exhibited as Ex.P1. In the said circumstances, in order to show the source, P.W.1 has stated in his cross examination, as the loan given to the accused was taken away from the bank account maintained in Bank of India Soolur Branch. Further, he has stated that there was an entry made in the pass book, in respect to the said amount drawn from the Bank. But, at the same time, in order to support the above evidence, the copy of the pass books have not been exhibited on the side of the appellant. In this regard, in the judgment reported in **2015 1 SCC 1999** our Honourble Apex Court has held as follows:

> *"9. ......Further the complainant did not produce bank statement to substantiate his claim. The*

trial Court took into account the testimony of the wife of the complainant in another Criminal case arising under Section 138 of the NI Act in which she has stated that the present appellant – accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial Court came to conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him.

10. In our view the said conclusion of the trial Court has been arrived at on proper appreciation of material evidence on record. The impugned judgment of remand made by the High Court in this case is unsustainable and liable to be set aside."

16. So, following the principle laid by our Honourable Apex Court, in this case also the appellant has not established the fact that he has having the source to lend a such huge money to the respondent. So the non submission of copy of the pass book will create a doubt, whether the appellant is having the capacity to lend a loan as stated by him or not.

17. Further, the non producing of the pass book create a suspicious circumstances over the case of appellant.

18. Apart from the above circumstances, the evidence given by P.W.1 clearly shows at the time of availing loan, a pro note was executed

by the accused. In the trial Court after showing the original, the copy of the same was marked as Ex.P1. If really the cheque alleged to have been given by the respondent towards the discharge of loan, no prudent man can leave the pro note with the complainant after giving the cheque. In general, at the time, when the cheque was received for discharging the liability, it is the duty of the complainant to hand over the pro note executed by the accused. But, in this case, as per the evidence of P.W.1, the pro note which is said to have been executed by the accused/respondent herein was in the custody of the complainant, till he gave evidence before the trial Court, which also creates the doubt about the genunity of the case.

19. Further more, in the 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 not disturb the finding of the acquittal recorded by the trial Court.

20. 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.

24.07.2018

Index:yes/no
Internet:yes/no
Speaking order : Non – Speaking Order

msv / sbn

To

1.The learned Additional District
and Sessions Judge,
Coimbatore cum II Fast Track Court.

2. The learned Judicial Magisrate No.3,
Coimbatore.

R.PONGIAPPAN.J

msv / sbn

Crl.A.No. 131 of 2012

24.07.2018