

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.07.2018

PRONOUNCED ON : 26.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.A.No.184 of 2012

K.Jaishankar ... Appellant

Vs

M.Devaraj ... Respondent

Prayer : Criminal Appeal filed under Sections 378 (4) of Criminal Procedure Code, to call for the records and set aside the acquittal dated 06.01.2012 made in Crl.A.No.102 of 2011 on the file of V Additional Sessions Judge, Chennai, reversing the judgment of conviction dated 05.05.2011 made in C.C.No.2661 of 2010 on the file of II Metropolitan Magistrate, Egmore, Chennai.

For Appellant : Mr.C.Kanagaraj

For Respondents: No appearance

J U D G M E N T

This appeal is preferred as against the judgment dated 06.01.2012 passed in Criminal Appeal No.102 of 2011 on the file of V Additional Sessions Judge, Chennai, thereby reversing the conviction and sentence imposed vide the order dated 05.05.2011 passed in C.C.No.2661 of 2010 on the file of II Metropolitan Magistrate, Egmore, Chennai.

2. The case of the complainant is that he filed a complaint for the offence under Section 138 of Negotiable Instruments Act against the accused alleging that the accused issued a cheque for a sum of Rs.50,000/- towards the discharge of his legal liability dated 13.03.2010 drawn on Central Bank, Chennai. On presentation of the same on 13.03.2010, it was returned dishonour for the reason "insufficient funds" on 17.03.2010. It was

communicated to the complainant with written memo. That this transaction, the complainant caused statutory notice dated 20.03.2010 and the same was duly received by the accused/respondent. After receipt of the same, the accused neither repaid the cheque amount nor issued any reply. Therefore, the complainant lodged a complaint for the offence under Section 138 of Negotiable Instruments Act against the accused.

3. The Trial Court, after furnishing the copies to the accused and the accused pleaded not guilty. The complainant examined himself as P.W.1 and marked Exs.P1 to P4. The respondent examined himself D.W.1 as defense side witness and marked Ex.D1. The Trial Court after considering the evidence and materials available on record, convicted the accused for the offence under Section 138 of Negotiable Instruments Act and sentenced him to undergo six months Simple Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo Simple Imprisonment for three months, against which, the accused preferred an appeal in Criminal Appeal No.102 of 2011 and the learned V Additional Sessions Judge, Chennai, after hearing on arguments of both the sides, reversed the judgment of the conviction and sentence passed by the Trial Court and acquitted the accused, as against which, the present appeal has been preferred by the complainant.

4. The learned counsel for the appellant/complainant submitted that P.W.1/complainant has proved the case against the accused for the offence under Section 138 of Negotiable Instruments Act. The accused never denied the issuance of the cheque and signature of the cheque and as such, to presumption under Section 138 of Negotiable Instruments Act proved that the cheque was issued for legally enforceable debt by the accused. Further, the accused did not deny the receipt of notice and did not issue any reply to rebut the presumption under Section 119 and 138 of Negotiable Instruments Act. Further, he would contend that the evidence of D.W.1 and Ex.D1 cannot be taken as substantive piece of evidence for proving the issuance of the cheque and another cheque during the year 2008 itself to one Kannan Finance. Ex.P1 cheque was issued in discharge of his liability of Rs.50,000/- to the complainant and it was returned dishonoured for the reason that "funds insufficient". As such, the complainant has established this case beyond any reasonable doubts and prayed for restoration of the conviction and sentence passed by the Trial Court.

5.The case of the respondent/accused that Ex.P1 cheque was fabricated and concocted one and it was never issued for any discharge of any legally enforceable debt or liability. The accused examined himself as D.W.1 and marked Ex.D1 and thereby, rebutted the presumption under Section 119 and 138 of Negotiable Instruments Act. The complainant did not remember the date on which he paid the amount and he did not obtain any documents as a security of the amount which he paid to the respondent.

6.Heard the arguments advanced by Mr.C.Kanagaraj, learned counsel appearing for the appellant and there is no appearance on behalf of the respondent and perused the materials available on records.

7.From the evidence of complainant, it is seen that the complainant was running a finance company and lending money to the public in the name and style of Kannan Finance. During borrowal loan, the respondent issued blank cheques to the Kannan Finance in the year 2008. Further, the evidence of the complainant in the cross-examination clearly shows that the respondent did not borrow any loan from the complainant and it was also admitted that he did not lend any loan to the respondent. To prove the same, he also deposed that he do not remember the date of cheque payment made to the respondent and he did not obtain any document for the loan lend by him from the respondent. Therefore, the impugned cheque was not issued for legally enforceable debt and as such the appellant/complainant failed to prove the said requirement and it is fatal to the case of the complainant.

8.Moreover, the respondent examined himself D.W.1 and marked Ex.D1. The defence evidence and the documents are substantive piece of evidence and are sufficient to rebut the presumption under Section 119 and 138 of Negotiable Instruments Act. The respondent categorical evidence is that he issued six cheques in favour of one Kannan Finance and it is proved by Ex.D1, counterfoil of the cheques. It is also admitted by the complainant that he was running Kannan Finance. As such, the complainant has failed to prove his case beyond any doubt.

9.In this regard, it is appropriate to consider the judgment rendered by the Hon'ble Supreme Court of India reported in "CDJ 2009 SC 1411 - Jugesh Sehgal v. Shamsher

Singh Gogi" in which the Hon'ble Apex held as follows :-

"9. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice; "

10. Further, the Hon'ble Supreme Court of India held in the judgment reported in "(2008) 4 SCC 54 - Krishna

Janardhan Bhat v. Dattatraya G.Hegde" in paragraph Nos. 34, 35 and 44 which reads as follows:

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

35. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

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44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P., Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Rajesh Ranjan Yadav v. CBI) Article 6(2) of the European Convention on Human Rights provides : "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with

the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact."

11. In view of the above discussions, this Court is of the considered opinion that the complainant did not comply all the ingredients under Section 138 of Negotiable Instruments Act, in order to attract the penal provisions. Accordingly, the First Appellate Court rightly acquitted the accused by setting aside the conviction and sentence passed by the Trial Court.

12. In the result, the Criminal Appeal is dismissed and the judgment of the acquittal passed in Criminal Appeal No.102 of 2011 on the file of the V Additional Sessions Judge, Chennai, in reversing the judgment of the Trial Court in C.C.No.2661 of 2010, dated 05.05.2011, is hereby confirmed.

Sd/-

Assistant Registrar(CS)

//True Copy//

LPP

Sub Assistant Registrar

To

1. The II Additional District and Sessions Judge,
Tindivanam.

2. The V Additional Sessions Judge,
Chennai

3. The Inspector of Police,
Vanoor Police Station,
Villupuram District.

4. The Public Prosecutor,
High Court, Madras.

CRL.A.No.184 of 2012

VSNI (CO)
ASK (14/08/2018)



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