IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.01.2018

CORAM

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

Crl.A.No.471 of 2012

D.Selvin ...Petitioner/Complainant

Vs.

A.Jayapandian ...Respondent/Accused

Prayer:- This Criminal Appeal is filed under Section 378 of Cr.P.C., to set aside the order passed by the learned IV Fast Track Court at Coimbatore at Tiruppur dated 30.09.2011 in C.A.No.404 of 2008 reversing the judgment passed in C.C.No.305 of 2003 by the learned Judicial Magistrate, Avinashi, dated 13.11.2008.

For Petitioner : Mr.S.Thiruvengadam

For Respondent : No appearance

JUDGEMENT

This criminal appeal has been filed against the order passed by the learned Additional District and Sessions Judge, Fast Track Court No.IV, Coimbatore at Tiruppur in C.A.No.404 of 2008 dated 30.09.2011, by which the Sessions Court reversed the judgment of the trial Court namely the learned District Munsif-cum-Judicial Magistrate, Avinashi, in C.C.No.305 of 2003, dated 13.11.2008.

2. The appellant was the complainant before the trial Court. According to him, the respondent/accused borrowed a sum of Rs.2,00,000/- from the appellant on 27.06.2003 and in order to repay the same on the same day, the respondent/accused issued a cheque drawn on State Bank of Bikaner and Jaipur. It is the further case of the appellant/complainant that as per the instructions of the respondent/ accused, the cheque was presented on 12.09.2003 at appellant's bank and the said cheque was returned on 15.09.2003 and in this regard, the appellant's bank has sent a memo on 19.09.2003. Pursuant to which, the appellant has sent a statutory legal notice on 24.09.2003 to the respondent. Subsequently, the respondent on 10.10.2003 has sent a reply, denying the contention made in the notice issued by the appellant. Since the respondent did not come forward to repay

the said amount of Rs.2,00,000/- in lieu of the cheque amount, which was returned as insufficient fund, the appellant filed a complaint against the respondent to punish him under Section 138 of Negotiable Instruments Act before the trial Court and the same was taken on file as C.C.No.305 of 2003.3

3. After trial, the trial Court convicted the respondent/accused for the offence punishable under Section 138 of Negotiable Instruments Act and sentenced him to undergo one year simple imprisonment and imposed a fine of Rs.3,000/-, in default, to undergo further simple imprisonment of one month. As against the said judgment and conviction, the respondent/accused filed an appeal in Crl.A.No.404 of 2008 before the Additional District and Sessions Judge, Fast Track Court No.IV, Coimbatore at Tiruppur. The appellate Court, after having considered the judgment of the trial Court and the evidence, has reversed the said judgment of the trial Court by allowing the appeal, by thus, the respondent/accused has been acquitted. Aggrieved over the said order of Appellate Court, acquitting the respondent/accused, the present appeal has been filed.

4. Heard Mr.S.Thiruvengadam, learned counsel appearing for the appellant. None appears for the respondent.

5. It is the case of the appellant that the respondent borrowed a sum of Rs.2,00,000/- on 27.06.2003 from the appellant and on the same day, he issued a cheque. However, on instructions from the respondent, the cheque was presented for collection by the appellant on 12.09.2003 and the same was returned by return memos dated 15.09.2003 and 19.09.2003. Thereafter, notice to the respondent was issued by the appellant on 24.09.2003, demanding him to pay the cheque amount. However, on receipt of the same, the respondent had sent a reply on 10.10.2003 denying the said transaction between the appellant and the respondent and therefore, the appellant had filed a complaint under Section 138 of Negotiable Instruments Act to punish the respondent.

6. The case of the respondent is that the respondent has never borrowed any amount from the appellant and in fact, the respondent did not know, who is the appellant. In fact, three years prior to the alleged transaction, the respondent had given the cheque to one Thirumalai, who is the proprietor of Pandian Traders. The cheque was given for business transaction to the said Thirumalai and the said cheque has been now misused by the appellant by striking of the name of the payee ie., Pandian Traders and written the name of the appellant and the date also originally written as 25.10.2000 and it had been scored and the new date ie., 27.06.2003 has been written.

7. It is the further case of the respondent that the said factors had been explained by the respondent in the reply notice itself, where he clearly denied the very alleged transaction taken place as claimed by the appellant and the cheque in question also was not at all given to the appellant at any point of time and it is further case of the respondent/ accused that there was no necessity to get any loan that too an amount of Rs.2,00,000/- from the appellant as the respondent does not have any business transaction with the appellant.

8. Before the trial Court, the appellant/complaint has deposed as P.W.1 and the respondent/accused has deposed as D.W.1. The trial Court after having considered the evidence given by the both sides has proceeded to come to the conclusion that the appellant has proved that there was a legally enforceable debt between the parties and in order to repay the debt, the said cheque was issued. Since the signature of the respondent was denied, the trial Court has proceeded to state that the signature originally made by the respondent/accused and the subsequent signature of him as alleged by the appellant as striking of the name of the payee and writing the appellant name, had been compared by the trial Court itself and accordingly, it had come to the conclusion that the signature is one and the same.

9. The trial Court has also proceeded to state that during the cross-examination, the respondent/accused had stated that he had issued the cheque to one Thirumalai by filing up the name of Pandian Traders as payee and when he was questioned in the cross-examination, about the subsequent signature that was shown in the cheque leaf i.e, name of the payee and date, the respondent/accused had replied that he is not clear as to whether the signature belongs to him. In this context, the learned trial Judge has come to the conclusion that the deposition of the respondent/accused may not be accepted, since he has given evasive reply, when a query was made to the respondent/accused as to whether the subsequent signature shown in the cheque leaf, striking the payee name and the date, he has given only evasive reply that he has not known that the subsequent signature belongs to him. Only in that context, the learned trial Court Judge has come to the conclusion that the complainant/appellant has proved his case as the statutory presumption were also infavour of the complainant under the Negotiable Instruments Act. On that score, the learned Judge of the trial Court has come to the conclusion that the respondent/accused has committed the offence punishable under Section 138 of Negotiable Instruments Act and accordingly, he has convicted the respondent/ accused.

10. However, the first appellate Court/Session Court

has gone into each and every such finding given by the trial Court and also the decision. The trial Court has not taken the original date of the cheque i.e., 25.10.2000, where the name of the payee was written as Pandian Traders. In this regard, the case of the respondent/accused is that in the year of 2000, the cheque was given to one Thirumalai, who is the owner of Pandian Traders with whom, the respondent/accused claimed that he did have the business transactions. When the said cheque had been once again claimed to be re-issued in favour of the complainant/appellant, the name of the payee has been scored of, where the appellant name was written and the date of the cheque has also been altered from 25.10.2000 to 26.07.2003. In this regard, a reasonable doubt that may arisen to any person who see the cheque in question, has also arisen to the learned Judge of the Appellate Court. If at all, a sum of Rs.2,00,000/- paid towards loan and in lieu of that or to repay the same, the appellant/complainant obtained the cheque from the respondent/accused, definitely no prudent man would accept this nature of the cheque where the name of the payee and date had already been written and both the information have been scored out with the signature of the payer. If an alternation is made in the cheque, normally the cheque would not be accepted by the bank authority. Therefore, no person would get a cheque leaf like this and would refuse to accept such cheque and get clear cheque in the name of the lendor. Therefore, the said aspects have been clearly pointed out by the appellate Court by saying that no prudent creditor would accept the doubtful and suspicious cheque.

11. Secondly, the learned Appellate Court Judge has also gone in to the case of the complainant as well as the deposition that he has made in the trial Court, with regard to the place, where the loan was given and where the cheque was issued in this regard. The fact remains that the respondent/accused is residing and doing business at Chennai whereas, the appellant/complainant is residing and doing business at Avinashi, but it was claimed by the complainant that loan was given to the respondent at Coimbatore, where both the parties come out there and the cheque was given there itself. In this regard, reasonable doubt arose that, for getting the loan of Rs.2,00,000/- the respondent would not have invited the appellant to Coimbatore, which is neither the place of the complainant nor the place of the accused.

12. More over, when the source of the amount was asked to the complainant, it seems that he has stated before the trial Court that he was having Rs.50,000/- cash at his disbursal and for remaining amount of Rs.1,50,000/-, he pledged his wife's jewels and out of which he was able to mobilize a sum of Rs.2,00,000/- and the same was given to the respondent/accused.

According to the complainant, the reason for getting loan on the part of the respondent/accused is that for marriage expenses. In this regard, the complainant has not stated on whose marriage the said loan was obtained. Further, when the complainant was asked that whether he had shown the transaction in the Income Tax account, the answer was negative. More over, when the interest rate was asked for, since the fund itself was moblised by pledging the jewels of the complainant's wife, it was the answer of the complainant that the loan was given to the respondent/accused interest free, for the reason that the respondent/accused belongs to the same community of the appellant.

13. This contradiction has been fantastically culled out by the appellate Court and based on these contradictions, the appellate Court has come to the conclusion that there are no enforceable debts available with the complainant/appellant and therefore, the said aspect has not been proved by the appellant. If at all, for the repayment of the loan the appellant/complainant required for a cheque from the respondent/accused, only a fresh cheque leaf ie., with the name of the drawee as well as the date of the cheque could have been given. Here the original drawee's name was written in favour of one Pandian Traders and the date of the cheque was 25.10.2000 i.e, three years prior to the alleged transaction between the parties. Subsequently, after three years, a sum of Rs.2,00,000/- advanced to the respondent of course without interest, mobilized out of the alleged pledging of jewels of the appellant's wife, certainly, the appellant would have insisted upon the respondent/accused for issuance of fresh and unambiguous cheque clearly writing the name of the appellant and the date. There is no justification on the part of the appellant/complainant for accepting the said suspicious cheque. On the other hand, clear and cogent case of the respondent is that the cheque was given in the year 2000 to one Thirumalai of Pandian Traders, for some business transaction as with whom, the respondent/accused claimed that he had have business transactions. When that being the position, the trial Court went to the extent of observing that during the cross examination, since the respondent/accused did not say about the signature of the respondent/accused, subsequently made in the cheque leaf without definite words, he had believed the words of the appellant and accordingly convicted the respondent. These aspects have been clearly pointed out by the learned Judge of the appellate Court and he has given good reasons for reversing the said judgment as has been referred above.

14. In cheque bouncing cases under Section 138 of Negotiable Instruments Act, two essential aspects have to be looked into by the Courts. The first course of action is on

evidence, as to whether the ingredients of the offence set out in Section 138 of the Negotiable Instruments Act have been made out and if so, the second aspect is as to whether the accused shall be able to rebut the statutory presumption envisaged under Section 139 of the N.I.Act.

15. Though a statutory presumption as contemplated as in all other cases, in this case also is available in favour of the complainant, however the rebuttal comes from the respondent/accused side is an acceptable rebuttal against the statutory presumption. Since the law has been settled in this regard, as the decree of proof with regard to the rebuttal against the statutory presumption is only preponderance of probability, the facts and circumstances as has been discussed above in this case would clearly establish that the respondent/accused has made out the rebuttal with the said decree of proof i.e., preponderance of probability. In this regard, the dictum of the Hon'ble Apex Court in Rangappa Vs. Sri Mohan reported in 2010 (11) SCC 441 can be usefully referred to :-

> "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 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.
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> 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.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

16. This Court feels that the said findings given by the trial Court is devoid of merits and the judgment of the appellate Court is having acceptable reasons for its conclusion. In view of the above, this Court is of the considered view that the impugned judgment does not require any interference from this Court.

17. In the result, this criminal appeal is devoid of merits and accordingly is dismissed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Additional District and Sessions Judge,
   Fast Track Court No.IV,
   Coimbatore at Tiruppur

2. The District Munsif-cum-Judicial Magistrate,
   Avinashi.

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