IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

Criminal Appeal No.501 of 2012

K.R.Narayanasamy .. Appellant/Complainant

Vs.

1. M/s.Arulmigu Annai Veeramathiamman Textiles Partnership firm rep. by its Partner C.Jothiramalingam.

2.Jothiramalingam, partner
4/420, Bharathi Nagar,
Palladam Road, Tiruppur,
Coimbatore District. .. Respondents/Accused

Criminal Appeal filed under Section 378(4) of Criminal Procedure Code, to set aside the order dated 1.3.2007 made in C.A.No.308/2006 on the file of Court of Additional District Fast Track Court No.I, Coimbatore reversing the judgment dated 28.06.2006 made in C.C.No.829/2003 on the file of Judicial Magistrate No.5, Coimbatore.

For Appellant : No appearance
For Respondent: No appearance

JUDGEMENT

This Criminal Appeal has been filed against the judgment of the Additional District Judge, Fast Track Court No.1, Coimbatore dated 01.03.2007 made in C.A.No.308 of 2006 by which the first Appellate Court reversed the judgment and conviction made by the Judicial Magistrate, No.V, Coimbatore, by his judgment dated 28.06.2006 in C.C.No.829 of 2003.

2.The appellant/complainant claimed that, the first respondent/accused is a partnership firm, wherein the second respondent/accused is a partner. The appellant/complainant had business transaction of cotton purchase and sale with the 2nd respondent. Out of the said business transaction, it is the claim of the appellant/complainant that, on 02.02.2003 under Invoice No.9, the appellant/complainant supplied cotton to the respondents/accused for a value of Rs.1,54,530/- and towards making the payment for the said supply of cotton, the second respondent/accused issued a cheque to the appellant/complainant on 28.02.2003 for a sum of Rs.1,54,530/- drawn on Tamil Nadu Mercantile Bank, Chikkanna Chettiar

Street, Tiruppur. The said cheque was presented on 20.03.2003 by the complainant at his bank. However, the same was returned for the reasons "Exceeds arrangement". Therefore, the complainant had given oral intimation about the return of cheque to the second respondent/accused on 09.04.2003. Thereafter, based on the instructions given by the second accused, the appellant/complainant had represented the said cheque at his bank on 16.06.2003. This time also, the cheque returned for the reasons "Exceeds arrangement" and this had been once again intimated to the second respondent/accused on 04.07.2003.

3.It is the further claim of the appellant/complainant that, inspite of second intimation given after the dishonor of the cheque second time, the second respondent/accused did not come forward to make the payment. Therefore, the appellant/plaintiff issued a legal notice on 15.07.2003, demanding to pay the said amount within the statutory period. Instead of repaying the said amount, the second respondent/accused had issued a reply on 12.08.2003, stating a different version. Thereby, he had not come forward to repay the cheque amount. Therefore, the complainant/appellant had filed a complaint before the Trial Court for punishing the respondents/accused for the offence punishable under Section 138 of the Negotiable Instruments Act.

4.The Trial Court after having considered the case of the complainant as well as the counter case of the accused, by appreciating the oral as well as the documentary evidences, has ultimately found that the respondents/accused were guilty of the offence punishable under 138 of Negotiable Instruments Act and accordingly the Trial Court convicted the first respondent/accused and to pay a fine of Rs.1000/- and in respect of the second respondent/accused to undergo simple imprisonment for six months and also imposed a fine of Rs.4,000/- in default to undergo simple imprisonment for three months.

5.Aggrieved over the said judgment and conviction of the Trial Court, the respondents/accused had filed an appeal before the First Appellate Court as aforesaid. The Appellate Court after re-appreciating the evidences, recorded by the Trial Court and after discussing the merits and demerits of the case of the parties, based on the evidences adduced before the Trial Court, has come to a conclusion that there was no legally enforceable debt available for alleged issuance of cheque by the second respondent/accused and therefore on that score the learned Judge of the Appellate Court was pleased to reverse the judgment of conviction of the Trial Court by allowing the criminal appeal filed by the respondents/accused by his order dated 01.03.2007 in C.A.No.308 of 2006. Challenging the said reversal order of acquittal made by the first Appellate Court, the present appeal has been filed by the appellant/complainant.

6.When the case was called for final hearing, no one was present either for the appellant or for the respondents. Since, the appeal is pending from the year 2012, it is being disposed of on merits by this order.

7.On perusal of the judgment of the Trial Court as well as the first Appellate Court, it discloses the fact that, the definite case of the appellant/complainant is that, on 02.02.2003, the appellant/complainant has supplied cotton to the respondents/accused under Invoice No.9 to the value for a sum of Rs.1,54,530/-. Only to pay the value of the said supply of cotton, on 02.02.2003, the second respondent/accused, as a partner of the first respondent/accused firm, issued a cheque on 28.02.2003, for a sum of Rs.1,54,530/-.

8.It is also the case of the appellant/complainant that, the said cheque was presented on 20.03.2003, at his bank, which was returned for the reasons “exceeds arrangements”. Therefore, the said returning of cheque was intimated orally by the complainant/appellant of the second respondent/accused on 09.04.2003. In this regard, it is the further case of the complainant/appellant that, on instructions from the second respondent/accused, the cheque was once again represented on 16.06.2003. However, this time also the said cheque was returned by his bank for the reason “exceeds arrangement”. Once again, the said development had been intimated to the second respondent/accused on 04.07.2003. However, the second respondent did not come forward to make the payment. Therefore, the complainant/appellant had issued statutory notice on 15.07.2003. On receipt of the same, the second respondent/accused issued a reply on 12.08.2003, giving different reasons, thereby the second respondent did not come forward to settle the due towards the cheque amount.

9.In this context, the complainant/appellant himself has been examined as P.W.1 before the Trial Court, where Exs.P1 to P10 were marked. On the side of the accused, the second respondent accused was examined as D.W.1. That apart, three more persons on behalf of the defence/accused side were examined as D.W.2 to D.W.4.

10.If, it is the case of the complainant/appellant that he had supplied cotton to the respondent/accused on 02.02.2003 under invoice No.9 for a value of Rs.1,54,530/- for which the cheque in dispute was issued on 28.02.2003 for the said value, and if the said transaction itself was denied by the accused side, then, the burden of proof to establish that there was a legally enforceable debt on 03.02.2003 for the supply of cotton as claimed by the complainant/appellant lies on the shoulders of the complainant.

11.In order to prove or substantiate the said claim on the side of the complainant/appellant, the photocopy of invoice No.9 dated 02.02.2003 had been marked as document before the Trial Court. Considering the said documents and also considering the deposition of both P.W.1 as well as D.W.1, where both agreed that there were business transaction between them, the Trial Court had come to a conclusion that there was a legally enforceable debt and only for the said purpose, the disputed cheque was issued. As the signature and issuance of said cheque has not been denied by the accused D.W.1 and therefore on that ground, the Trial Court has safely come to a conclusion that the second respondent/accused had committed the offence punishable under Section 138 of Negotiable Instruments Act. Accordingly, the Trial Court convicted the accused persons as referred to above.

12.However, the first Appellate Court has gone into these aspects by deeply appreciating the evidences adduced by both sides. In this context, it may be relevant to point out, as it is rightly found by the first Appellate Court, that the very transaction dated 02.02.2003 was in dispute and the same had been strongly denied by the accused side. The said transaction alone is the reason to establish that there was a legally enforceable debt between the complainant and the accused and for the said reason, the cheque in dispute was given. The complainant/appellant must have established that the transaction actually had been taken place on 02.02.2003.

13.In this regard, the appellant/complainant had produced only the photocopy of the invoice dated 02.02.2003. However, it was the case of the appellant/complainant also that whenever the cotton is supplied, the original invoice would be sent to the purchaser. However, the duplicate copy/carbon copy shall be kept intact by the supplier. Also, if the cotton is sent by lorry, the lorry receipt also would be kept intact by the supplier. When that being the usual practice, there can be no much difficulty for the appellant/complainant to produce the duplicate/carbon copy of invoicce dated 09.02.2003 as well as the lorry receipt. Herein the case in hand, no doubt, there was a business transaction between the complainant and the accused and as per the practice, which is in vogue, the cotton supplier/broker like the appellant/complainant would approach the purchasers for cotton supply and once the price is negotiated for supply of cotton, their practice is to get blank cheques from purchasers and once the material is supplied, based on the supply made by the supplier, the blank cheque given by the purchaser shall be encashed.

14.In this regard, it is the definite case of the accused that in respect of supply of cotton from the complainant, who is a broker for cotton supply, after fixing the price after negotiation, three blank cheques were given and after supplying the cotton, those cheques were encashed. Like that, second time also, the complainant-supplier had approached the accused-purchaser for supply of cotton from Andhra Pradesh. This time after fixing the price, as usual, two blank cheques were given for supply of cotton. However, the complainant this time did not make supply of cotton for the reasons best known to him. Therefore, the accused approached the complainant to return back the blank cheques, the same were not returned and only that said blank cheques given for the expected supply of cotton, which were not actually supplied by the complainant, was utilized by the complainant by filing up the amount stating that this cheque was rightly issued by the second accused on behalf of the first accused firm for the alleged supply of cotton on 02.02.2003, under invoice No.9, for a value of Rs.1,54,530/-.

15.When it is the definite case of the accused side, if rightly cotton has been supplied on 02.02.2003, under invoice No.9, for a value of Rs.1,54,530/-, there can be no difficulty on the side of the complainant to produce the necessary duplicate copyof inovice dated 02.02.2003 along with lorry receipt.

16.Further apart from D.W.1, three more persons were examined on the side of the defendants i.e. D.W.2 to D.W.4. The D.W.2, one Loorthusamy deposed before the trial court that, he is residing at Mangalam Road, doing cotton business for 10 years and he was doing the business on the basis of commission and also he knew the respondent/accused and the appellant/complainant and according to him, while fixing the price of the cotton, he used to issue blank cheques and while delivering the goods through lorry, they used to send invoice alongwith goods and after getting delivery, they used to get delivery receipts. D.W.3, one Purushotamaraj, who is working as Supervisor of Coimbatore Marketing Committee deposed before the Trial Court stating that, the complainant company had not obtained any permission for delivery of cotton to another firm on 02.02.2003. He further deposed that as per Section 34(5) of Tamil Nadu Agricultural Trades Marketing (Regulation) Act 1987, the supplier of cotton have to obtain permission to sent cotton to another place. Therefore, it is a fact that there was no permission obtained by the complainant for the supply of cotton to the respondent/accused on 02.02.2003.

17.Like wise D.W.4, one Sundararaj, who was working as collection Inspector of Sales Tax deposed that the appellant/complainant firm namely M/s.Yamini Cotton Company had not submitted sale tax returns and also not registered under Tamil Nadu Sales Tax Act.

18.In this context, it is relevant to point out that P.W.1, Narayanasamy, who deposed on behalf of the complainant before the trial court had stated that, the documents which were required to be produced to substantiate the alleged supply of cotton on 02.02.2003, were filed before the Sales

Tax Authorities, therefore, he was not able to file duplicate copy of the same. However, from the evidence of D.W.4, it becomes clear that the appellant/complainant firm was not registered under the Tamil Nadu Sales Tax Act and he had not filed any return to the authorities under the said Act.

19.These factors would disclose that if at all the complainant, as claimed by them, had supplied the cotton to the respondents/accused on 02.02.2003 under invoice No.9, definitely they must be in a position to produce the duplicate copy/carbon copy of the said invoice No.9. That apart, they can also produce the other documents such as lorry receipt, delivery challan etc. Those documents, even though were to be considered essential to substantiate the claim of the complainant, has not been produced by the complainant side. However, these factors were not properly appreciated in proper perspective by the trial Court.

20.These aspects have been gone into by the first Appellate Court and after taking the facts and circumstances of the evidences on the side of the complainant as well as on the side of the accused as discussed above, the first Appellate Court has come to a right conclusion that there was no legally enforceable debt on 02.02.2003 on the supply of cotton to the respondents/accused for a sum of Rs.1,54,530/-.

21.It is a settled proposition that unless a legally enforceable debt is proved or atleast proved for the purpose of presumption under the provisions of the Negotiable Instruments Act, it cannot be said that the cheque in dispute had been issued by the accused side only for repaying the amount for the said debt dated 02.02.2003.

22.In this regard, the law laid down by the Hon'ble Apex Court in Rangappa Vs. Sri Mohan reported in 2010 11 SCC 441 can be usefully extracted hereunder:

> "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.

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."

23.Even though a statutory presumption is in favour of the complainant under the Negotiable Instruments Act, the exception for such statutory presumption is an acceptable rebuttal, and in this case, such acceptable rebuttal has come from the side of the respondent/accused, and this has been clearly established by the accused side before the Trial Court. However, the trial Court has not properly appreciated these aspects. But, the first appellate Court has taken into account all these evidences and given its findings for an ultimate conclusion, that the respondents/accused has not committed any offence punishable under Section 138 of Negotiable Instruments Act. Accordingly, the appellate Court has reversed the judgment and conviction by allowing the appeal, which is appealed herein.

24.This Court, after having gone through the above said facts and circumstances, is of the clear view, that, the above mentioned judgment dated 01.03.2007, of the first Appellate Court made in C.A.No.308 of 2006 requires no interference from this Court. Therefore, this appeal fails, as such it is dismissed accordingly.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The Judicial Magistrate No.V,
Coimbatore.

2.The Additional District Judge,
Fast Track Court No.I,
Coimbatore.

3.The Public Prosecutor,
High Court, Madras.

+ 1 cc to M/s. M.N. Balakrishnan, Advocate Sr.3081

Criminal Appeal No.501 of 2012

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