IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.02.2018

DELIVERED ON : 21.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.641 of 2008

Rasappan ... Appellant

Vs

S.K.Marappan ... Respondent

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the Order of acquittal dated 23.04.2008 made in C.C.No.477 of 2003 on the file of the Judicial Magistrate, Tiruchengode.

For Appellant : Mr.N.Manokaran

For Respondent : Ms.N.Premalatha
for M/s.C.D.Johnson

JUDGMENT

This Criminal Appeal is preferred by the appellant against the order of acquittal passed by the learned Judicial Magistrate Tiruchengode made in C.C.No.477 of 2003 dated 23.4.2008 under section 138 of the Negotiable Instruments Act.

2.Breif case of the appellant:

The respondent borrowed a sum of Rs.10,00,000/- from the appellant/complainant on 2.5.2003 and issued a post-dated cheque bearing Number 027729 drawn at Salem District Central Co-operative Bank, Tiruchengode on 2.6.2003 for discharging the loan liability. The appellant presented the cheque through his bank, Lakshmi Vilas Bank Limited, Tiruchengode on 11.6.2003, but the same was dishonoured and returned with “Insufficient funds” on 11.6.2003. The statutory legal notice to the respondent was issued on 14.6.2003 and he received the notice on 18.6.2003 and sent a reply notice dated 25.6.2003 on tenable ground nor made any payment. Hence the complaint filed by the appellant before the trial Court.

3.During trial, the appellant /complainant examined himself as PW1 and marked Exhibits P1 to P6. The respondent/accused examined himself as RW1 and no documents were marked on his side. On appreciating the evidence adduced by both parties, the learned trial Court acquitted the accused on the ground that the appellant failed to prove the loan as "legally enforceable debt". Aggrieved over this, the appellant/complainant preferred this appeal.

4.Rival Submissions:

The learned counsel for the appellant submits that the trial Court has failed to note that the execution of the cheque had not been denied, while so it is the burden on the part of the appellant/accused to rebut the presumption arises under sections 118 and 139 of Negotiable Instrument Act. The trial Court went wrong in simply accepting the defence version even without knowing the veracity of the said statement.

5.The learned counsel for the appellant submits that the trial Court has failed to note that the complainant has proved his case to the satisfaction of the Court. It is for the appellant/accused to rebut the presumption beyond all reasonable doubts. The trial Court has erred in disbelieving the evidence of PW1 merely based on some suggestion put in the cross examination. In fact the trial Court should have read the entire suggestion as whole, whereas each and every word in the suggestion would give different meaning, such an interpretation would defeat the very purpose of cross examination.

6.The learned counsel for the appellant submits that the trial Court has failed to note that there is a presumption under section 118(g) of the act in favour of the complainant who was holder of the cheque no evidence has been let in to rebut the presumption under section 139 of the act except some ipsi dixi oral evidence.

7.The learned counsel for the appellant submits that the trial Court has failed to note sections 118,138 and 139 of the Act would require that the Court shall presume the liability of the drawer of the cheque for the amount for which the cheque were drawn on accepting the consideration. In case of a mandatory presumption "The burden on the appellant/accused person" would not be light, as one cannot be held to be discharged merely by reason of the fact that the explanation offered by the appellant/accused is reasonable and probable.

8.The learned counsel for the appellant submits that the trial Court has failed to note that the accused should have proved his case by leading cogent evidence, that there was no debt or liability. The respondent/complainant not having discharge to burden of proving that the cheque was not issued for a debt or liability, the acquittal, by the Trial Court was not correct and mere denial is not sufficient.

9.The learned counsel for the appellant submits that the trial Court has failed to note that formal evidence of accused is not permissible in view of the principles laid down in the decision reported AIR 2001 SC 2895 and also in AIR 2001 SC 3897.

10.The learned counsel for the appellant submits that the trial Court has failed to note and appreciate the principles laid down in decision reported in 2004(3) KLT 93 S.C. In the said ruling the apex Court has held that notice issued to the drawyee or to the bank for stoppage of payment will not preclude an action under section 138 and in view of the said ruling by the Hon'ble Apex Court, the trial Court should not have given any importance for arriving at a finding in favour of the appellant/accused.

11.The learned counsel for the appellant submits that the trial Court has failed to note and appreciate the fact that in the decision reported in 1999 (3) KLT 440 SC had held that when the signature contained in the cheque is admitted the presumption under section 118 of the Negotiable Instrument Act can be legally informed and that the cheque was issued or drawn for the consideration on the date which the cheques bears, and the burden is on the appellant/accused rebut the presumption.

12.The learned counsel for the appellant submits that the trial Court has failed to note that the holder is entitled to fill up the instrument under section 20 of the Negotiable Instrument Act. Further the respondent has filed a petition to get an expert opinion not chosen to get an opinion from the handwriting expert so as to prove his defence.

13.The learned Counsel for the respondent supported the findings of the Trial Court and seeks dismissal of appeal.

14.I have heard Mr.N.Manokaran, learned counsel for the petitioner and Ms.N.Premalatha for M/s.C.D.Johnson, learned counsel for the respondent and perused the entire materials available on record.

15.The offence under Section 138 of the Negotiable Instruments Act (herein after referred as N.I.Act) can be completed only with the concatenation of a number of the acts. Following are the acts which are the components of the said offence:

1) Drawing of the cheque

2) Presentation of the cheque in to the Bank.

3) Returning of the cheque unpaid by the drawee bank.

4) Giving notice in writing to the drawer of the cheque demanding the payment of the cheque amount.

5) Failure of the drawer to make payment within 15 days of the receipt of the notice.

16.The Act contains provisions raising presumptions as regards the negotiable instruments under Section 118(a) of the Act as also under Section 139 of the Act thereof. The said presumptions are rebutable. Whether presumption rebutted or not would depend upon the facts and circumstances of each case. The Hon'ble Supreme Court clearly laid down in catena of decisions that the standard of proof in discharge of the burden in terms of Section 139 of the N.I. Act being the preponderance of a probability, the inference thereof can be drawn not only from the material brought on record but also from the reference to the circumstances upon which the accused relies upon. The burden to rebut the presumptions on the accused is not as high as that of the prosecution.

16.The meaning of the expression 'may presume' and 'shall presume' have been explained in Section 4 of the Evidence Act, 1872. In terms of Section 4 of the Evidence Act, whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act. Applying the definition of proved or disproved to the principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after consideration of the matter before it, it either believes that the consideration does not exist or considers the nonexistence of the consideration so probable that a prudent man under the circumstances does not exist. For rebutting such presumptions, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Whether in the given facts and circumstances of a case, the initial burden has been discharged by the accused would be a question of fact. It was a matter relating to appreciation of evidence. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts, which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not so heavy as is normally upon the prosecution to prove the guilt of the accused. If some material brought on record consistent with the innocence of the accused, which may reasonably be true, even though it is not possibly proved to be true, the accused would be entitled to acquittal.

17.The Hon'ble Supreme Court in various cases held that under Section 118 of N.I. Act, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 of N.I. Act, the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part of a debt or liability. Thus in complaint under Section 138 of the Act, the Court has to presume that the cheque had been issued for a debt or liability. The presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused.

18.It is further held that whenever a cheque was issued towards partial discharge of the loan and when it was dishonoured after admitting the borrowal of the amount from the complainant, his plea that he gave a blank cheque duly signed in favour of the complainant does not amount to rebutting the presumption with regard to existence of subsisting liability.

19.There is striking distinction between the blank cheque and undated cheque. In case of blank cheque, three factors viz., date, name of the payee and quantum of amount are kept unfilled. In case of undated cheque, what is not filled is only with regard to date. When the cheque is admittedly issued with the blank date and when the payee has no objection with regard to the name, amount and signature, it can be presumed that there is an implied consent for putting the date as and when required the beneficiary and get it encashed. In other words when the date is put by the payee or the drawer of the cheque, the presumption under Section 118 of the N.I. Act would arise. The burden is, therefore, entirely on the drawer of the cheque to establish that the payee has no authority to put the date and encash the cheque.

20.A complainant will be able to secure a conviction even without proving his right to possess the cheque and to receive or recover the amount due thereon from the drawer. The possibility of an unwarranted prosecution and even an unmerited conviction would certainly haunt his thoughts and deter him from issuing cheques. The Court shall not close its eyes to such probable realities. An interpretation which is likely to defeat the object of the Act has to be avoided.

21.Hence, in my view, the expression 'holder' is cautiously used in Section 139 of N.I. Act so that the presumption under the said section shall be drawn in favour of the complainant, only if it is established by evidence and other materials on record that he is the 'holder' of the cheque, as defined under Section 8 of the Act. In the absence of establishing the same, no presumption shall be drawn under Section 139 of N.I. Act, in favour of the complainant, who may ordinarily be the 'payee' or 'holder in due course', as the case may be. If this is not insisted, there may be chances for misuse of the provision which will defeat the very object of the enactment.

22.The Judgments passed by the Courts under the Negotiable Instruments Act have differed as to the quantum of rebutting evidence required.

23.In the case of Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay reported in AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai v. State of Maharashtra reported in AIR 1964 SC 575, where the Apex Court reiterated the principle enunciated and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible.

24.From the above discussions, it is manifest that under Sections 138 and 139 of the Act, it is incumbent upon the Court to raise presumption and accused can rebut the same by leading evidence and then burden would shift to the complainant. The respondent rebut the case of the appellant by shifting his burden.

25.The learned Counsel appearing for the appellant/complainant submits that the trial Court overlooked the presumptions available in favour of the complainant under Sections 118(a) and 139 of the N.I. Act and thereby erred in recording acquittal of the respondent/accused for the offence under Section 138 of the N.I. Act.

26.I have gone through the evidences adduced and the learned trial Court is right in dismissing the complaint. Therefore, the order passed by the learned trial judge is confirmed.

27.In the result, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Judicial Magistrate,
Tiruchengode.

Do Thro The Chief Judicial Magistrate,
Namakkal.

+1cc to Mr.N.Manokaran, Advocate sr.no.4327

Criminal Appeal No.641 of 2008

nr 05/03/2019