

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 06.03.2018
DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal Nos.131 and 132 of 2009

S.Satheez ... Appellant/ Respondent /
Complainant in both the CrI.A.s

Vs

Royal. T.Devakumar,
Proprietor TDK Enterprises,
Hi-Tech Petrol and Diesel Bunk,
Solar Pirivu, Erode-2. ...Respondent/Appellant/Accused
in both the CrI.A.s

Common Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the order of acquittal dated 23.12.2008 made in C.A.Nos.223 and 224 of 2008 on the file of the Additional District Sessions Court/Fast Track Court No.I, Erode reversing the order of conviction imposed in the judgment dated 24.06.2008 made in C.C.Nos.8 and 18 of 2008 on the file of the Judicial Magistrate No.III, Erode.

(In both the CrI.A.s)

For Appellant : Mr.N.Manokaran

For Respondent : Mr.I.C.Vasudevan

JUDGMENT

The Appellant preferred these Criminal appeals against the order of acquittal dated 23.12.2008 made in C.A.Nos.223 and 224 of 2008 on the file of the Additional District Sessions Court / Fast Track Court No.I, Erode reversing the order of conviction imposed in the judgment dated 24.6.2008 made in C.C.No.8 and 18 of 2008 on the file of the Judicial Magistrate No.III. Erode.

2.The brief case of the appellant in CrI.A.No.131 of 2009:

The case of the appellant before the trial Court is that on 7.6.2007 the accused borrowed a sum of Rs.4,48,500/- from the complainant for his urgent business expenses and to discharge above said liability, the accused issued two post dated cheques, drawn on Dhanalakshmi Bank Limited, Erode, a cheque bearing No.076487 for Rs.4,20,000/- dated 7.7.2007. As per request, the appellant/complainant presented the impugned cheque Exhibit P1 for collection on 7.11.2007 through his bank Punjab National Bank, Erode Branch and the same has been dishonoured as "Funds Insufficient". The complainant issued a legal notice on 19.11.2007 and the same is filed as Exhibit P3. The local postal authorities intimated the service of notice to the respondent/accused on 20.11.2007 itself up to 28.11.2007, the respondent not claimed the said notice and the postal cover was returned on 29.11.2007 with endorsement 'not claimed' intimation. Even though the intimation of notices was received by the respondent purposely evaded to receive the notice. Hence the respondent/accused committed an offence under section 138 of Negotiable Instrument Act 1881 as amended by Act of 1988 and miscellaneous provisions Act 2002 Act 55 of 2002.

3.The brief case of the appellant in Crl.A.No.132 of 2009:

The case of the appellant is that on 21.6.2007, the accused borrowed a sum of Rs.4,48,500/- from him for his urgent business expenses and to discharge above said liability, the respondent/accused issued cheque dated 22.10.2007, drawn on Dhanalakshmi Bank Limited Erode, bearing No.096988 for Rs.4.48,500/-. As per request complainant presented the impugned cheque for collection on 22.10.2007 through his bank Punjab National Bank, EC K.K.N. Erode Branch, and the same has been dishonored as "Funds Insufficient". The complainant received the message by Bank Return Memo on 23.10.2007. The complainant issued a legal notice to the respondent on 19.11.2007. The local postal authorities intimated the respondent on 20.11.2007 itself up to 28.11.2007, the respondent/accused not claimed the said notice and the postal cover was returned on 29.11.2007 with endorsement 'not claimed'.

4.Before the learned Trial Court, the appellant examined himself as PW1 in both the cases in C.C.nos.8 and 18 of 2008 and Exhibits P1 to P5 was marked. No evidence was adduced on behalf of the respondent / accused.

5. On careful perusal of records, the learned trial Court in its separate judgments, convicted the respondent/accused for the offences u/s.138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for 10 months with fine of Rs.4,000/- in default to undergo further period of 2 months simple imprisonment and ordered the sentences to run concurrently.

6. Aggrieved over this, the respondent/accused preferred separate appeals before the learned Additional District Sessions Court / Fast Track Court No.I, erode in C.A.Nos.223 and 224 of 2008 and the learned lower appellate Court was pleased to reverse the findings of the trial Court and acquitted the respondent/accused. Hence the special leave to appeal was sought by the appellant and same was allowed by this Court.

7. I heard Mr.N.Manokaran, learned counsel for the appellant and Mr.I.C.Vasudevan, learned counsel for the respondent in both the Criminal Appeals and perused the entire materials available on record.

8. The learned counsel for the appellant submits that the order of acquittal passed by the first appellate Court is against law, weight of evidence and all probabilities of the case.

9. The learned counsel for the appellant submits that the first appellate Court has failed to note that the execution of the cheques had not been denied, while so it is the burden on the part of the appellant to rebut the presumption arises under section 118 and 139 of Negotiable Instrument Act.

10. The learned counsel for the appellant submits that the first appellate Court went wrong in simply accepting the defence version even without knowing the veracity of the said statement. The accused came forward with a defence that the cheque is not supported by any consideration if so the burden on him to prove the same.

11. The learned counsel for the appellant submits that the first appellate Court has failed to note that the

complainant has proved his case to the satisfaction of the Court. It is for the appellant to rebut the presumption beyond all reasonable doubts. The lower appellate Court has erred in disbelieving the evidence of PW1 merely based on some suggestion put in the cross examination.

12.The learned counsel for the appellant submits that the first appellate Court has failed to note that the evidence of PW1 is very clear, cogent and unshaken. The proceeding under section 138 is summary in nature and there is no need or necessity to examine any other witness to corroborate the version of PW1.

13.The learned counsel for the appellant submits that the first appellate Court has failed to note that no attempt made on the part of the appellant to give a criminal complaint against the complainant for the act of alleged misuse of the cheques.

14.The learned counsel for the appellant submits that the first appellate Court has failed to note that admittedly no evidence has been let in to rebut the presumption under section 139 of the Act. This aspect has not at all been considered by the first appellate Court and the provisions of section 139 of the Negotiable Instrument are altogether ignored and over looked.

15.The learned counsel for the appellant submits that the first appellate Court has failed to note that sections 118, 138 and 139 of the Act would require that the Court Shall presume" the liability of the drawer of the cheques for the amount for which the cheques were drawn on accepting the consideration.

16.The learned counsel for the appellant submits that the first appellate Court has failed to note that in case of a mandatory presumption "the burden on the 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 is reasonable and probable.

17.The learned counsel for the appellant submits that the first appellate Court has failed to note that the wordings contained in sections 118 and 139 of the Act are

unless the contrary is proved would make it clear that the presumption has to be rebutted by "proof" and not by a bare explanation, which is merely plausible unless the explanation is supported by proof, the mandatory presumption created by the provision cannot be said to be rebutted. The Respondent not having discharge to burden of proving that the cheques were not issued for a debt or liability, the acquittal, by the lower appellate Court was not correct.

18.The learned counsel for the appellant submits that the first appellate Court has failed to note that the appellant cannot take advantage of the weakness in the complainant case because the burden of proof is on the appellant. The first appellate Court has dismissed the complaint by finding fault with the complainant without appreciating the evidence on record.

19.The learned counsel for the appellant submits that the first appellate Court has failed to note that Exhibit P1 was issued by the appellant; therefore it is for him to prove as to how the cheques reached the hands of the complainant. There is a legal presumption under section 20 of the Negotiable Instrument Act empowering the holder to fill up the instrument. Hence there is no material alteration.

20.The learned counsel for the appellant submits that the first appellate Court has failed to note that the capacity of the complainant to pay the cheque amount need not be proved by documentary evidence in the absence of any contra evidence adduced on the side of the appellant.

21.The learned counsel for the appellant submits that the first appellate Court has failed to note that the notice has been sent to the correct address in which the appellant has received the summons from the Court. Therefore the appellant is not entitled to raise the said defence as held in 2007(2) MWN CrI (DCC) 100.

22.The learned counsel for the appellant submits that the first appellate Court has failed to note that there is no evidence on record to show that the cheque was issued towards security. Even assuming so, there is no legal impediment to prosecute the drawer in respect of the cheque issued for security in respect of enforceable debt.

23.The learned counsel for the appellant cited for the following decisions in support of his contentions:

- 1) (2010) 11 SCC 441 (Rangappa v. Sri Mohan)
- 2) 2015 (8) SCC 378 (T.Vasanthakumar v. Vijayakumari)
- 3) 2016 (5) CTC 563 SC (Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited)
- 4) 1999 (3) SCC 35 (Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal)
- 5) CDJ 2016 SC 1007 (B.M.Basavaraj v. Srinivas S.Datta)

24.Per contra, the Learned Counsel for the Respondent would submit that the Learned Trial Court failed to appreciate the case as per law and the lower appellate Court has rightly held that the appellant/complainant has not come with clean hands and allowed the appeal filed by the Respondent/Accused.

25.This Court has carefully considered the rival submission made on either side.

26.The point to be decided in this appeal is whether the Lower Appellate Court is right in holding that Appellant failed to prove his case and acquittal of the respondent/accused.

27.This Court on careful consideration of the documents and evidence finds that there is perversity in the judgment of the Lower Appellate Court. The Learned Trial Court rightly rejected the case of the respondent/accused on the findings that the execution of the impugned cheques had not been denied, while so it is the burden on the part of the respondent/accused to rebut the presumption arises under section 118 and 139 of Negotiable Instrument Act.

28.For considering the rival submissions made on either side, this Court has to look into the following documents as well as evidence adduced on either side. The cheque, in question, has been marked as Ex-P1 in both cases. Return memo issued by the concerned Bank has been

marked as Ex-P2 and copy of legal notice dated has been marked as Ex-P3 in both cases.

29. In Ex-P3, it has been mentioned that the respondent/accused has received a sum of Rs. 4,48,500/- from the appellant/complainant and issued two post dated cheques. Even in the complaint, specific date has been mentioned on which the accused has received a sum of Rs. 4,48,500/- from the appellant/complainant on two occasions. At this juncture, the Court has to look into the evidence adduced by the complainant. The appellant/complainant has been examined as P.W.1 and his specific evidence is that the accused has in aggregation received loan from him and issued the two impugned cheques.

30. From a cumulative reading of the evidence given by the complainant, the Court can easily come to a conclusion that the impugned cheques in question is supported by consideration. The impugned cheques Exhibit P1 in both cases were issued by the respondent/accused and therefore it is for him to prove as to how the cheques reached the hands of the appellant/complainant. There is a legal presumption under section 20 of the Negotiable Instrument Act empowering the holder to fill up the instrument. Hence there is no material alteration. Therefore, it is needless to say that the impugned cheques, in question are supported by consideration.

31. Now, the Court has to look into the defense taken on the side of the respondent/accused. On the side of the respondent/accused, it has been contended to the effect that the respondent/accused has received some amounts from the appellant/complainant and the same have already been discharged and after receiving blank cheques, the appellant/complainant filed cases one after another.

32. It is true that the cheques, in question have been issued by the respondent/accused. Since, the cheques have been issued by the respondent/accused and a presumption is available under Section 139 of N.I. Act. In the instant case, as noted down earlier, the evidence given by P.W.1 cannot be faulted in any way. On the basis of his evidence, the Court can come to a conclusion that Ex-P1, cheques, issued in both cases, in question, is supported by consideration.

33. Having appreciated the submission made by the learned counsel for the parties, this Court finds that the ground on which the impugned judgment and order of acquittal has been structured is preposterous. Section 138 (b) of the NI Act casts an obligation on the drawee of the cheque which is dishonoured that after receipt of the information he makes a demand for the payment of the said amount (the amount mentioned in the cheque) by giving a notice in writing to the drawer of the cheque within 30 days from the day of receipt of the information by him from the bank regarding the dishonour of the cheque for insufficiency of the fund etc. The said demand can be made by the complainant through a lawyer as his authorized agent by giving the details. It is not necessary in law that the complainant himself would sign that demand. Such interpretation of making the demand, as provided under Section 138(b) would only frustrate the legislative object for which Section 138 of the N.I. Act is enacted.

34. That apart, the fundamental ground on which the respondent has been acquitted by the lower appellate Court is that the appellant/complainant has failed to prove the legal liability against the respondent. This finding is the basis on which the acquittal has been directed. Before this Court embarks on interpreting Section 139, which is very unique to the scheme of the N.I. Act, it would be proper to observe that the offence under the N.I. Act cannot be equated with an offence made out by the provision of the IPC or any other offence.

35. The offence under Section 138 of the N.I. Act is in the nature of civil wrong but it has been strapped within the criminal liability. Section 138 of the N.I. Act requires some fundamental ingredients to be proved viz., (i) there is a legally enforceable debt; (ii) the cheque that was drawn, was so drawn in discharge in whole or in part of any debt or liability, which presupposes existence of legally enforceable debt; and (iii) the Cheque issued has returned due to insufficiency of fund.

36. To enforce the said Act, the scheme of Section 139 has been rephrased by the Amendment Act (Act 66 of 1988) which has come into effect from 01.04.1989. The re-phrased provision reads as under:

"Section 139-presumption in favour of the holder- it shall be presumed, unless the contrary is proved that the holder of the cheque received the cheque of

the nature referred to Section 138 for the discharge, in whole or in part, of any debt or other liability."

Section 118 of the NI Act, which deals specially with the special rule of evidence under the N.I. Act, 1881 provides the rule of presumption as to ramification of the negotiable instrument. It provides further that, until the contrary is proved, the following presumptions shall be made:

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date- that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance - that every accepted bill of exchange was accepted within the reasonable time after its date and before its maturity;

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity;

(e) As to order of indorsements - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course - that the holder is a holder of a negotiable instrument in due course: Provided that, where instrument has been obtained for its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

The said rule of evidence carves out, not only distinction from the general principles of drawing presumption, but also makes the process certain.

37. The said rule of presumption is like any other rule of presumption under the Evidence Act. Notwithstanding the distinction, Section 139 but marks a rebuttable presumption in respect of discharge of any debt or liability or existence of any debt or liability.

38. Whether a prudent person can believe that keeping two live cheques in custody of someone, the same amount of money will be given to that person without taking back those cheques?

39. In *Hiten P. Dalal vs. Bratindranath Banerjee*, reported in AIR 2001 SC 3879, the Hon'ble Apex Court has distinguished or made distinction between the two types of presumption but also has delineated the nature of evidence required to rebut the two. In the case of discretionary presumption, the presumption drawn may be rebutted by the expression, "might reasonably be true and which is consistent with the innocence of the accused". In case of statutory presumption, the burden on the accused is heavy and it cannot be held to be discharged merely by reason that explanation offered by the accused is reasonable and probable. It shall be shown that the explanation has its true and probable foundation. The words "unless the contrary is proved" which occur in this provision, make it clear that the presumption is required to be rebutted by proof not by mere explanation. So probably that a reasonable man would act on the supposition that the probable cause so offered did exist. Unless, explanation is founded on proof, the presumption created by that provision cannot be said to have rebutted.

40. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in *State of Madras vs. A. Vaidyanatha Iyer*, reported in AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused". Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs.

41. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact

unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

42. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, " after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".

43. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

44. In the instant case, as pointed out earlier on the side of the appellant/complainant, clinching evidence has been forthcoming for the purpose of proving that Ex-P1, cheques has been issued in connection with an enforceable debt. Therefore, viewing from any angle, the contentions put forth on the side of the respondent/accused cannot be accepted.

45. The learned lower appellate Court without considering the evidence given by P.W.1 in a proper perspective erroneously reversed the findings of the learned Trial Court wherein, the respondent/accused was found guilty under Section 138 of the NI Act.

46. Therefore, the present criminal appeal filed by the appellant is allowed and the order passed by the learned Additional District Sessions Court / Fast Track Court No.I, Erode in C.A.Nos.223 and 224 of 2008 dated 23.12.2008 are set aside and the conviction and sentence imposed in C.C.Nos.8 and 18 of 2008 on the file of the learned Judicial Magistrate No.III. Erode, are confirmed.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

vs

To

- 1.The Additional District Sessions Court/
Fast Track Court No.I, Erode.
- 2.The Judicial Magistrate No.III, Erode.

+2ccs to Mr.I.C.Vasudevan , Advocate SR.No. 349,350

+2ccs to Mr. N.Manokaran, Advocate SR.No. 301,302

Criminal Appeal Nos.131 & 132 of 2009

A.SK(14/02/2019)



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