IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 27.06.2019

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.316/2009

L.Senthil Kumar .. Appellant / Complainant

Vs

T.Muruganananthan .. Respondent / Accused

Prayer:- This Criminal Appeal filed under section 378 Cr.P.C., to call for the records and set aside the judgment of acquittal dated 14.03.2009 made in CA.No.470/2007 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore reversing the judgment of the Trial Court dated 20.09.2007 made in CC.NO.424/2003 on the file of the learned Judicial Magistrate No.6, Coimbatore.

For Appellant : Mr.P.M.Duraiswamy

For Respondent : Mr.S.G.Senthilkumar for M/s.Ponnambalaa Thiyagarajan

JUDGMENT

The present Appeal has been filed by the appellant/complainant against the judgment dated 14.03.2009 made in C.A.No.470/2007 by the learned Additional District and Sessions Judge, Fast Track Court No.3, Coimbatore, whereby the Lower Appellate Court has set aside the judgment of conviction and sentence passed by the Trial Court, viz., the learned Judicial Magistrate No.6, Coimbatore, after finding the respondent/accused guilty under section 138 of the Negotiable Instruments Act, 1881, and convicting him for the said offence and sentencing him to undergo six months simple imprisonment and to pay a fine of Rs.3000/- with a default sentence of one month simple imprisonment.

2 For the sake of convenience, the appellant is referred to as ''the complainant'' and the respondent is referred to as ''the accused''.

3 A private complaint under section 200 Cr.P.C., had been filed by the complainant against the accused in CC.No.424/2003 for the offence u/s.138 NI Act. The case of the complainant is that the accused had borrowed an amount of Rs.1.40 Lakhs as loan from the complainant on 13.01.2002 and on the same day, he had issued an Acknowledgment Memo/Receipt towards the receipt of the amount. After repeated demands by the complainant, the accused had issued a cheque dated 21.02.2003 drawn on the State Bank of India, SRKV Branch, Periyanacikenpalayam and the complainant had presented the same for collection on 06.03.2003 and that it was dishonoured stating reason ''exceeds arrangement''. The cheque was returned on the same day. Thereafter, the complainant had issued a Legal Notice on 12.03.2003 and the notice was received by the accused on 13.03.2003. Since the accused neither replied the notice nor repaid the amount, the complaint was filed.

4 On filing of the complaint, the sworn statement of the complainant had been recorded and finding that a prima facie case was made out against the accused, the complaint was taken on file by the learned Judicial Magistrate No.6, Coimbatore, on 17.07.2006, and the copy of the complaint was sent to the accused along with the summons u/s.204[3] Cr.P.C. and when the accused had entered appearance before the Trial Court, the particulars of the offence were narrated to him and the accused was questioned. He denied the offence and pleaded not guilty and sought to be tried. In order to prove the charge against the accused, the complainant had examined himself as P.W.1 and had marked six documents on his side.

5 The case of the prosecution, as divulged from the evidence of P.W.1/complainant is that the accused had borrowed a sum of Rs.1.40 Lakhs on 13.01.2002 and on the same day, the accused had issued the receipt, acknowledging the receipt of the amount. The Acknowledgment Memo/Receipt was marked as Ex.P.1. After repeated demands, the accused had issued a cheque dated 21.02.2003 drawn on the State Bank of India, Kumarapalayam Branch. The said cheque was marked as Ex.P.2. Thereafter, the complainant had presented the cheque for collection through his Bankers, viz., the State Bank of India, SRKV Branch, Periyanaickenpalayam, on the same day and the cheque had been returned on 06.03.2003 stating the reason of ''exceeds arrangements''. The Return Memo was marked as Ex.P.3. The Debit Advice was marked as Ex.P.6. Subsequently, the complainant had issued a Legal Notice on 12.03.2003, a copy of such notice was marked as Ex.P.4. On 13.03.2003, the accused had received the legal notice and the Acknowledgment Card for proof of receipt of the legal notice was marked as Ex.P.5. The accused neither sent a reply to the notice nor repaid the

amount. Thereafter, the accused was questioned u/s.313[1][b] Cr.P.C. and he denied the evidence against him as false and he had further stated that he has no evidence to produce. Thereby, the Trial Court, vide order dated 17.07.2006, had found the accused guilty of the offence under section 138 NI Act and convicted and sentenced him to undergo one year simple imprisonment and to pay a fine of Rs.1000/- with a default sentence of one month simple imprisonment.

6 Against the said judgment of conviction and sentence, the accused had preferred CA.No.343/2006 and the said appeal was partly allowed and the case was remanded back to the Trial Court for retrial vide judgment dated 11.01.2007 with a direction to the Trial Court to afford an opportunity to the accused to cross-examine the complainant. Thereby, the case was once again taken up for trial. During cross-examination, the accused had marked three documents. Ex.D.1 was the Reply dated 10.05.2004 sent by the accused to the Legal Notice issued by the complainant. Ex.D.2 was the reply sent by the accused to the Advocate of the complainant and Ex.D.3 was the Return Cover in respect of the reply notice sent to the complainant. The accused had taken a stand that though the reply notice was sent to the correct address of the complainant, the same had been returned stating that ''no such addressee'' inferring that the complaint has been filed by the complainant from a false address. The other grounds taken by the accused was that no reference was made by the complainant with regard to the reply sent by the accused and that Ex.P.1 cannot be taken as proof for receipt of the amount. However, the Trial Court, after marking the defence documents, once again found the accused guilty of the offence under section 138 NI Act and convicted and sentenced him to undergo 6 months simple imprisonment and to pay a fine of Rs.3000/- with a default sentence of one month simple imprisonment.

7 Challenging the said conviction and sentence, the accused preferred CA.No.470/2007 before the learned Additional District and Sessions Judge, Fast Track Court No.3, Coimbatore. The Lower Appellate Court rendered a finding that the complainant has not proved payment of huge amount of Rs.1,40,000/- and disbelieved Ex.P.1 stating Ex.P.2 cheque was not issued in respect of discharge of a legally enforceable debt or liability. The Lower Appellate Court had also rendered a finding that in the absence of any promissory note, the debt is not proved and there was no legally enforceable debt and rejected Ex.P.1-Memo/Receipt and thereby, acquitted the accused. Hence this appeal.

8 The learned counsel for the appellant/complainant would submit that the finding of the Lower Appellate Court is perverse

and suffers from infirmity. He would submit that Ex.P.1-Memo/Receipt acknowledging the receipt of Rs.1,40,000/- is the proof of the accused having received the said sum from the complainant and when such being so, the finding of the Lower Appellate Court is perverse. He would further submit that there is a presumption in favour of the complainant as per section 118 and 139 NI Act and as per section 118 of the Act, until the contrary is proved, the following presumption shall be made 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. Further, as per section 139 of the Act, presumption is in favour of the holder and it shall be presumed that unless contrary is proved that the holder of the cheque received the cheque of the nature referred to in section 138 of the Act for the discharge, in whole or in part, of any debt or other liability. However, the accused had neither denied of having issued the cheque nor denied the issuance of the receipt. When such being so, unless the contrary is proved, it is presumed that the cheque had been issued towards consideration. Further, to strengthen the legally enforceable debt, the complainant has also marked the Receipt-Ex.P.1 for the accused having received the amount of Rs.1,40,000/- from the complainant. When no evidence has been let in to rebut the presumption, the Lower Appellate Court, on wrong appreciation of the evidence, had rendered a perverse finding in acquitting the accused, stating that in the absence of any promissory note, the debt is not legally enforceable and would pray for setting aside the judgment of the Lower Appellate Court.

9 Per contra, the learned counsel appearing for the respondent/accused would submit that the respondent/accused had sent a reply, denying the liability and that the Lower Appellate Court, finding that there is no promissory note, had rightly acquitted the respondent/accused and would pray for dismissal of this appeal.

10 The learned counsel for the appellant would submit that the reply had been sent only after the complaint was filed and the accused had not let in contrary evidence to disprove the complainant's case.

11 This Court has considered the rival submissions and also perused the materials placed before it including the impugned judgments of the Courts below.

12 A perusal of the judgment of the Lower Appellate Court, which is impugned herein, would prima facie show that the Lower Appellate Court had erred in rendering a perverse finding that

since there is no promissory note there is no legally enforceable debt. For better appreciation, it is relevant to extract paragraph No.10 of the judgment of the Lower Appellate Court dated 14.03.2009:-

> ''10 It is not proved by the complainant that there was legally enforceable debt or liability to discharge which the accused issued the cheque Ex.P.2. According to P.W.1, the accused borrowed this huge amount of Rs.1,40,000/- and issued only Memo [Ex.P.1] to acknowledge the debt. In the absence of any promissory note the debt is not legally enforceable on the basis of the Memo Ex.P.1. Ex.P.1 Memo is not legally enforceable and therefore, the debt or liability on the basis of Ex.P.1 itself is not legally enforceable. Therefore, we have to hold that the cheque Ex.P.2 is not issued to discharge any legally enforceable debt.''

13 The above finding of the Lower Appellate Court is erroneous as it is evident from the perusal of Ex.P.1-Memo / Receipt in original that the respondent/accused, using his Company Letter Pad bearing the name M/s.Mohan Textiles, had written that he had received a sum of Rs.1,40,000/- from the complainant as loan and that he would repay the same within two months and the said receipt is the acknowledgment for the same and he had also affixed his signature in the capacity of the Proprietor of Mohan Textiles. The signature of the respondent/accused is also not disputed and hence, the finding of the Lower Appellate Court as regards Ex.P.1 is perverse.

14 Further, there is a presumption in favour of the complainant under sections 118 and 139 of the Negotiable Instruments Act, 1881. Section 118 of the Act reads thus:-

> Section 118:- Presumptions as to Negotiable Instruments - 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 a 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 of a negotiable instrument is a holder in due course.
Provided that, where the instrument has been obtained from 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 of 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.''

Section 139 of the Act reads thus:-

139-Presumption in favour of holder:- It shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.''

The appellant/complainant being the holder of the cheque, the above provisions provide for presumption in favour of him. Apart from that the respondent/accused had marked Ex.P.1 - Memo/Receipt towards payment of loan amount of Rs.1,40,000/- borrowed by the respondent/accused from the complainant, unless the contrary is proved, the respondent/accused cannot be acquitted. Hence, the judgment of acquittal of the Lower Appellate Court warrants interference.

15 In the result, the Criminal Appeal is allowed setting aside judgment of acquittal dated 14.03.2009 made in CA.No.470/2007 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore and confirming the judgment of the Trial Court dated 20.09.2007 made in CC.NO.424/2003 on the file of the learned Judicial Magistrate No.6, Coimbatore.

16 The Trial Court shall take steps to secure the presence of the respondent/accused to undergo the remaining period of sentence.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

AP

To:

1.The Additional District and Sessions Judge,
Fast Track Court No.III, Coimbatore.

2.The Judicial Magistrate No.6
Coimbatore.

3.The Public Prosecutor,
High Court, Madras.

Copy to

The Section Officer,
Criminal Section,
High Court, Madras-104.

+1cc to Mr.P.M.Duraiswamy, Advocate sr.53232
+1cc to Mr.G.Ponnambalathiyagarajan, Advocate Sr.53611

Crl.A.No.316/2009

sv[co]
srg 13/08/2019