IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.012019

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.A.No.600 of 2009

A.M.S.Ameenullah ... Appellant

Vs.

Sowdhagani ... Respondent

Prayer:

Appeal filed under Section 378 (4) of Cr.P.C., seeking to call for the records and set aside the order of acquitting the respondent/ accused passed in C.C.No.27/2008 dated 18.06.2009 on the file of the Judicial Magistrate No.I, Mayiladudurai and allow the criminal appeal.

For Appellant : Mr.K.M.Vijayan
Senior Counsel
for Mr.R.Sivakumar

For Respondent : Mr.S.Sounthar

J U D G M E N T

The appellant has filed this appeal seeking to set aside the judgment dated 18.06.2009 made in C.C.No.27 of 2008 by the learned Judicial Magistrate No.I, Mayiladuthurai.

2.The appellant is the complainant and the respondent is the accused in the case in C.C.No.27 of 2008. For the sake of convenience, the appellant will be hereinafter referred to as 'complainant' and the respondent will be hereinafter referred to as 'accused'.

3.The case of the complainant is that the accused is the sister of the complainant. The accused owes the complainant a sum of Rs.25 Lakhs and for the said subsisting liability, the accused issued a cheque in favour of the complainant dated 03.01.2008, bearing No.126898 for a sum of Rs.25 Lakhs drawn on Indian Overseas Bank, Thirunallar Branch. When the said cheque was presented for collection, the same was returned as 'payment stopped by drawer' on 09.01.2008. Thereafter, the complainant issued legal notice to the accused on 22.01.2008 and the accused refused to receive the said notice. Since the accused did not pay the amount due to the complainant, the complainant filed complaint before the learned Judicial Magistrate No.I, Mayiladuthurai and the same was assigned C.C.No.27 of 2008.

4.After the appearance of the accused free copies were served on her. The particulars of the offence were explained to the accused and the substance of the accusation under Section 138 of the Negotiable Instruments Act was read over and explained to the accused as per Section 251 of Cr.P.C. The accused denied the accusation, pleaded of not being guilty and claimed to be tried.

5.The complainant reiterated the facts averted by him in the complaint as P.W.1 and exhibited Ex.P1 to Ex.P4 to prove the case against the accused. The accused exhibited Ex.D1 to Ex.D6 during the cross-examination of P.W.1 to defend the case of the complainant.

6.After the examination of the complainant, the accused was examined under Section 313 (1) of Cr.P.C. with regard to the incriminating piece of evidence appearing against her. She stated that the evidence of the complainant is false. She had nothing more to say, but did not choose to examine any witness on her side.

7.On the side of the appellant/ complainant, the complainant examined himself as P.W.1 and marked 4 documents as exhibits Ex.P1 to Ex.P4. Ex.P1 is the cheque dated 03.01.2008, Ex.P2 is the memo by Indian Bank dated 09.01.2008, Ex.P3 is the copy of the legal notice dated 22.01.2008 and Ex.P4 is the acknowledgement card dated 29.01.2008.

8.On the side of the respondent/ accused no witness was examined, however, 6 documents were marked as exhibits Ex.D1 to Ex.D6. Ex.D1 is the release deed dated 12.04.2006, Ex.D2 is the letter dated 17.09.2006, Ex.D3 is the partition agreement dated 17.07.2006, Ex.D4 is the letter dated 20.12.2007, Ex.D5 is the letter dated 04.01.2008 and Ex.D6 is the acknowledgement card dated 08.01.2008.

9.After trial, the Trial Court acquitted the accused on the ground that the complainant has failed to prove his case beyond all reasonable doubts. Aggrieved by the said acquittal of the accused, the appellant/ complainant has filed this appeal.

10.The learned Senior Counsel appearing for the appellant/ complainant would submit that though the complainant did not aver anything with regard to Ex.D1 to Ex.D5 in his complaint, the fact remains that the accused received a sum of Rs.25 Lakhs as consideration of family arrangement. Though the amount was given as consideration of family arrangement, once the accused received the said amount from the complainant, it is legally enforceable liability for which, the accused issued cheque in favour of the complainant on 03.01.2008. However, the said cheque when presented for collection, was returned with endorsement 'payment stopped by drawer' on 09.01.2008.

11.The learned Senior Counsel appearing for the appellant/ complainant would further submit that as per Section 138 of the Negotiable Instruments Act initial burden lies on the complainant to mark the instrument, Banker's memo and to issue legal notice to the accused. Thereafter, it is for the accused to disprove the case. He would further submit that as per the Negotiable Instruments Act, presumption always lies in favour of the holder of the cheque. He would further submit that the appellant clearly established his case by examining himself as P.W.1. However, the accused has not examined any witnesses.

12.The learned Senior Counsel appearing for the appellant/ complainant would further submit that even a bare perusal of Ex.D4 would reveal that the complainant had given a sum of Rs.25 Lakhs for which, the accused has issued the cheque dated 03.01.2008, so that if the family arrangement fails, the complainant can appropriate the amount. Accordingly, he prayed for conviction of the accused.

13.In support of his contentions, the learned Senior Counsel appearing for the appellant/ complainant relied upon the decision of the Hon'ble Apex Court reported in (2018) 8 Supreme Court Cases 165 (Kishan Rao Vs. Shankargouda), the relevant portion of which reads as follows:

> "20.This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:
>
> "20....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the

consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist...”

21.In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

23.No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW.1, himself has not been explained by the High court.”

14.Per contra, the learned counsel appearing for the respondent/ accused would submit that the complainant did not aver anything about the documents marked by the accused. He would further submit that Ex.D1 would indicate that initially there was a family arrangement in which the accused was allotted 'C' Schedule property and subsequently, the said property was conveyed to the third party by the accused. Apart from that, there were some properties owned by their parents, for which the accused received Rs.25 Lakhs. There was another agreement in between the complainant and the accused stating that the amount of Rs.25 Lakhs will be paid to the accused by the complainant in due course after selling the property.

15.The learned counsel appearing for the respondent/ accused would further submit that in another letter Ex.D4 dated 20.12.2007, P.W.1 admitted that he collected the cheque on 03.01.2008 from the accused and the balance amount will be paid in due course if there is no family arrangement in future, the instrument will be returned to the accused. Immediately after the instrument date i.e., 03.01.2008, there was no family arrangement and no settlement was arrived. Hence, the accused issued letter dated 04.01.2008 to the complainant stating that the cheque was issued based on the threat and coercion and at the instigation of the complainant and not on her own willing.

16.The learned counsel appearing for the respondent/ accused would further submit that all the above documents clearly establish that there was no legally enforceable debt and there was no cause of action that arise for filing the complaint. Accordingly, he prayed for dismissal of the appeal.

17.In the light of the above submissions now it has to be analysed whether the complainant has proved his case that there was legally enforceable debt for which, the instrument Ex.P1 was issued.

18.Admittedly it is not in dispute that the appellant and respondent are brother and sister and there was family dispute right from the year 2003. The complainant and accused family are reputed family in their locality. There was a partition in their family in the year 2003. The documents marked by the respondent/ accused were admitted by P.W.1 in his chief and cross examination. He has also admitted that he has not averred anything about the documents marked by the accused in his complaint.

19.The complaint simply says that the accused received a sum of Rs.25 Lakhs from the complainant, for which, she issued a cheque dated 03.01.2008 and the said cheque when presented for collection, was returned with endorsement 'payment stopped by drawer' on 09.01.2008.

20.As per Ex.D1, the accused received a sum of Rs.25 Lakhs from the complainant for consideration of share relating to their parent's share, however, Ex.D2 indicate that a sum of Rs.18 Lakhs was given to the accused as cash and the remaining amount was to be paid to the tenants of the common property for their eviction.

21.Ex.D3 indicate that the amount of Rs.25 Lakhs was paid from the sale consideration of Mayiladuthurai Town property which belonged to the complainant and the accused has to repay a sum of Rs.6 Lakhs to their another brother. Thereafter, the document marked as Ex.D4 was written by the complainant to the accused in which complainant indicate that he received the cheque on the condition that family partition will be held in the presence of Panchayatars and on that day, after completion of panchayat, the amount if everything settled peacefully cheque will be returned in favour of her and the complainant balance amount will be paid and the complainant agreed to collect the partition release deed from the accused. Thereafter, the accused gave the cheque. The cheque was collected with a view to settle the family dispute inbetween the brother and sister and the complainant collected the cheque with coercion and exhibiting family sentiment for which all these documents confirmed by the complainant.

22.On perusal of the entire records, all can easily draw inference that there was family partition dispute inbetween the complainant and the accused and the complainant did not establish after receipt of letter dated 20.12.2007, there was family arrangement arrived inbetween the complainant and accused. It is clearly established that there was no legally enforceable debt in favour of the complainant and purely family arrangement inbetween the complainant and accused.

23.In the decision of the Hon'ble Apex Court relied upon by the learned Senior Counsel appearing for the appellant / complainant, it is clearly held that the accused may adduce direct evidence to prove the consideration and no debt or liability to be discharged by him. It is also clearly held that to disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and debt did not exist or their non-existence.

24.In the present case, the accused clearly established her case by marking Ex.D1 to Ex.D5 and appellant/ P.W.1 also admitted the said documents. Hence, there is no legally enforceable debt or other liability in favour of the appellant.

The cause of action arise only after the family arrangement. There is no cause of action at the time of presentation of the cheque. Hence, the Trial Court rightly acquitted the accused.

25.Further, the judgment of acquittal cannot be interfered with in a mechanical manner unless the judgment is perverse or against the legal principles. In fact, the Hon'ble Apex Court in the decision reported in 2012 SCW 5627 (Murugesan and others vs. State through Inspector of Police) has held that in the case of an appeal against acquittal, the presumption of innocence available to the accused has been reinforced by such order of acquittal and it need not be slightly interfered with. In yet another decision of the Hon'ble Apex Court reported in (2004) 13 Supreme Court Cases 374 (Hydru vs. State of Kerala), it was held that an order of acquittal need not be interfered with by the higher Courts unless there is any procedural irregularity or material evidence has been overlooked or misread by the subordinate Court.

26.In view of all the above, I do not find any legal infirmity in the judgment of the Trial Court warranting interference by this Court. The criminal appeal is accordingly dismissed. The judgment dated 18.06.2009 made in C.C.No.27 of 2008 by the learned Judicial Magistrate No.I, Mayiladuthurai, is hereby confirmed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

The Judicial Magistrate No.I,
Mayiladudurai.

Copy to

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

+1cc to M/S.R.Shivakumar, Advocate sr.6757
+1cc to Mr.S.Sounthar, Advocate Sr.6627

Crl.A.No.600 of 2009

gp[co]
srg 01/03/2019