IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.02.2018
DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.594 of 2010

A.P.Arjun ... Appellant

Vs

S.Sukumar ... Respondent

Prayer: Criminal Appeal filed under Section 378(4) of the Criminal Procedure Code, against the Judgment of Acquittal passed by the Additional District Judge, Fast Track Court No.1, Chengleput, dated 23.06.2010 in C.A.No.37 of 2007 reversing the order dated 21.03.2007 in C.C. No. 184/2006 on the file of the Judicial Magistrate, Alandur.

For Appellant : Mr.CPG.Yoganand
For Respondent : Mr.S.Senthilnathan

JUDGMENT

This criminal appeal is filed by the Appellant against the order of acquittal passed by the Learned Additional District Judge, Fast Track Court No.1, Chengalput, dated 23.6.2010 in C.A.No.37 of 2007 reversing the judgment of conviction and sentence imposed by the Learned Judicial Magistrate, Alandur in C.C.No.184 of 2006 dated 21.3.2007.

2.The brief case of the appellant:

The complainant and respondent are friends and there were money transaction between them. As such the respondent received a sum of Rs.5,00,000/- towards hand loan from the appellant. After so many requests and demands the respondent issued two cheques, one cheque for Rs.2,00,000/- bearing No. 202498 dated 20.09.2005 and another cheque for Rs.3,00,000/- bearing No. 202497 dated 20.9.2005 drawn on City Union Bank Limited, Triplicane, Chennai. When the cheques were presented in the State Bank of India, Velachery Branch for collection, by the appellant, the same was returned with an endorsement of “Insufficient funds”. Hence the appellant issued a lawyer’s notice on 2.1.2006 to the respondent and the same was returned with an endorsement “Information Delivered”. Therefore the appellant filed the complaint under section 138 of Negotiable Instrument Act before the Judicial Magistrate, Alandur.

3.Before the learned trial Court, the appellant himself was examined as PW1 and Exhibits P1 to P6 were marked. The respondent/accused examined himself as DW1 and no documents were marked on its side. On completion of the trial, the learned trial Court convicted the respondent/accused for the offences under section 138 of Negotiable Instruments Act and sentenced him to undergo two years simple imprisonment and imposed fine of Rs.5,000/- in default to undergo one month simple imprisonment.

4.Aggrieved over the judgment passed by the learned trial Court, the lower appellate Court on appreciation of the evidence reversed the findings of the learned trial Court and acquitted the respondent/accused. Hence this criminal appeal is filed by the appellant challenging the judgment of the lower appellate Court.

5.The learned counsel for the appellant submits that the learned judge committed a grave error in proceeding on the patently wrong notion of law that, even for drawing the presumption under section 139 of the Negotiable Instrument Act 1881,essential ingredients have to be established one, whether there was a pre-existing liability regarding the borrowing of the sum of Rs.5,00,000/- by the respondent from the appellant, and another, whether such liability was legally enforceable, thus ignoring the correct position of law that once the signature is either admitted by the drawer as in the instant case or is proved by the drawee, initial presumption as laid down under section 139 of the Negotiable Instrument Act comes into force and it is for the drawer, the respondent herein, to rebut the same with evidence and not otherwise as contended by the learned Judge.

6.The learned counsel for the appellant submits that the learned Judge, by his wrong appreciation of the position of law, has cast even the initial burden on the appellant to prove the pre-existing liability and that the same is lawfully enforceable, which burden thus cast on the appellant herein goes against the spirit and very purpose of the presumption laid down under section 139 of the Negotiable Instrument Act.

7.The learned counsel for the appellant submits that the learned Judge failed to take note of the deposition of the respondent DW1 in his chief examination that the subject cheques were allegedly given to the landlords of the property on which the respondent was constructing a building as the said landlords demanded money and that as the said landlords were 3 in number, the respondent gave the subject cheques without writing the payee's name, thus in any case categorically admitting to his lawful liability to pay to the quantum of the subject cheques.

8.The learned counsel for the appellant submits that the learned Judge having appreciated the fact that the subject cheques were drawn signed and executed by the respondent from his bank account based on the respondent’s own admission, failed to appreciate that the respondent himself has not disputed the pre-existing lawful liability on the subject cheques and also the quantum of his liability to the tune of the subject cheques.

9.The learned counsel for the appellant submits that the learned Judge ought to have appreciated that even if the said deposit of the respondent is believed to be true on the face of it, though vehemently denied as false by the appellant, the respondent has only disputed the person to whom he was due to make payment, that is, the recipient / payee, either the said landlords or the appellant herein more so, as section 138 of the Negotiable Instrument Act has a wider application as it pertains to the discharge of any debt or other liability and does not restrict the liability to the payee only as narrowly and wrongly interpreted by the learned judge.

10.The learned counsel for the appellant submits that the learned Judge ought to have held that section 20 of the Negotiable Instrument Act dealing with inchoate instruments comes into force infavour of the appellant in as much as it holds that where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instrument then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, thereby gives prima facie authority to the holder thereof to make or complete, as the case may be , upon it a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp, even if the case of the respondent is taken as true on its face value for the sake of argument, as, the case of the respondent is admittedly not that he gave blank cheques for no dues liable to be paid by him, but, the only dispute is with regard to the recipient/payee concerned.

11.The learned counsel for the appellant submits that the learned Judge failed to note that the respondent has to rebut the presumption laid down under sections 118 and 139 of the Negotiable Instrument Act by adducing evidence and proof and nor merely raise plausible explanation as he did in the instant case and that neither any one of the 3 landlords for whose dues the subject cheques were allegedly given nor their power agent, Uma, was examined by the respondent.

12.Further except for his self serving oral evidence in his chief examination as DW 1 no document was marked by the respondent, no other witness was examined and no shred of evidence, whatsoever was brought to the notice of the Trial Court to the effect that an agreement had been allegedly entered into between the respondent and the said Uma and that the respondent had handed over the subject cheques to her in order to present the same to the owners of the plot and that after completion of 80% of the construction work, the respondent had demanded the cheques and that the said Uma had allegedly informed him about the loss of cheques and that the said Uma allegedly gave the subject cheques to this appellant in order to file the subject complaint.

13.The learned counsel for the appellant submits that the learned Judge failed to take into consideration the fact that if at all there had been an agreement as alleged by the respondent, the respondent would have marked the same in evidence before the Court or having not filed the same, ought to have given reasons as to why the same could not be marked in evidence before the Court.

14.The learned counsel for the appellant submits that the learned Judge failed to see that no documentary evidence of any nature was relied upon by the respondent to substantiate any of his averments put forth vide his chief examination as d1 and vide suggestions to the appellant PW1 during his cross examination. Yet, the learned Judge in his wisdom chose to believe the version of the respondent word by word as gospel truth and reverse the judgment of the trial Court without any basis.

15.The learned counsel for the appellant submits that the learned Judge erred in coming to the conclusion in the absence of any positive evidence on behalf of the respondent to substantiate his claim in the light of the fact that, having received the demand notice under section 138 of the Negotiable Instrument Act and having duly acknowledged the same in his own signature, the respondent had chosen neither to comply with the lawful demand set forth thereto and pay the subject cheque amounts, nor reply to the said notice, either one of which course the respondent would have adopted as is prudently expected of him, if at all his case was true and erroneously concluded that no offence was made out.

16.The learned counsel for the appellant submits that the learned Judge ought to have held that if at all the allegation of the respondent that the subject cheques were misused by the said Uma, the power agent of the landlords, is to be believed as true, the respondent ought to have lodged a police complaint inter alia to retrieve the subject cheques or filed a civil suit for appropriate reliefs for at the least, send across a demand notice calling upon the said Uma to return the subject cheques. Admittedly, as the respondent has not resorted to any of the above avenues in the instant case, thus leading to the rightful, prudent inference that the said allegation of the respondent remains only as a malicious afterthought, the learned judge ought to have dismissed the same as having no basis either in law or in facts, more so as the respondent has not even replied to the demand notice under section 138 of the Negotiable Instrument Act.

17.The learned counsel for the appellant submits that the learned Judge erred in concluding that it was only during his cross examination, the appellant therein mentioned the date of the hand loan as 15.08.2006 and that the failure of the appellant herein to mention the date of amount in the complaint as well as in his sworn statement and also in his examination in chief throws a cloud of doubt as to whether a huge amount of Rs.5,00,000/- could have been given by the appellant herein to the respondent herein on 15.8.2006. In the said context, the learned Judge instead of pricking holes in the case of the appellant herein, ought to have put the onus on the respondent herein to displace the burden of proof cast under the presumptions laid down under sections 118 and 139 of the Negotiable Instrument Act by adducing rebuttal evidence.

18.The learned counsel for the appellant submits that the learned Judge has misconceived the case of the appellant in concluding that the respondent borrowed sum of Rs.5,00,000/- from the appellant herein with an undertaking to repay the amount within a month and that the appellant had demanded the said amount within a week from the date of payment and no convincing explanation was given by the appellant as to what was his necessity to demand the amount within a week in as much as the admitted fact that, in any case, the subject cheques are both dated 20.09.2005 only, more than a month from the date of payment of the loan, that is 15.8.2006.

19.The learned counsel for the appellant submits that the learned Judge has gone out of his way to give a wrong finding that his perusal of the subject cheques, marked as Exhibits P1 and P2 showed that except the signature of the respondent, other entries, such as the name of payee, the particulars of amount have not been written by the respondent, which is undoubtedly the exclusive domain of an expert witness to opine. More so, as it is the clear and categorical case of the appellant from the very beginning that except the name of the payee, all other particulars in the subject cheques were filled up by the respondent herein in his own handwriting. And, when the wrong finding goes, the conclusion based on the same also goes.

20.The learned counsel for the appellant submits that the learned Judge misconstrued the deposition of the appellant in concluding that except the signature of the appellant, other entries such as the name of payee, the particulars of amount have not been written by the respondent and going one step further, concluded that said factum was allegedly admitted by the appellant in cross examination. But, a mere perusal of the cross examination of the appellant PW1 would reveal that appellant admitted only that the subject cheques were given to him by the respondent without filling the name of the payee only. The learned judge has stretched it further to include other particulars, such as the amount and others and, when such premise is nonexistent, the wrong concluding based on the same also goes.

21.The learned counsel for the appellant submits that the learned Judge erred in finding fault with the appellant for not producing record to show that a sum of Rs.5,00,000/- was given by the appellant to the respondent on 15.8.2006 without appreciating the purport of the provisions dealing with presumptions, as laid down under sections 118 and 139 of the Negotiable Instrument Act. The presumptions, though rebuttable, puts the onus on the respondent to rebut the same with tenable evidence sustainable in law and not by mere plausible suggestions , more so, as in the instant case where not even a single piece of document was filed and relied upon by the respondent.

22.The learned counsel for the appellant submits that the learned Judge erred in finding fault with the appellant for not producing his Income Tax return before the Court to substantiate the appellant’s claim of giving the hand loan of Rs.5,00,000/- to the respondent on 15.8.2006 glossing over the fact that the same appellant PW1 in his cross examination has stated that he has not shown the loan to the respondent in his Income Tax return as the same was a hand loan for only a month. Consequently, the learned Judge clearly missed the fact that the Income Tax return, even if produced before the Court, would not have served any purpose which is exactly why, the same was not produced before the Court.

23.The learned counsel for the appellant submits that the learned Judge lost sight of the Income Tax return filing procedure in the case of the appellant, a Civil Engineer and Building Contractor by profession and was self employed who was required under law to file only his profit and loss statement and balance sheet showing his Business Income (not his personal Balance sheet) together with his Income Tax Form. The loans, either advanced or borrowed, would not find a mention anywhere in the said papers for the relevant assessment year in which the loan was advanced to the respondent.

24.The learned counsel for the appellant submits that the learned Judge committed a grave mistake in holding that the appellant has not let in any convincing oral as well as documentary evidence to show that he was capable of giving a hand loan of Rs.5,00,000/- on a single day to the respondent herein. By holding so, the learned Judge remained obvious to the deposition of PW1 in his cross examination wherein he spelt out the source of the funds in categorical terms, viz Rs.80,000/'- was received as refund from the Income Tax Department, part of the said sum and other funds to the tune of Rs.70,000/- in his Canara Bank Account and Rs.40,000/- in his ICICI bank account were both withdrawn and given to the respondent in the year 2005 together with Rs.4,00,000/- kept in cash at the appellant’s residence.

25.The learned counsel for the appellant submits that the learned Judge ought to have known better that while the appellant was refunded with a sum of Rs.80,000/- by the Income Tax Department towards TDS deduced from and out of his customer’s payment made to him, which fact was not denied even by way of a suggestion by the respondent, the appellant’s gross receipts ought to have been around 20 times the TDS amount as the TDS deduction for the relevant assessment year was only between 5 - 6% of the gross payments and ought to have concluded that the appellant was more than capable of lending the subject loan amount of Rs.5,00,000/- to the respondent.

26.The learned counsel for the appellant submits that the learned Judge erred in drawing adverse inference on his own volition against the appellant herein for not producing the Source of Income and the Income Tax returns before the Court, while no application under section 91 of Cr.P.C. for production of the Bank statements of the appellant and his Income Tax returns was filed by the respondent herein.

27.The learned counsel for the appellant submits that the learned Judge has given undue importance to the issue that the subject cheques both dated 20.9.2005 were presented to the Bank only on 26.12.2005 with the delay of more than three months and that if at all the respondent had been in urgent need of the money, he would have presented the cheques immediately or at least by the end of the month of September 2005. The fact remains that the subject cheques were presented 2 times between the date they bear, that is 20.09.2005 and 26.12.2005, the date of last cheque return memo. On both the occasions, the subject cheques were returned unencashed as "Exceeds Arrangements". The earlier presentations were not mentioned in the complaint as that has nothing to do with the present cause of action for the subject complaint and that not even a suggestion to such effect was put to the appellant PW1 during his cross examination and hence the appellant did not have any opportunity to speak about the earlier presentations and return of the subject cheques nor was the same deemed necessary. Given these circumstances, the learned Judge, while sitting in appeal ought not to have entertained such questions of fact as plausible rebuttal in the appeal stage. The only contention of the appellant rightly appreciated in his favour by the learned Judge, to his credit, was that Exhibit P6, whether it be an Acknowledgement Card for the Legal Notice or the Returned cover with the postal remarks "Information Delivered" it does not alter the case of the appellant and that in any case it will not help the case of the respondent as the respondent himself has conceded in his evidence about his receipt of the said legal notice. The fact is, Exhibit P6 is the Acknowledgement Card for the legal notice duly signed by the respondent himself.

28.The learned counsel for the appellant cited the following decisions:

(1) 2002 (1) CTC 530 (Y.Sreelatha @ Roja v. Mukanchand Bothra)

(2) 2009(2) SCC 513 (Kumar Exports v. Sharma Carpets)

(3) 2000 (II) CTC 443 (Gummadi Industries Ltd., Habibulla Road, Chennai-17 and another v. Khushroo F.Engineer M/s.Zen Global Finance Latd., Alwarpet, Chennai-18)

29.Per contra, the Learned Counsel for the Respondent would submit that the Learned Trial Court failed to appreciate the evidences in a proper perspective and the lower appellate Court has rightly held that the appellant/complainant has not come with clean hands and allowed the appeal filed by him.

30.The learned counsel for the respondent cited the following decisions in support of his submissions:

(1) (2004) MLJ (Crl.) 563 (Abdul Raheem v. U.P.K.Mohammed Haneefa)

(2) CDJ 2013 SC 1060 (John K.Abraham v. Simon C.Abraham & Another)

(3) (2006) 2 MLJ (Crl.) 793 (P.Eswaran v. J.A.Abdul Hameed)

31.I heard Mr.CPG.Yoganand, learned counsel for the appellant and Mr.S.Senthilnathan, learned counsel for the respondent and perused the materials available on record and the decisions cited.

32.It is indisputable that every conclusion of Judgment or finding whatever its subject is must be the result of evidence. It must be based on proof of facts. What then is this evidence and what is proof?

33.The Evidence Act has not defined the terms "evidence" and "proved".

34.I have therefore to look to the Evidence Act. According to the said law "Evidence means and includes:

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry: Such statements are called oral evidence.

(2) All documents produced for the inspection of the Court; such documents are called "documentary".

This is not, however, a complete or exhaustive definition as it seeks to simply explain what the Legislature meant by the use of that word.

Then again fact according to the Evidence Act "means and includes -

(1) Anything, state of things, or relation of things, capable of being perceived by the senses;

(2) Any mental condition of which any person is conscious.

Section 5 says that "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others."

35.Thus the Evidence Act makes not only the facts in issue but also the relevant facts admissible in evidence. As regards the term "proved" the Evidence Act says that "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."

36.The Evidence Act postulates three possible contingencies; either a fact is proved, or not proved or disproved and explains accordingly these various situations. The requisite belief as to existence of the fact is engendered and probability in relation thereto is raised only on the strength and basis of the matters before the Court, namely the evidence in the case adduced under the provisions of the Evidence Act. This evidence is either oral or documentary and includes everything that is relevant and admissible under the provisions of the Evidence Act.

37.The evidence, whether oral or documentary, may be direct or circumstantial. The so-called "direct evidence" is the evidence afforded by the direct testimony of eye-witness to the fact to be proved. It is the evidence of direct perception of the facts in issue. In other words, it applies directly to the fact which forms the subject of inquiry, the factum probandum. On the other hand the circumstantial evidence is the evidence of collateral facts which lead to an inference on the facts in issue. Like facts in issue, collateral facts have necessity to be proved by the testimony equally original and direct. In this way the circumstantial evidence is equally direct in its nature. In a large number of cases circumstantial evidence is the only available evidence. Surely evidence of direct perception is not the only means of finding the truth. Facts are facts. They may be known by perception or may even known by inference or reasoning. Inference and reasoning, as we know, is a mode of thinking by which starting from which we know we end in forming a belief that certain fact does exist or has existed.

38.This reasoning process is valid because the universe of facts is rational. It is a harmonious whole marked by consistency. There is order, certainty, regularity, system in the internal relation of all the facts of the universe. Facts are never contradictory. It is therefore possible no come to the thing signified from the sign that is seen. Of course, the chain of inferential facts must be complete and the process of inference must be well marshaled free from all fallacies and all shortcomings to reach the correct result. Just as what we see and feel is proof if there has been nothing to delude the senses or the testimony, of an eye-witness may be acted upon if it is free from all sources of error, viz, imperfect observation, bias, temptation to exaggerate and all other disturbing causes. So also if the chain of circumstances which lead to an inference as to the fact in issue is full and complete and the reasoning is valid and proceeds on right lines and the belief that results therefrom corresponds to all the facts covered by it and leads to one necessary result, the inferential result will be as credible and acceptable as the direct undeluded perception. It is on this basis that the Indian Evidence Act has made provisions for admissibility of evidence not only of facts in issue but also of relevant facts. There can therefore be little scope for the contention that in a proceeding governed by the Evidence Act, circumstantial evidence has no place.

39.The learned counsel for the appellant vehemently argued regarding non-application of the learned lower appellate judge in considering the provisions of Negotiable Instruments Act and the appreciation of evidence adduced in this case coupled with the decisions cited by him.

40.Therefore what all is contended for on behalf of the appellant is that where the lower appellate Court failed to take the conclusive tendencies and the chain of circumstances lead to the irresistible conclusion compatible with the existence of the facts alleged in this case. There can be no two opinions on this point. In the case of circumstantial evidence, process of inference and deduction is essentially involved, frequently of a delicate and perplexing character, leading to numerous cases if fallacy. It is therefore necessary that circumstantial evidence must not only be full and cogent but also of conclusive nature as to exclude to moral certainty any other hypothesis on which it could be explained.

41.In the case on hand, the signatures contained in the two impugned cheques were admitted by the respondent/accused and both were marked as Exhibits-P1 and P2. Even though the respondent/accused admitted his signatures found in Exhibit P1 and P2, the presumption under section 139 of Negotiable Instrument Act has to be drawn that these cheques were given towards discharge of his liability. Two essential ingredients have to be established for drawing the presumption. One is whether there was a pre-existing liability regarding the borrowing of a sum of Rs.5 Lakhs by the respondent/accused and another is such liability is a legally enforceable debt. The appellant failed to depose in his sworn statement and in the complaint regarding the date of the loan advanced to the respondent/accused. Further no record has been produced to show that a sum of Rs.5 Lakhs was given by the appellant to the respondent. This itself disprove the case of the appellant.

42.In the complaint filed by the appellant, it is alleged that the respondent/accused borrowed a sum of Rs.5 Lakhs with an undertaking to repay the amount within a month. The appellant demanded the loan amount within a week as seen from his evidence. There is no reasonable explanation adduced by the appellant regarding the necessity for him to demand the amount within a week from the date of alleged payment of Rs.5 Lakhs. Further the case of the respondent is that he had been building construction work and one Uma was the Power Agent for the plot on which the building was being constructed. An agreement had been entered between the respondent/accused and the Uma and in pursuance thereof he handed over two cheques to her in order to present the same to the owner of the plot. The cheques given to Uma were misused by the appellant since there was a misunderstanding in the business conducted by the both parties.

43.On perusal of Exhibits-P1 and P2, the cheques were dated as 20.9.2005 and the respondent/accused issued the cheques to the appellant one week after the hand loan of Rs.5 Lakhs, as seen from the evidence of the appellant. The appellant presented the cheques for collection only on 26.12.2005 even though he adduced in his evidence that he is in urgent need of the money. But the conduct of the appellant is otherwise and contra to the evidence deposed and no reason has been given by the appellant for presentation of impugned cheques after delay of three months. As far as this case is concerned, the appellant fail to prove the payment of Rs.5 Lakhs to the respondent/accused as rightly held by the lower appellate Court.

44.In the result, the criminal appeal is dismissed and the judgment passed by the learned Additional District Judge, Fast Track Court No.1, Chengleput, dated 23.06.2010 in C.A.No.37 of 2007, is confirmed.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

vs
To

1.The Additional District Judge, Fast Track Court No.1, Chengleput.

2. The Judicial Magistrate
Alandur.

3. The Section officer
Criminal Section, High Court, Madras 104.

+1 CC to MR.S.Senthilnathan, Advocate sr 81.
+1 CC to Mr.CPG.Yoganand, Advocate sr 42.

Criminal Appeal No.594 of 2010

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SP(04/02/2019)