

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.03.2018

DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.1033 of 2005

M/s.Arjun Amaravathi Chits (P) Ltd.,
Rep. by its Power Agent,
T.Bhuvarahamurthy,
S/o Thyagarajan,
No.12, Desikar Street,
Vadapalani, Chennai. Appellant/Complainant

Vs

Balraj Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the judgment and decree dated 09.11.2005 of the VII Metropolitan Magistrate Court in C.C.No.5106 of 1999.

For Appellant : Mr.M.J.Jaseem Mohamed

For Respondent : Mr.I.David Singh
Legal Aid Counsel

JUDGMENT

This Criminal appeal is filed by the appellant/complainant against the judgment dated 9.11.2005 passed by the Learned VII Metropolitan Magistrate Court in C.C.No.5106 of 1999, wherein the learned trial judge acquitted the respondent/accused on the complaint made under section 138 r/w 142 of the Negotiable Instruments Act, 1883.

2.The brief case for the appellant:

One Radhakrishnan joined in the chit fund conducted by the appellant and he taken chit amount of Rs.1,00,000/- and for reimbursing the same, the respondent/accused as a guarantor issued the cheque for Rs.45,300/- dated 22.4.1999 bearing No.992875 drawn on Indian Bank Purasaivakkam Branch. When the

cheque was presented in the Nedungadi Bank George Town Branch for collection, by the appellant/complainant, the cheque was returned on 11.5.1999 with an endorsement of "Insufficient funds". Hence the appellant/complainant issued statutory notice on 19.5.1999 to the respondent/accused and the same was received by him on 19.5.1999. Since there is no reply nor repayment of the cheque amount, the appellant filed this case under section 138 of Negotiable Instrument Act.

3.Before the trial Court the appellant/complainant examined himself as PW1 and branch manager PW2 marked Exhibits P1 to P11. The respondent/accused examined himself as DW 6 and examined DW 1 to 5 on his side.

4.On completion of trial, the learned trial Court acquitted the respondent/accused under Section 138 of the Negotiable Instruments Act.

5.The learned counsel for the Appellant submits that the learned magistrate erred in holding that the cheque was issued not to discharge the debt or liability for the respondent/accused, especially when section 138 of the Act mandates general presumption in favour of the holder/appellant.

6.The learned counsel for the Appellant submits that the learned Magistrate has totally overlooked the fact that the procedure is the hand maid of justice and not its mistress when going into the question of the pleadings found in the complaint and totally absolved the respondent from the entire proceedings opening the flood gates of further litigation. If the respondent/accused was really aggrieved he ought to have filed a discharge petition and got himself discharged at the earliest point of time.

7.The learned counsel for the Appellant submits that the learned magistrate failed to see that if notices were to be exchanged between the parties and their counsels then there would be no end to it and the limitation to file the statutory complaint would be lost. Further there is no question of suppressing any material fact because what appears to be material to the respondent/accused would appear immaterial to the Appellant/complainant and vice-versa. Further suppression arises only when any document which is in possession of the Appellant/complainant alone was not marked. On the other hand copy of the reply notice was marked by the respondent/accused.

8.The learned counsel for the Appellant submits that the Court below even after extensively discussing and debating in Exhibit-P2 (promissory note) has been signed by the respondent/accused though holding him liable and duty bound to pay the lawful and legitimate cheque amount, discharged him on very filmy grounds.

9.The learned counsel for the Appellant submits that the learned magistrate misunderstood and misconstrued the judgments relied upon by the appellant/complainant viz. 2002 (I) CTC 530, 2003 (2) CTC 31, 1998 1 CrL. LW 354, 1998 (1) MWN 311, 1999 (2) CrL. LW 618, 2005 CrL. LJ 1454, 2001 CrL. J 2178 and the judgment of this Court confirmed by the learned V Additional Sessions Court in C.A.No.90 of 2000. Therefore all the judgments relied upon by the respondent/accused will not apply to the facts and circumstances of the present case.

10.The learned counsel for the Appellant submits that the Court below failed to note that the respondent/accused himself admitted in his witness (DW6) that his signature in the pro-note and in the cheque is one and the same and it is evident that he had issued the cheque to wipe out the said legally enforceable debt and liability. During cross examination of PW1 Appellant/complainant had stated that the respondent/accused was also a subscriber of another chit value of Rs.1,00,000/- (Chit Ref.No.AL 3 G/15) and had no dues in the chit and received back the document such as pro-note. This is also fortified by examining DW3 and DW5, Branch Manager and Legal Officer of the appellant/complainant company who respectively deposed to the effect that except pronote, no other documents were received from the subscriber at the time of disbursement of the prized chit amount.

11.The learned counsel for Appellant submits that the Court below did not take in its fold the evidence of DW4 which is to the effect the respondent/accused is not in possession of any document to show that he has paid the entire dues apart from his self-serving statement. On the other hand respondent/accused have also feigned ignorance as to whether the present case was filed against the respondent/accused because of the arrears due and payable by him to the appellant/complainant.

12.The learned counsel for the Appellant submits that the Court below did not take into consideration of the evidence of the respondent/accused who was examined as DW6 and his self-

serving statement that respondent/accused did not sign as surety for DW4 Radhakrishnan is much in contradiction to the evidence of Radhakrishnan who has stated that signatures were obtained from the respondent/accused for the chit subscribed by him. Further his own evidence goes to show that appellant/complainant had sent the notice dated 20.05.1999 as Exhibit D3 subsequent to the receipt of statutory notice issued by the Appellant/complainant. Thus it could be seen that the notice dated 20.05.1999 is an off shoot and after thought of the statutory notice issued with an oblique motive of making fortune out of misfortune, Further respondent/accused also feigned ignorance as to whether Radhakrishnan paid the entire dues owed to the appellant/complainant. Therefore it goes to show that Radhakrishnan has not discharged his liability and if it were so the respondent/accused would have answered the question put to him in the affirmative.

13.The learned counsel for the Appellant submits that the Court below failed to see that the subscriber Mr.Radhakrishnan DW4 admitted the chit liability towards his chit (AL 2 Z/13) for which the accused was a guarantor issued the impugned cheque. Hence it has been proved beyond doubt that the accused is the Guarantor for Balraj and vice-versa. Thus it is very crystal clear from the statement of account marked as Exhibit-P8 that the subscriber defaulted the further installments after receiving the prized chit amount and the Guarantor viz Balraj has to pay the legally and lawfully payable debts to the complainant. Time and again it was reiterated that the documents pertaining to Balraj is not with the complaint and that does not mean that the documents in respect of Radhakrishnan is not with the complaint. Exhibit P8 was marked only to assist the Lower Court as to how the cheque amount is arrived at. Therefore it cannot be eschewed for being non-probative in as much as the evidence of both Balraj and Radhakrishnan are self-serving statements end they happen to be intimate and bosom friends.

14.I heard Mr.M.J.Jaseem Mohamed, learned counsel for the appellant and Mr.I.David Singh, learned Legal Aid Counsel for the respondent and perused the entire materials available on record.

15.In the case on hand, there is a chit transaction between the both parties and the appellant/complainant himself stated in his evidence that the accused was the guarantor for Mr.K.Radhakrishnan and due to non repayment, he issued the cheque for Rs.45,300/- which was marked as Exhibit P1. The statutory notice sent to the respondent/accused was marked as

Exhibit P6 and the statement of accounts in respect of the respondent/accused is marked as Exhibit P9. PW2, the branch manager Indian Bank was examined to prove the dishonor of the impugned cheque and the statement of accounts Exhibits P9 and P10 were marked through him.

16.The guarantor Radhakrishnan was also examined by the accused as DW 4. In his evidence, DW4 deposed that the appellant received the blank cheque for security towards the chit amount taken by him and paid the entire amount without any balance and not aware of the case prosecuted against the respondent/accused and he also joined in the chit fund and the accused stood as a guarantor for him also and denied the issuance of cheque to the appellant/complainant as a security for the accused.

17.It is pertinent to note that the complaint was instituted against the guarantor for the default committed by the respondent/accused. But the guarantor appeared as a witness before the learned trial Court and denied the averments made in the complaint. Further the appellant/complainant failed to explain the sequence of the events happened in the chit fund company owned by the appellant/complainant.

18.Therefore the view taken by the learned trial Court that the complainant did not prove that the cheque was issued in respect of an enforceable liability and the respondent / accused was rightly acquitted.

19.Section 139 of the Act, it is provided, "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".

20.The effect of these presumptions is to place the evidential burden on the accused of proving that the cheque was not received by the complainant towards the discharge of any liability, because both Sections 138 and 139 of the Act require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn.

21.As noted in State of Madras v. 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. 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.

22.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. In other words, provided the facts required to form the basis of a presumption of law exists, 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".

23.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'.

24.Therefore, it can be stated that the respondent/accused proved by adducing evidences that there was no valid liability.

25.On perusal of the provisions of Section 138 of the Act, it is manifest that to constitute an offence thereunder, the following ingredients are required to be filled:-

- (i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account.
- (ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability.

(iii) That cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(iv) That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement within the Bank.

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

26. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act. The evidence led by the complainant in this case was not on all fours on the necessary ingredients, as aforesaid.

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

28. The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Mr. I. David Singh, Legal Aid Advocate.

Sd/-
सत्यमेव जयते Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The VII Metropolitan Magistrate,
George Town, Madras.

2.-Do- Thro The Chief Metropolitan Magistrate,
Egmore, Chennai-8.

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

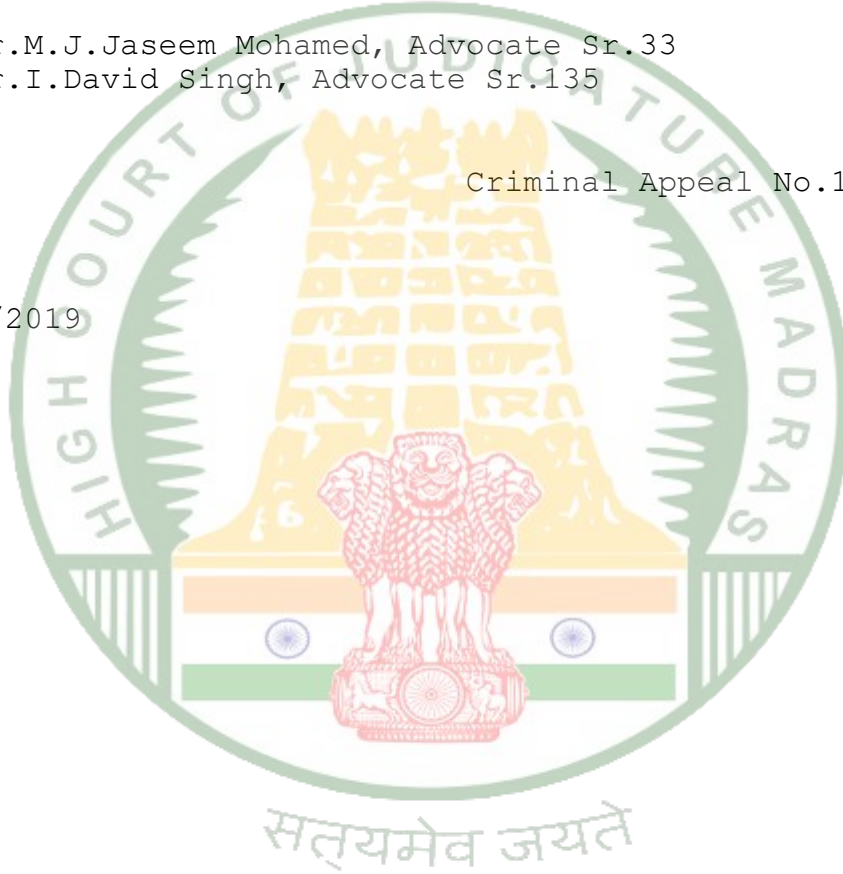
4.The Secretary,
High Court, Legal Services Committee,
High Court, Madras(Legal Aid)
(To pay Rs.5,000/- to Mr.J.David Singh Advocate)

+1cc to Mr.M.J.Jaseem Mohamed, Advocate Sr.33

+1cc to Mr.I.David Singh, Advocate Sr.135

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