

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 25.09.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.A.No.63 of 2012

S.Ravi

.. Appellant/
Complainant

Vs.

S.Kumaresan

.. Respondent/
Accused

Criminal Appeal filed under Section 378(4) Cr.P.C., challenging the judgment and order dated 01.07.2011 passed by the Additional Sessions Judge (Fast Track Court No.II), Ranipet in C.A.No.2 of 2010 reversing the judgment and order dated 14.05.2009 passed by the Judicial Magistrate, Arakkonam in C.C.No.137 of 2006.

For Appellant : Mr.M.S.Sudarsanam

For Respondent: Mr.Karthik Raja,
Amicus Curiae

J U D G M E N T

This criminal appeal has been preferred challenging the judgment and order dated 01.07.2011 passed by the Additional Sessions Judge (Fast Track Court No.II), Ranipet in C.A.No.2 of 2010, in and by which, the judgment and order dated 14.05.2009 passed by the Judicial Magistrate, Arakkonam in C.C.No.137 of 2006, convicting the accused has been set aside.

2. For the sake of convenience, the appellant and the respondent will be referred to as complainant and accused respectively.

3. It is the case of the complainant that on 20.08.2005, the accused borrowed Rs.1,50,000/- and for discharging the said liability, issued a post-dated cheque dated 25.11.2005 (Ex.P1) for Rs.1,50,000/- drawn on Indian

Bank, Palavakkam branch; on 25.11.2005, the accused requested the complainant to deposit the cheque on 29.11.2005 and accordingly, the complainant deposited the same in Indian Bank, Arakkonam branch on 29.11.2005; however, the cheque was returned with the endorsement "funds insufficient" on 27.12.2005 (Ex.P3); the complainant contacted the accused and the accused requested him to re-present the cheque and accordingly, the complainant re-presented the cheque on 08.02.2006; this time also the cheque was returned unpaid with the endorsement "funds insufficient" vide bank advice dated 10.02.2006 (Ex.P4); the complainant issued a statutory demand notice dated 23.02.2006 (Ex.P5), which was received by the accused on 25.02.2006 vide acknowledgment card (Ex.P6); since the accused did not comply with the demand, the complainant initiated a prosecution in C.C.No.137 of 2006 before the Judicial Magistrate, Arakkonam under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") against the accused.

4. On the appearance of the accused, he was questioned under Section 251 Cr.P.C. and he denied the accusation. To prove the case, the complainant examined himself as P.W.1. and marked Ex.P1 to Ex.P6. Guru Subramani, Assistant Manager of Indian Bank, Palavakkam branch was examined as P.W.2, where the accused was having his account and his account statement was marked as Ex.P7.

5. When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. No witness was examined on the side of the accused nor any document marked.

6. After considering the evidence on record and hearing either side, the trial Court, by judgment dated 14.05.2009 in C.C.No.137 of 2006, convicted the accused of the offence under Section 138 of the NI Act and sentenced him to undergo one year simple imprisonment and fine of Rs.5,000/- in default, to undergo three months simple imprisonment. Challenging the conviction and sentence, the accused filed C.A.No.2 of 2010, which has been allowed by the Additional Sessions Court, FTC-II, Ranipet on 01.07.2011, challenging which, the complainant has preferred the present appeal against acquittal.

7. Notice in this appeal was served on the accused on 20.02.2012 by the Judicial Magistrate, Arakkonam, despite which, he did not enter appearance. Therefore, this Court appointed Mr.Karthik Raja, Advocate (Enrl. No.1934 of 2006) of more than 10 years of standing in the criminal side to appear for the accused.

8. Heard Mr.Samuel Rajapandian, learned counsel for the complainant and Mr.Karthik Raja, learned counsel for the

accused.

9. This Court perused the reasoning given by the appellate Court for acquitting the accused and it may be worthwhile to extract the same :

"... 6. Yet, I'm impressed that the complainant hasn't successfully discharged the initial burden of establishing the subsistence a legally enforceable debt on the date of issue of the cheque or earlier. Rs.1,50,000/- is a huge amount. The complainant took no security except a post-dated cheque which is Exhibit-P1. No proof of the complainant's economic position to the extent of lending Rs.1,50,000/- so liberally that he bothered to take no security. True, the burden to prove non-existence of consideration is upon the accused. For this, he need not adduce independent evidence on his side, he may even rely upon the complainant's evidence and bring on record preponderance of probabilities pointing to non-existence of consideration. Reference : Kalavalli Vs. Parthasarathy [2008(2) LW (Cri.) 1230 para (42) page (1244)]. I disbelieve the complainant's evidence that he lent Rs.1,50,000/- to the accused just on a post-dated cheque without any other security...."

It is trite that in an appeal against acquittal, when two views are possible, the view that favours the case of the accused merits acceptance and the acquittal should not be easily disturbed, as held in Arulvelu and another Vs State and another [(2009)10 SCC 206]. The relevant portion of which reads as under :

"34.

(1) ...

(2) ...

(3) ...

(4) ...

(5) If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

10. This Court carefully perused the evidence of the complainant (P.W.1). The complainant (P.W.1), in his evidence, has stated that, the accused had borrowed Rs.1,50,000/- on 20.08.2005 and gave a post-dated cheque dated 25.11.2005 drawn on Indian Bank, Palavakkam branch for Rs.1,50,000/-; however, on 25.11.2005, the accused called him and told not to present the cheque and requested him to present it on 29.11.2005; accordingly, he presented the cheque on 29.11.2005; but, it was returned unpaid; again at the request of the accused, he re-presented the cheque on

08.02.2006 vide bank challan (Ex.P2) and the cheque was dishonoured on 10.02.2006 on the ground "funds insufficient" vide bank memo (Ex.P4); the statutory demand notice dated 23.02.2006 (Ex.P5) was issued and the same was received by the accused on 25.02.2006 vide acknowledgment card (Ex.P6).

11. In the cross-examination, the complainant (P.W.1) has stated that, he know the accused for about five years and that, earlier he had taken some loans and had returned it promptly and that is the reason, he gave Rs.1,50,000/- without taking anything in writing from the accused, except the post-dated cheque. It may be relevant to state here that, this answer was elicited by the defence in the cross-examination. The defence has not disputed the signature in the impugned cheque.

12. In fact, in the cross-examination, the complainant (P.W.1) has stated that, the accused himself has filled the cheque, signed and given to him on the day of borrowal. Ultimately, it was suggested to the accused that, the brother of the complainant is running an automobile finance concern and the cheque was given to him and the same has been misused, which suggestion, the complainant has denied.

13. Apart from merely suggesting to the complainant, the accused had not produced any credible material, in support of the defence taken by him. On the contrary, the complainant has examined the Manager of the bank, in which, the accused was having his account and his statement of account was marked as Ex.P7. In Krishna Janardhan Bhat Vs. Dattatraya G. Hegde [(2008) 4 SCC 54], the Supreme Court held that albeit Section 139 of the NI Act, the complainant should prove the debt satisfactorily. This legal position was specifically overruled by a Three Judge Bench of the Supreme Court in Rangappa Vs. Sri Mohan [(2010) 11 SCC 441], wherein, it is held that it is not necessary for the complainant to prove the debt to the hilt, for, that would make Section 139 of the NI Act otiose. However, the Supreme Court has held that presumption under Section 139 of the NI Act can be discharged by the accused by preponderance of probability and not by proof beyond reasonable doubt.

14. This Court perused the Section 313 Cr.P.C. statement of the accused and found that, he has not even given any satisfactory explanation as to how, the cheque executed and signed by him, came into the hands of the complainant. Thus, in the teeth of the evidence adduced by the complainant and in the light of the presumption under Section 139 of the NI Act, the reasons given by the appellate Court, acquitting the accused cannot be sustained.

In the result, this appeal is allowed and the conviction and sentence imposed by the trial Court stands restored. The trial Court is directed to secure the appellant and commit him to prison to undergo the remaining period of sentence, if any.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Additional Sessions Judge/
Fast Track CourtII,
Ranipet.
- 2.The Judicial Magistrate,
Arakkonam.
- 3.Do Thro'The Chief Judicial Magistrate,
Vellore District.
- 4.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.M.S.Sudarsanam, Advocate SR.82608

CRL.A.No.63 of 2012

KK(CO)
CB(14/11/2019)

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