IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :09.04.2019

Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Appeal No.373 of 2015

M.Sivaperumal ... Appellant

/versus/

S.Kamalanathan ... Respondent

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the judgment passed by II Additional Sessions Judge, Salem in Crl.A.No.56 of 2014 dated 24.09.2014 and to restore C.C.No.104 of 2013 dated 11.04.2014 passed by Judicial Magistrate, (Fast Track) Omalur.

For Appellant : Mr.V.Srinivasa Babu

For Respondent : R.Ganesan
Legal Aid Counsel

J U D G M E N T

Heard the learned counsel for the appellant and the learned Legal Aid counsel for the respondent.

2. The case of the appellant is that he and the respondent are relatives and they know each other for a long time. On 01.10.2012, the respondent borrowed a sum of Rs.5,00,000/- and promised to clear the loan within two months and as a security, he also issued a post dated cheque for Rs.5,00,000/- drawn on Indian bank, Devakottai branch. On the expiry of two months period, the cheque was presented for collection. However, the same was returned for "insufficient funds". A statutory notice was issued to the respondent calling upon him to send a demand draft for Rs.5,00,000/- to avoid prosecution under Section 138 of Negotiable Instruments Act. The respondent sent a reply dated 04.01.2013 denied the liability and alleged that the deeds, important papers including cheques and hand bag left in the premises of the complainant have been misused by the complainant.

3. With this set of facts, the parties appeared before the Trial Court and contested the case. On behalf of the complainant, 4 witnesses were examined and 8 Exhibits were marked. In defence, the accused mounted the witness box and examined himself as DW.1. The Trial Court on considering the evidence placed before it, held that the prima facie burden of proving the cheque that has been issued for discharge of debt, was proved by the complainant. Whereas, the accused has failed to rebut the presumption and therefore, convicted the respondent and sentenced him to undergo 1 year Simple Imprisonment and pay a compensation of Rs.5,00,000/-. Aggrieved by that, the accused preferred appeal before the II Additional Sessions Court, Salem.

4. The Lower Appellate Court on re appreciation of the evidence held that the accused has discharged the reverse burden through his reply notice and by suggesting his defence to the complainant during the cross-examination and also by mounting the witness box by projecting his defence. Since the accused has discharged the burden rebuttable by preponderance of probability and the complainant has not proved the factum of debt beyond reasonable doubt, the complaint was liable to be dismissed. Accordingly, allowed the appeal and dismissed the complaint and acquitted the accused.

5. The contention of the revision petitioner, who has lost the case at the hands of the Lower Appellate Court, is that the Appellate Court ignored the statutory presumption under Sections 118 and 139 of Negotiable Instruments Act. The accused has initially denied the issuance of cheque and loss of cheque. He has neither proved that the signature found in the cheque is not his signature nor produced any documents to show that the cheque leaf kept in his bag was stolen and misused by the complainant. Contrarily in his deposition before the Court, he has come out with different theory that he and the complainant belong to same political party and due to difference of opinion to wreak vengeance, the cheque was misused by the complainant. The complainant having produced his Income Tax Returns which reflects the loan given to the accused and the failure of the accused to discharge the burden was not properly considered by the Lower Appellate Court. The Lower Appellate Court pointed out that the cheque being a non MICR cheque, when computerised cheque was in practice even few years earlier to the date of cheque, it has disbelieved that the cheque was issued for discharge of any enforceable liability.

6. The learned counsel for the revision petitioner would contend that there is no bar for issuing non MICR cheque even after introduction of computerised cheque and the bank officials had deposed before the Court that non MICR cheques are valid. While so, the Lower Appellate Court perversely without

considering the positive evidence let in by the complainant had been relied upon the self saving statement of the accused, which were only bald denial of liability without any substance.

7. Per contra, the learned legal aid counsel appearing for the respondent appointed by the Legal Services Authority would submit that the complaint itself is not maintainable and the criminal complaint erroneously taken on file under Section 138 of Negotiable Instruments Act. The learned counsel on reading of Section 138 of Negotiable Instruments Act would submit that only if the cheque has been given for enforceable liability, Section 138 gets attracted. Whereas according to the complainant, both statutory notice as well as in the complaint, he has mentioned the subject cheque was issued as a security for the loan he availed so, Section 138 of Negotiable Instruments Act is not attracted. Further, the learned counsel would submit that the Lower Appellate Court doubting the case of the complainant, pointed out that after introduction of computerised cheques non MICR cheques, ought not to have been issued by the bank to the account holder long back and therefore, the date on which the cheque has been issued cannot be the actual date of which the cheque bear. The learned counsel also relying upon the abstract of the Income Tax Returns submitted by the complainant would state that the IT return relied by the complainant is subsequent to filing of the criminal complaint and mere IT returns will not substantiate the factum of lending Rs.5 lakhs. The annual income of the complainant as shown in the Income Tax Returns so far does not indicate that he his capable of advancing loan of Rs.5,00,000/.

8. Heard the learned counsel and perused the records.

9. The presumption under Section 139 of Negotiable Instruments Act is a rebuttal presumption and such rebuttal need not be beyond any reasonable doubt even preponderance of probability is sufficient. When we look out the facts of the case, whether the drawer of the cheque has rebutted the presumption with any degree of probability, we find except the reply notice and his oral evidence, there is no material to indicate that he and the complainant were in long association and he had trusted the complainant to the extent of leaving his belongings at his house including signed cheque leaves.

10. Be that as it may, when the accused has initially denied the signature in the cheque, he should have at least placed some material to substantiate his defence. Furthermore, if really the signature is forged or differed even his own bank would have returned the cheque pointing out that the "signature differs". In this case, the memo of return by the bank only indicates "insufficient funds". As far as the loss of cheque leaves, it is

the case of the complainant that after 2011 election he and the complainant were fallen out. If it is so, the cheques should have been taken away by the complainant before the year 2011, whereas the cheque is dated 01.10.2012. Therefore, from May 2011 i.e., the general election till October 2012, the accused has not given any police complaint or directed the bank to stop the payment. Therefore, both the defence taken by the complainant is only an afterthought and mere denial.

11. In the context it is relevant to refer the latest judgment of the Hon'ble Supreme Court in Kishan Rao Vs. Shankargouda reported in (2018) 8 Supreme Court Cases 165, wherein relying upon the Rengappa's case and the subsequent judgment of the Hon'ble Supreme Court, the Hon'ble Supreme Court has held that mere denial regarding the existence of debt shall not serve any purpose. In the facts of this case, a mere denial defence has been taken by the accused. Unfortunately the Lower Appellate Court has carried away by illusionary defenc,. though the trial Court had rightly held the accused guilty for the commission of the offence. Hence, the judgment of the Lower Appellate Court is said to be perverse and is liable to be set aside.

12. Accordingly, the Appeal is allowed. The judgment of the Lower Appellate Court in Crl.A.No.56 of 2014 dated 24.09.2014 is set aside.

13. However, considering the length of time taken for disposal of this matter and the nature of the transaction and relationship between the complainant and the accused, this Court is of the view that the sentence imposed on the respondent is liable to be modified. Accordingly, the period of imprisonment imposed by the trial Court is modified from one year Simple Imprisonment to two months Simple Imprisonment. The compensation amount stands unaltered. The Trial Court is directed to secure the accused and committing him to undergo the remaining period of sentence and the period of sentence if any under gone by the accused shall be given set off under Section 428 IPC.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rpl

To

1.The Judicial Magistrate,
Fast Track Court, Omalur.

2.-Do- Thro the Chief Judicial Magistrate,
Salem.

3.The II Additional Sessions Judge,
Salem

4.Do Thro the Principal Sessions Judge,
Salem.

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

+1cc to Mr.Srinivasa Babu, Advocate Sr.34958
+1cc to Mr.R.Ganesh, Advocate Sr.34980

Crl.A.No.373 of 2015

srg 18/06/2019