



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.399 of 2015

K.N.Kittusamy

... Appellant

vs.

1. A.P.Shubbramaniam,
2. The State rep. by
Public Prosecutor, Erode.

... Respondent

The Criminal Appeal has been filed under Section 378 of Cr.P.C, against the judgment dated 17.11.2014 passed in C.A.No.26 of 2014 on the file of the learned II Additional Sessions Judge, Erode District, reversing the judgment dated 13.02.2014 passed in C.C.No.173 of 2007 on the file of the learned District Munsif cum Judicial Magistrate, Perundurai and set aside the same by allowing the present appeal and convict the respondent in accordance with law.

For Appellant : Mr.S.Kamadevan

For Respondents: Mr.Mr.S.Ashok Kumar,
Senior Counsel for
M/s.P.Palani Nathan for R1
Mr.T.Shanmugarajeswaran
Govt. Advocate (Crl.Side) for R2

JUDGMENT

This criminal appeal has been filed by the complainant against the judgment of acquittal made by the learned II Additional Sessions Judge, Erode District, reversing the judgment of conviction dated 13.02.2014 passed in C.C.No.173 of 2007 by the learned District Munsif cum Judicial Magistrate, Perundurai.

2 The appellant is complainant and respondent is accused. The appellant filed a private complaint under Section 200 of Cr.P.C. for the offence under Section 138 of Negotiable Instruments Act (for brevity 'NI Act') stating that the respondent/accused borrowed a sum of Rs.7,00,000/- from the appellant and to discharge the same, the respondent/accused issued a cheque bearing No.20603 dated 24.05.2007 drawn on Chennimalai Co-operative Urban Bank Limited, Chennimalai Branch, for a sum of Rs.7,00,000/-. Since the respondent had not repaid



the amount, the appellant/complainant has presented the said cheque for collection on 24.05.2007, but, the same was dishonored and returned as 'Refer to drawer' without having sufficient fund in the bank account of the respondent/accused. Therefore the appellant/complainant had caused legal notice on 25.05.2007 calling upon the respondent/accused to repay the amount. On receipt the said notice, the respondent/accused had issued reply containing false allegations, not repaid the amount. Therefore the appellant filed a complaint and the same was taken on file by the learned District Munsif-cum-Judicial Magistrate, Perundurai, in C.C.No.173 of 2007.

3 Before the trial Court, in order to prove the case of the appellant/complainant, P.W.1 & P.W.2 were examined and marked documents as Ex.P1 to Ex.P10. On the side of the defence, no one was examined and Ex.D1 to Ex.D9 were marked.

4 The learned Magistrate, after trial, found the respondent/accused guilty for the offence under Section 138 of NI Act and hence by judgment dated 13.02.2014, convicted and sentenced him to undergo simple imprisonment for a period of six months and to pay a compensation of Rs.7,00,000/- within one month, in default, to undergo simple imprisonment for a further period of two months. Aggrieved against the judgment of conviction, the respondent/accused has preferred an appeal before the learned II Additional District and Sessions Judge, Erode. The learned Sessions Judge, after hearing both the parties, by judgment dated 17.11.2014, allowed the appeal and set aside the conviction and sentence made by the trial Court, against which, present appeal has been filed by the complainant.

5 According to learned counsel appearing for the appellant/complainant, the respondent has admitted the transaction and execution of cheque and it is for him to prove that there was no legally enforceable debt on the date of presentation of the cheque by the appellant/complainant. Even though, the learned trial Judge accepted the case of the complainant and convicted the respondent, the lower appellate Court miserably failed to appreciate the legal proposition that once execution of the cheque and signature found on the same is admitted, the burden of proof would automatically shift on the side of defence only and presumption under Section 118 and 139 of NI Act would come into play and it is for the accused to rebut the same in the manner known to law. The lower appellate Court has failed to consider the legal proposition and held that the respondent/complainant rebutted the presumption through preponderance of probabilities. In the present case, the respondent has taken a defence that he borrowed only Rs.1.00 lakh in the year 1998 and subsequently repaid the same the cheque issued as security for the above debt was not returned by



the appellant and further the respondent has changed his initial in the year 2005 and effected Gazette publication, but, he has not established the above facts in the manner known to law. Mere balled defence would not suffice, unless the same has been proved in the manner known to law. The lower appellate Court has given weightage to the case of the respondent, whereas, the respondent has not established the same. Even though, to prove the defence, the respondent need not let in any direct evidence, he can prove the same by preponderance of probabilities. In this case, once a specific defence taken by the respondent/accused with regard to documentary evidence, it is for him to produce reliable documents establishing his defence, but the documents produced by the respondent is insufficient to rebut the presumption. The lower appellate Court has failed to consider the fact that the legal presumption has not been rebutted by the respondent/accused in the right way and acquitted the respondent/accused, which warrants interference.

6 According to learned Senior Counsel appearing for the respondent/accused, even though, the respondent admitted the transaction and issuance of cheque, it is for the appellant to prove his initial burden that there was legally enforceable debt on the date of presentation of cheque. The respondent has only borrowed a sum of Rs.1.00 lakh in the year 1998 and the same was repaid, but the appellant/complainant did not return the cheque in question and has filed a false case against the respondent. There is no legally enforceable debt on the date of present of cheque and false case has been foisted against the respondent, making use of the cheque issued in the year 1998. In order to prove the same, the respondent has also produced nine documents. Further the respondent has changed his initial in the year of 2004 as K.P.Subhramaniam instead of A.P.Shubbramaniam and a gazette publication was also issued on 18.08.2004 and also intimated the same to the Bank on 23.05.2005, where he is maintaining account. Therefore, after 2004, the respondent could not sign as A.P.Shubbramaniam, since he has changed his initial. Even otherwise, in the cheque in question, the place provided for writing the date and year, the year starts with "19", if the cheque was really issued in the year 2007, as alleged by the appellant/complainant, year in the subject cheque would have started with "20" and not "19". Further the Manager of the Bank admitted that Gazette publication was effected with regard to change of initial of the respondent and therefore the respondent has established his defence. Even though, the learned Magistrate has failed to consider the facts of the case and erroneously convicted the respondent, whereas, the lower appellate Court by appreciating the evidence on record in the right way, acquitted the respondent, which does not call for any interference, since the respondent/accused had rebutted the presumption through preponderance of probabilities.



7 Heard the learned counsel appearing on either side and perused the original records.

8 It is the contention of the learned counsel for the appellant/complainant that the respondent borrowed a sum of Rs.7.00 lakhs and issued a subject cheque in the year 2007 towards discharge of the said amount, since he did not repay the amount, the appellant presented the cheque for collection and got bounced. Therefore he filed a complaint against the respondent and the respondent admitted the transaction and execution of cheque and signature found on the same and once these are all admitted, automatically presumption under Section 118 and 139 would come into play and the respondent has to rebut the same in the manner known to law, but the respondent has failed to establish his defence and the documents produced by him was not sufficient to rebut the presumption.

9 Per contra, the learned counsel appearing for the respondent contended that the respondent borrowed only a sum of Rs.1.00 lakhs in the year 1998 and has also repaid the same, but the subject cheque issued towards security for the above debt was not returned by the appellant and has filed the false complaint. Further in the subject cheque, the year starts with "19" and not as "20", if the subject cheque has been issued in the year 2007 as alleged by the appellant, it would have started with "20". The respondent has changed his initial in the year 2005 itself as K.P.Subbramaniyam and it could not be possible for him to sign as A.P.Shubbramaniam in the year 2007 and therefore the respondent has rebutted the presumption.

10 It is settled proposition of law that once execution of cheque and signature found on the same and transaction are admitted, presumption under Section 118 and 139 of NI Act would come into play, which favours the complainant, holder of the cheque. No doubt, the said presumption is rebuttable presumption. The respondent/accused need not come into witness box and produce a strong piece of proof to rebut the presumption, he can very well rebut the presumption through preponderance of probability or through cross examining the witnesses. If at all the respondent has borrowed only Rs.1.00 lakh and repaid the same as contended by him, he should have taken steps to get back the subject cheque, which according to him issued towards security for the debt. But, on record, there is absolutely no proof to show that the respondent borrowed only Rs.1.00 lakh and repaid the same. The respondent has failed to take any steps to get back the subject cheque and after receipt of the statutory notice, he replied containing his defence. Further it is found in the reply notice that the respondent has not stated anything about change of initial and specimen



signature. It is seen that the cheque was not returned for the reason that signature differs, it was returned as "refer to drawer". If at all he has changed his initial and specimen signature and intimated the same to the Bank, he should have disclosed the informations that to whom he has issued the cheques, which are uncleared as on date and the respondent has failed to establish the fact. Further the respondent has admitted his signature found on the cheque. In this case, on reading of the entire materials placed on record, it reveal that the respondent/accused has failed to establish his defence through preponderance of probability in the manner know to law. The documents produced by the respondent and the defence taken by him would not suffice to rebut the presumption, since there is defect in the case of the respondent/accused, which overcomes the defence taken by him. This Court is of the view that the judgment of the acquittal made by the trial Court warrants interference for the reasons stated above.

11 In the result, the criminal appeal is allowed the judgment of acquittal made by the learned II Additional Sessions Judge is hereby set aside and the judgment of conviction dated 13.02.2014 made by the learned District Musif cum Judicial Magistrat, Perundurai, in C.C.No.173 of 2007 is hereby restored. Trial Court is directed to secure the accused to undergo remaining period of imprisonment, if any.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

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To

1. The II Additional Sessions Judge, Erode District.
2. The District Munsif cum Judicial Magistrate, Perundurai.
3. The Public Prosecutor
High Court, Madras 104.
4. The Public Prosecutor
Erode.

+1 CC to Mr.S.Kamadevan, Advocate sr 53762

Cr1.A.No.399 of 2015

KS(CO)
SP(01/08/2019)