

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.04.2019

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.508 of 2016

C.M.Logamoorthy

...Appellant

Versus

M.A.Amalraj

...Respondent

Criminal Appeal filed under Section 378(4) of Criminal Procedure Code, to set aside the judgment in C.A.No.24 of 2013 dated 29.07.2015 on the file of the learned Principal Sessions Judge, Chengalpattu.

For Appellant : Mr.G.V.Sridharan

For respondent : Mr.N.Selvaraju

JUDGMENT

This Criminal Appeal has been filed to set aside the judgment in C.A.No.24 of 2013 dated 29.07.2015 on the file of the learned Principal Sessions Judge, Chengalpattu.

2.The brief facts of the case are as follows:

The respondent/accused has borrowed a sum of Rs.50,00,000/- from the appellant for his business expenses and promised to repay the money with interest and thereby issued two post-dated cheques for an amount of Rs.25,00,000/- each dated 13.02.2012. When the appellant presented the both cheques for encashment, it was returned with an endorsement as "Account Closed". Hence, the appellant herein sent a legal notice to the respondent on 01.03.2012 informing him about the dishonour of the cheques and calling upon the appellant to pay the cheque amount within fifteen days from the date of receipt of legal notice. After receiving the said notice, the respondent herein neither repaid the money nor given any reply to the said notice.

3. The appellant has preferred a private complaint before the learned Judicial Magistrate, Fast Track Court, Alandur under Section 138 of Negotiable Instruments Act. The case was taken on file in C.C.No.68 of 2012 on file and notice was sent to the respondent and the respondent appeared before the Judicial Magistrate through the counsel. Before the trial Court, in order

to prove his case, the appellant examined P.W.1 and P.W.2 and marked Exs.P1 to P13.

4. After completing the evidence on the side of the complainant incriminating materials were put before the respondent under section 313 Cr.P.C, he denied the same as false and on his side, he examined R.W.1 to R.W.5 and marked Ex.R.1 to Ex.R.7. After full-fledged trial, the learned Magistrate found the respondent /accused guilty for the offence under Section 138 of NI Act and convicted and sentenced him to undergo one year simple imprisonment and to pay a fine of Rs.5,000/- as compensation, in default, to undergo one month simple imprisonment. Aggrieved against the judgment passed by the Judicial Magistrate, FTC, Alandur, the respondent had preferred an appeal in C.A.No.24 of 2013 before the learned Principal Sessions Judge, Chengalpattu. The learned Judge, after hearing arguments advanced on either side, allowed the appeal by setting aside the conviction and sentence passed by the trial Court. As against the judgment of the learned Principal Sessions Judge, Chengalpattu in C.A.No.24 of 2013, dated 29.07.2013, the appellant therein has preferred the present criminal appeal before this Court.

5. The learned counsel for the appellant would submit that the respondent borrowed a sum of Rs.5,00,000/- in the year of 2008. The appellant continuously insisted the respondent/accused to repay the money either for principal amount or for the interest. Therefore, the respondent issued a post dated cheque on 04.02.2012. When the appellant presented the cheque for encashment, the same was returned as account closed. Hence, the appellant filed a complaint. The Appellate Judge, while dealing the matter, failed to appreciate the evidence. The respondent has admitted the execution of the cheque and signature found in the cheque. Therefore, the statutory presumption is available under Section 139 of Negotiable Instrument Act, it is for the respondent to rebut the presumption. The respondent has not rebutted the presumption. Since, the respondent has not rebutted the presumption, the judgment of the learned Sessions Judge warrants interference.

6. The learned counsel for the respondent would submit that even the complainant himself admitted that during the cross examination, he borrowed the money from the appellant, in the year 2008, for which he has also issued a promissory note and various cheques. The complainant has also admitted during the cross-examination that he received so many cheques and also blank promissory note and two cheques were presented before the Bank. The same were dishonored. But no action was taken against

the respondent. This present cheque was also issued in the year 2012. The amount mentioned in the cheques Ex.R5 and R6 are Rs.7,00,000/- and Rs.8,80,000/-. Whereas the present cheque issued only for a sum of Rs.5,00,000/- is not tallied with the amount mentioned in the Ex.P1 is not tallied with the Ex.R5 and Ex.R6. It shows that the respondent has not borrowed the money and issued the cheque in the year 2012. Under these circumstances, the complaint under 138 of NI Act itself is not maintainable.

7. Further the learned counsel for the respondent would submit that admittedly the respondent borrowed the money in the year 2008. The cheque is issued only in the year 2012, which is time barred. Therefore, the cheque has not been issued as stated by the complainant. The said cheque itself is issued in the year 2008. The complainant has admitted that during the cross examination, he received the blank cheques and blank promissory note from the accused. There is no document to show that the respondent has not issued acknowledgment to extend the limitation or gave fresh promise to repay the time bound debt. There is no evidence of legally enforceable debt or liability and the date of presenting the cheque into the bank for collection.

8. Though the learned Magistrate failed to appreciate the evidence given during cross examination of the appellant and whereas the learned Sessions Judge rightly appreciated the evidence and allowed the appeal and dismissed the complaint. The Appellate Court is a fact finding Court, re-appreciated the entire oral and documentary evidences and rightly came to the conclusion that the respondent has rebutted the presumption and the learned Sessions Judge allowed the appeal and acquitted the respondent, hence, there is no need for interference.

9. Heard the learned counsel for the appellant as well as the learned counsel for the respondent and perused the materials placed before this Court.

10. Admittedly there was a money transaction between the appellant and the respondent. Though the appellant has filed a private complaint under Section 200 Cr.P.C. before the learned Magistrate, Alandur for the offence under Section 138 of NI Act, stating that the accused borrowed a sum of Rs.5,00,000/- for which he issued a post dated cheque on 04.02.2012. When the said cheque was presented before the bank for encashment, it was returned with an endorsement 'Account closed'. Therefore, the petitioner issued statutory notice through his advocate on 01.03.2012, calling upon him to repay the said amount mentioned

in the said notice. Though the respondent received the notice on 06.03.2012, he neither sent a reply nor repaid the amount. Therefore, the petitioner was constrained to file a private complaint before the learned Magistrate. In order to prove the case of the complaint, he examined two witnesses viz., P.W.1 and P.W.2 and marked 13 documents viz., Ex.P1 to Ex.P13. On the side of the defence, the respondent examined 5 witnesses viz., R.W.1 to R.W.5 and marked 7 documents viz., Ex.R1 to Ex.R7. The learned Magistrate, after considering the complaint and also the evidence and documents of the complainant, found the respondent guilty for offence under Section 138 of NI Act and convicted the respondent. Against the order of the learned Magistrate, the respondent filed an appeal before the learned Principal Sessions Judge, Chengalpattu in C.A.No.24 of 2013. The learned Appellate Judge reversed the judgment on the ground that the respondent has discharged the burden not only by adducing evidence on his side but also relying on the evidence of the complainant. The appellate Court is the fact finding Court, re-appreciated the entire evidence and came to the conclusion that the respondent has rebutted the presumption under Section 139 of NI Act by preponderance of probabilities and came to the conclusion that the respondent herein has not committed the offence under Section 138 of Negotiable Instrument Act and allowed the appeal and by setting aside the judgment passed by the learned Magistrate.

11. The contention raised by the learned counsel for the respondent that the appellant himself admitted that he only lend the money in the year 2008. Though, he repeatedly demanded the money, neither he repaid the principle amount nor paid any interest. Therefore, he issued a cheque dated 04.02.2012. P.W.1 was admitted that loan was given on 19.09.2008, for which he executed Ex.P1 and Ex.P2 only on 04.02.2012. Absolutely, there is no records to acknowledge the said liability or extended the period of limitation. Therefore, as submitted the cheque itself is issued only after three years period of limitation. Therefore, this Court cannot treated this cheque issued for legally enforceable debt or liability. From the available evidence, the cheque issued only after three years that itself is time barred. No doubt the respondent has not given any reply notice. Though the respondent has not sent any reply, during trial he has examined five witnesses on his side and marked seven documents. Though it is settled proposition that once the execution of the cheque is admitted and the signature found in the cheque is admitted, the Court can draw the statutory presumption that the cheque has been issued to discharge the legally enforceable debt. No doubt, the said statutory presumption is rebuttable presumption. It is for the accused to

rebut the presumption. While rebutting the presumption, the accused need not let in direct evidence and rebut the presumption, he can very well rebut the presumption by preponderance of possibility or probable defence. Even the defence can be established and the presumption can be rebutted during the cross examination of the witnesses.

12. On reading of the entire cross examination of P.W.1 done by the learned counsel for the respondent, it is clearly stated that there was a transaction between the appellant and the respondent in the year 2008. For which, the respondent has issued blank cheques and also promissory note. Further, he has admitted that Ex.R5 and Ex.R6 were issued by the respondent only and he presented the cheque for collection and the same were also dishonored. For which he has not taken any steps. Even in the year 2011, he presented the cheque for collection that was also returned. Subsequently, in the year 2012, he presented the cheques Ex.P1 and Ex.P2, he has not filed any statement of accounts and also any document for showing the time and date. Under these circumstances, this Court finds that Ex.P1 and Ex.P2 issued only for time barred debt. Therefore, the same were not issued legally enforceable debt.

13. Under these circumstances, this Court finds that the respondent rebutted the presumption by preponderance of probabilities by way of cross examination of the appellant. The lower appellate Court is fact finding Court rightly reappreciated the entire evidence independently and came to the conclusion that the respondent has not committed the offence under Section 138 of NI Act and rightly set aside the judgment of the learned Magistrate and also allowed the appeal.

14. On reading of the entire evidence and also admission made by the appellant, the learned Sessions Judge has rightly came to the conclusion that though the respondent admitted the execution of the cheque and he has rebutted the statutory presumption in the manner known to law. This Court, does not find any perversity in the judgment passed by the learned Sessions Judge in C.A.No.24 of 2013 dated 29.07.2015 and there is no compelled circumstances to interfere with the judgment of the lower Appellate Court.

15. Accordingly, this Criminal Appeal is dismissed.

Sd/-

Deputy Registrar

//True Copy//

Assistant Registrar

To

1.The Principal Sessions Judge,
Chengalpattu.

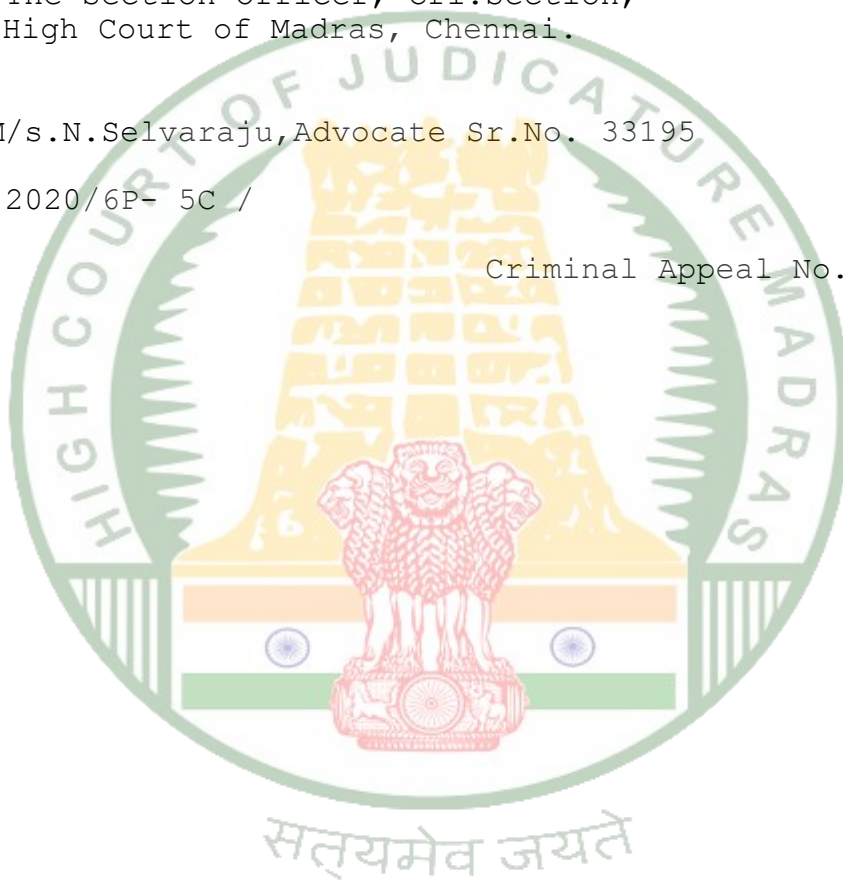
2.The Judicial Magistrate,
Fast Track Court, Alandur.

Copy to : The Section Officer, Crl.Section,
High Court of Madras, Chennai.

+1 cc to M/s.N.Selvaraju,Advocate Sr.No. 33195

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Criminal Appeal No.508 of 2016



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