

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.04.2019

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.151 of 2014

Vellaiyan .. Appellant/Complainant
/versus/

Senthilkumar .. Respondent/Accused

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to call for the records in C.A.No.40 of 2012 dated 24.01.2014 on the file of III Additional District and Sessions Judge, Cuddalore at Vridhachalam reversing the judgment dated 05.06.2012 in S.T.C.No.291 of 2011 on the file of the District Munsif cum Judicial Magistrate, Neyveli and set aside the judgment in C.A.No.40 of 2012.

For Appellant : Mr.Thirumurthy
for Mr.S.Manoharan

For Respondent : Mr.Paramasivadoss

J U D G M E N T

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

2. The matter is arising out of private complaint filed under Section 138 of the Negotiable Instruments Act, 1881. The case of the complainant is that on 05.04.2011, the accused borrowed a sum of Rs.10,00,000/- to meet out his family expenses and issued a post dated cheque drawn from his account maintained with Syndicate bank, Neyveli. When the cheque was presented for collection on 06.06.2011, it was returned with an endorsement "insufficient funds". Thereafter, a statutory notice was issued to the accused calling upon him to pay the cheque amount. Though the notice was received by the accused, he failed to pay the cheque amount. Hence the complaint.

3. Before the Trial Court, the complainant was examined himself as PW.1 and marked four exhibits viz., subject cheque [Ex.P1], Bank intimation [Ex.P2], Statutory notice [Ex.P3] and Acknowledgment card [Ex.P4].

4. The Trial Court after considering the case and the defence
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taken by the accused has held that the presumption under Section 138 of Negotiable Instruments Act has not been rebutted by the accused and having admitted the issuance of cheque, he is liable to pay the cheque amount and since the cheque has been dishonoured for insufficient of funds, the accused is liable to be sentenced. Accordingly, the Trial Court sentenced the accused to undergo 1 year Simple Imprisonment and pay a fine of Rs.5,000/-; in default, to undergo 6 months Simple Imprisonment. From out of fine amount, Rs.2,500/- was ordered to pay compensation to the complainant. Aggrieved by the conviction and sentence appeal has been preferred by the accused.

5. On appeal, the Lower Appellate Court reversed the finding of the Trial Court on the ground that the complainant has failed to prove his financial capacity to advance the loan of Rs.10,00,000/-. Relying upon the judgment of the Hon'ble Supreme Court rendered in Krishna Janardan Bhatt Vs. Dattatraya G.Hegde reported in 2008 (1) T.N.L.R. 41 (SC), the Lower Appellate Court held that the complainant ought to have examined one Ganapathy alleged to have been present at the time of advancing the loan. The complainant has not produced any income tax return which would indicate that he had sufficient money to lend loan of Rs.10,00,000/- and the said amount was paid and recorded in his account. For the said reasons, the appeal was allowed and the complaint was dismissed.

6. Aggrieved by that, the present appeal is filed on the ground stating that the complainant is basically an agriculturist. In his cross-examination he has disclosed about the source of income, the manner and purpose of which the money has been borrowed. As per the judgment of the Hon'ble Supreme Court in Rangappa Vs. Mohan, the dicta laid down by the Hon'ble Supreme Court in Krishna Janardan Bhatt Vs. Dattatraya G.Hegde has been reversed. It is suffice to sustain conviction if the complainant could prove that the cheque was issued by the accused for enforceable debt and if the accused failed to discharge the burden of presumption by preponderance of probability. As far as this case is concerned, the accused has not replied for the statutory notice, he has not placed any defence version under what circumstances the cheque drawn by him was given to the complainant or otherwise. While the Trial Court has rightly held the accused guilty, the Lower Appellate Court relied upon Krishna Janardan Bhatt Vs. Dattatraya G.Hegde, which is no more good law and pointing out the non production of income tax return and failure to prove sources of income would render the Trial Court Judgment perverse and liable to be reversed.

7. Heard the rival submissions of the learned counsels and the judgment in Basalingappa Vs. Mudibasappa reported in 2019 Supreme Court Cases Online SC 491 relied. The presumption under Sections 118 and 139 of Negotiable Instruments Act are rebuttal presumption. The accused need not rebutted the said presumption beyond any reasonable doubt. Mere preponderance of probability is sufficient for the said

purpose.

8. As far as the facts of this case is concerned, the entire cross-examination of PW.1 does not disclose any iota of evidence that the said cheque was not issued to the complainant or not issued for discharge of any debt. Except bald denial by way of suggestion. No material evidence in the nature of rebuttal available. Regarding the source of income several questions have been put in the cross-examination, wherein the complainant has explained that he own land, he is cultivating sugarcane, having cashew grove and also have lease hold right for 3 ½ acres of cashew grove and that apart, his son is employed in Tamilnadu Police Service. With these substantive evidence, the Court cannot simply ignore his statement and hold that the complainant has no source of income. Contrary evidence let in by the accused to disprove the said statement. It is now well settled by the Hon'ble Supreme Court that the non production of income tax return and non disclosure of transaction in the account will not render the complaint under Section 138 of Negotiable Instruments Act false. It all depends upon the facts of each case. When the issuance of cheque was admitted, the prima facie presumption of enforceable debt is in favour of the complainant, which could be rebutted by letting in evidence by preponderance of probability.

9. In this case the respondent/accused has miserably failed to rebut the presumption. Merely relying upon judgment of the Krishna Janardan Bhatt Vs. Dattatraya G.Hegde, the Lower Appellate Court has held that the complainant has failed to prove the source of income. The facts which have been elicited in the cross-examination of PW.1, have not been properly considered by the Lower Appellate Court. Hence, the judgment of the Lower Appellate Court is illegal and liable to be set aside.

10. While confirming the conviction of the Trial Court, the period of sentence imposed by the Trial Court requires consideration, since the accused/respondent has being enjoying the order of acquittal though wrongly by the Lower Appellate Court since 2014. Hence, while confirming the conviction for offence under Section 138 of Negotiable Instruments Act, the period of sentence imposed by the Trial Court is modified to 3 months Simple Imprisonment from one year simple imprisonment and the fine amount of Rs.5000/- and compensation of Rs.2500/- from out of fine amount ordered as by the Trial Court stands confirmed.

11. Accordingly, the appeal is partly allowed.

-sd/-

Assistant Registrar

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Sub-Assistant Registrar

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To

1.The District Munsif cum Judicial Magistrate,
Neyveli

2.The III Additional District and Sessions Judge,
Cuddalore at Vridhachalam

3. The Section officer,
Criminal Section,
High court,Madras

+1 cc to MR.P.PARAMASIVA DOSS Advocate SR.NO. 38697

+1 cc to DR.S.MANOCHARAN Advocate SR.NO. 38624

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RD 08/06/2019



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