IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.02.2019	Pronounced on:28.02.2019

Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Appeal No.29 of 2014

Mrs.Santhamani,
W/o.Ponnusamy,
Door No.64/220, Gandhi Nagar-2,
Thekkupalayam Post,
Coimbatore-641 020. ... Appellant/Complainant

/versus/

V.Velusamy,
S/o.Veramuthu,
Narasamukku, Akali Post,
Mannarkadu, Attapadi, Kerala. ... Respondent/Accused

Prayer: Criminal Appeal is filed under Section 378 of Criminal Procedure Code, praying to call for the records in C.C.No.32 of 2011, Judicial Magistrate, FTC No.II, Coimbatore in C.A.No.159 of 2012 dated 29.10.2012 on the file of the Hon'ble I Additional District and Sessions Judge, Coimbatore and dismiss the same with cost.

For Appellant : Mr.A.Suresh

For Respondent : No appearance

J U D G M E N T

The Appellant before this Court challenges the order of acquittal passed by the Lower Appellate Court on his complaint filed under Section 138 of Negotiable Instrument Act.

2. The Appellant has filed complaint before the trial Court alleging that she and the respondent are known to each other for nearly six years. The respondent sought for hand loan of Rs.1,00,000/- to met out his family expenses and promised to re-pay the same within one month. The Appellant advanced loan of Rs.1,00,000/- to the respondent on 09.05.2010. A post dated cheque was given by the respondent for the said sum dated 10.06.2010 drawn from Savings Bank Account at Post Office

Branch, SRK Vidyalaya, Periyanayakkanpalayam, Coimbatore. The cheque was presented for collection on 12.06.2010. It returned with memo “insufficient funds” on 15.06.2010. The return of the cheque was informed to the respondent by the appellant through notice dated 01.07.2010. On receipt of the notice, the respondent gave a false reply.

3. The above said complaint was taken on file by the Judicial Magistrate No.6, Coimbatore in C.C.No.32 of 2010 and notice was caused to the accused. The accused appeared and faced the trial.

4. The trial Court, after considering the evidence let in by the complainant/appellant and the accused/respondent held that the accused admits the cheque belongs to him and signature found in the cheque is affixed by him. Thus, the presumption under Section 139 of Negotiable Instrument Act has to be drawn that the cheque was issued to discharge an legally enforceable debt. Though the accused plead that he is not a resident of Periyanayakkanpalayam, Coimbatore, his own witness DW.2 under whom the accused working as jeep driver and the evidence of DW.1 did not probablised the case of the accused to rebut the presumption. So in the absence of contrary, the presumption has to be drawn against the accused/respondent.

5. Accordingly, the accused was found guilty. He was sentence to undergo 3 months S.I and to pay a fine of Rs.2,000/- in default 1 month S.I.

6. Aggrieved by the conviction and sentence, the accused has preferred the appeal before the District and Sessions Judge, Coimbatore in C.A.No.159 of 2012.

7. The Lower Appellate Court, after considering the depositions of PW.1, PW.2, DW.1 and DW.2 coupled with the documents relied by them and marked as Exhibits, particularly the reply of the accused to the statutory notice held that the issuance of subject cheque to the complainant by the accused as security towards the chit transaction held three years prior to its presentation is more probable. Therefore, mere issuance of cheque will not cast on the accused Criminal liability under Section 138 of Negotiable Instrument Act. Unless it was issued for discharge of enforcible liability.

6. The specific case of the complainant is that a sum of Rs.1,00,000/- was given to the accused as hand loan. Whereas, the accused has contended that the complainant was running a chit business and he is one of the subscriber. In the course of chit transaction, the subject cheque was given to the complainant as security. The complainant admits that he was conducting a chit to that extent, the contention of the accused

made in its reply notice is proved. Through DW.2 the accused has proved that he has shifted his residence from Periyanayakkampalayam in Coimbatore to Akazhi in Kerala. To prove this, he has marked the Voter ID Card of the accused (Ex.D.1) and the trip sheets Ex.D.4 which could show that the accused was operating a passenger carrier jeep from akazhi. Therefore, at the alleged time of advancing the loan in May-2010, the probability of accused residing in Periyanayakkanpalayam, Coimbatore is remote, since his Voter ID of the accused (Ex.D1) of the year 2008 discloses that he was resident at Akazhi, Kerala. Holding that by preponderance of probability, the accused has discharged the presumption under Section 139 of Negotiable Instrument Act. Therefore, having failed to prove that the subject cheque was issued for legally enforceable debt, the complaint under Section 138 of Negotiable Instrument Act is unsustainable. So the Lower Appellate Court has reversed the finding of the trial Court and acquitted the accused.

7. The complainant has filed the present appeal on the ground that the Lower Appellate Court failed to consider the materials available on record in its proper perspective. The Lower Appellate Court has erroneously allowed the appeal and set aside the conviction and sentence passed by the trial Court. The manner in which the Lower Appellate Court has appreciated the Law is totally contradictory to the basic Principle of Negotiable and Instrument Act and Criminal procedure code. When there is no material evidence to show that the accused was a subscriber to a Chit transaction, merely based on the admission of the complainant that he was conducting chit, the Lower Appellate Court has accepted the case of the accused that the subject cheque was issued as security for the chit transaction. The Lower Court has miserably failed to apply the cardinal principle of evidence that he who assert a fact shall bear the burden of proving the said fact asserted. While the accused has asserted that he was a subscriber to the chit conducted by the complainant he should have proved the said fact. The Lower Appellate Court contrarily has held that the complainant admitting that he was running a chit has failed to prove the negative that the accused was not a subscriber to the chit.

8. Regarding the doubt entertained by the Lower Appellate Court about the residence of the accused, the learned Counsel for the appellant would submit that through PW.2 it has been established that the distance between Periyanayakkanpalayam, Coimbatore and Akazhi, Kerala (the place at which the accused alleged to reside) is hardly 9 Kms away. The Voter ID card (Ex.P.1) does not have any evidentiary value to hold that on the dates of transaction namely borrowing hand

loan and issuance of cheque, the accused was not in Periyanayakkampalayam, Coimbatore.

9. For the above reasons, the learned Counsel appearing for the complainant/appellant would plead that the judgment of the Lower Appellate Court is liable to be set aside.

10. Notice was issued to the respondent. Despite receipt of the same, he did not appear or engaged the counsel to defend him. Hence, this Court thought fit to extend him legal Aid. Accordingly, Mr.N.Ramesh was appointed by the Legal Service Authority to represent the respondent. Unfortunately, today he is not present to represent the respondent.

11. This Court, on perusal of the records and the submissions made by the Learned Counsel appearing for the appellant holds that in the given facts and circumstances of the case, the finding of the Lower Appellate Court and the reasoning to arrive at the said finding does not carry any infirmity or illegality.

12. According to PW.1, the complainant, the subject cheque for Rs.1,00,000/- was issued by the respondent during the month of may-2010 to discharge his hand loan. In the cross examination, he admits that is maintaining a Register for the loan advanced to the accused. But, he has not produced that Register. He has admitted in the cross examination that while advancing loan to the accused one Subbulakshmi was present however, he did not examined the said Subbulakshmi to corroborate his version. He admits that he is an Income Tax assessee but did not disclosed about the loan in his account.

13. He admits that he was conducting a registered chit and used to collect cheques from the subscribers as security. Though, he denies the suggestion that the subject cheque was one such cheque issued by the accused as security, the probability of misusing the cheque issued as surety is not ruled out.

12. As rightly pointed out by the Lower Appellate Court, the presumption under Section 139 of Negotiable Instrument Act can be rebutted through prima facie material and by preponderance of probability. Once the presumption is rebutted by the accused, it is for the complainant to prove through substantive and corroborative evidence the fact that the subject cheque was issued to discharge the legally enforceable debt. In this case, the complainant except examining himself as PW.1 and relying upon the Ex.P.1 to Ex.P.5 which are the subject cheque, memo, Legal notice, acknowledgement card and reply notice substantiate and corroborate nothing relevant to the

alleged transaction, which took place prior to issuance of cheque produced.

14. In the said circumstances, this Court finds no merit in the Appeal. Hence, the Criminal Appeal No.29 of 2014 is dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To,

1. The Learned Judicial Magistrate, FTC No.II, Coimbatore.

2. The Learned I Additional District and Sessions Judge, Coimbatore.

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

Criminal Appeal No.29 of 2014

nr 28/08/2019