

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.04.2019	Pronounced on: 23.04.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Appeal No.546 of 2014

C.B.Sharma.

... Appellant/Complainant

/versus/

Varadharaj

... Respondent/Accused

Prayer: This Criminal Appeal is filed under Section 378 of the Cr.P.C., praying to call for records in C.A.No.96 of 2012 on the file of the I Additional Sessions Judge, Tiruvallur, and in C.C.No.12 of 2012 on the file of the Judicial Magistrate, Fast Track Court, at Magisterial level at Tiruvallur.

For Appellant : Mr.S.A.Rajan

For Respondent : Mr.C.S.Saravanan

J U D G M E N T

This Criminal Appeal is directed against the judgment of the Lower Appellate Court which has reversed the judgment of conviction and sentenced passed by the trial Court in the proceedings initiated under Section 138 of Negotiable Instrument Act against the respondent/accused.

2. The brief facts of the case is that from C.B.Sharma the complainant/appellant Varadharaj accused/respondent borrowed money on the following dates;

1.	10.01.2008	Rs.50,000/-
2.	15.04.2008	Rs.1,50,000/-
3.	05.06.2009	Rs. 60,000/-

3. While borrowing the above said money, Varadharaj executed pro-notes for Rs.50,000/- and Rs.1,50,000/-. When he borrowed Rs.60,000/- for the 3rd time, the money was paid to him without any security on faith. After repeated demand, the accused gave the following three cheques, to discharge the liability.

- (1). Cheque No.414795 dated 10.07.2010 for Rs.50,000/-.
- (2).Cheque No.460048 dated 10.07.2010 for Rs.1,50,000/-.
- (3). Cheque No.460049 dated 10.07.2010 for Rs.60,000/-.

4. All these cheques were drawn at Indian Overseas Bank, Manavalanagar Branch. When these cheques were present for collection, same was returned as "Account closed". After issuing the statutory notice, a complaint was filed.

5. To prove the allegation, the complainant has examined himself and marked 12 Exhibits. 3 cheques were marked as Ex.P.1 to Ex.P.3 respectively. The pro-notes were marked as Ex.P.10 and Ex.P.11. The return memos dated 06.10.2010 were marked as Ex.P.4 series. The Statutory notice dated 19.10.2010, marked as Ex.P.5. The reply notice of the accused dated 01.11.2010 marked as Ex.P.9. On the side of the defence, the prior intimation of the accused to the complainant about the closure of his account was marked as Ex.D.1.

6. The trial Court, after considering the fact that the pro-notes Ex.P.10 and Ex.P.11 executed by the accused indicates the liability and 3 cheques Ex.P.1 to Ex.P.3 presumed to have issued to discharge the said liability. Whereas, on appeal, the Lower Appellate Court taking note of the fact that the accused through notice dated 04.08.2010 marked as Ex.D.1 and in the reply to the statutory notice given by the accused dated 12.08.2010 marked as Ex.P.12 indicates that the cheques were not issued for any enforceable debt. The cheques Ex.P.1 and Ex.P.2 corresponds to promissory notes Ex.P.10 and Ex.P.11. Whereas, there is no pro-note to substantiate the claim under cheque (Ex.P.3) for Rs.60,000/-. Further, pointing out that the pro-notes Ex.P.10 and Ex.P.11, the interest column is left blank. The attester to the cheque Jaganathan was not examined by the complainant. The defence documents Ex.D.2 and Ex.D.3 which were marked in the appeal as additional Exhibits indicates that the accused has closed his account on 06.09.2007 itself, long before the date of cheque. The complainant admits that the borrowing was on three different dates and cheques were given on three different dates. But all the three cheques bears same date i.e., 10.07.2010. Taking note of the specific denial of the accused about the liability through prior notice Ex.D.1 and the subsequent reply notice Ex.P.9, the Lower Appellate Court held that under Ex.P.1 the accused has informed the complainant that the blank cheques given to him for the earlier loan transaction should not be presented since he has closed the account and there is no liability. In response of the said intimation, the complainant vide Ex.P.12 has replied stating that he does not have any blank cheque with him. While so, contrary to the reply notice Ex.P.12, dated 12.08.2010, the cheques Ex.P.1 to Ex.P.3 were filled up and

presented for collection, knowing fully well that the accused has closed the account long back.

7. For the above said reasons, the Lower Appellate Court has held that the accused has probabalized his defence, whereas, the complainant has failed to prove the cheques were issued for enforceable debt. The failure of the complainant to examine the witness to the pro-notes Ex.P.10 and Ex.P.11 and the failure of the complainant to substantiate that the cheques were issued for enforceable debt, entails the accused acquittal.

8. The learned counsel appearing for the appellant/complainant would submit that the finding of the Lower Appellate Court is erroneous on the face of the record. When the complainant has proved the debt through pro-notes Ex.P.10 and Ex.P.11, merely because the accused has denied the liability and had closed his account will not entail him acquittal. Having admitted his signature both in the pro-notes as well as in the cheques, the complainant has proved that the cheques were issued without "insufficient fund". The Lower Appellate Court has set aside the judgment of the trial Court without proper reference to evidence.

9. In support of his case, the learned counsel appearing for the appellant would rely upon the following judgments.

- (i). D.Chandrasekaran Vs. M.Muthukumarasamy, R.Marudhachalam and S.V.Nachimuthu reported in 2006 (5) CTCOL 279 (Mad).
- (ii). R.Tharmambal Vs. V.Christopher Moni Prakash reported in 2012 (3) MWN (Cr.) (DCC) 176 (Mad.)
- (iii). S.Mukanchand Bothra Vs. P.Mani reported in 2015(2) MWN (Cr.) DCC 125 (Mad.)

10. Per contra, the learned counsel appearing for the respondent/accused would contend that the accused has rebutted the burden of presumption under Sections 118 and 139 of Negotiable Instrument Act. Through his reply notice as well as the defence Exhibits, he has proved that there was no debt payable by the accused. The old pro-notes which were discharged long back has been made use by the complainant. The cheques drawn from the account which was closed long back has been filled up and presented despite prior intimation about the closure of the account. The actual date of lending loan and date of issuing the cheques were not established by the complainant and therefore the Lower Appellate Court right in dismissing the complaint.

11. The Principal of presumption under Sections 118 and 139 of Negotiable Instrument Act, has been well settled in Rangappa Vs. Sri Mohan reported in (2010) 11 SCC 441 and same has been followed in the recent judgment of the Hon'ble Supreme Court in Basalingappa Vs. Mudibasappa reported in CDJ 2019 SC 471. In this case the ratio of the Supreme Court about the legal presumption preferred in Sections 118 and 139 of Negotiable Instrument Act is extracted as below:

23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

12. So far as the facts of this case is concerned, the prima facie case of liability has been proved by the complainant by the cheques signed by the accused. The same has been denied and disputed by the accused through its 1st notice dated

04.08.2010 marked as Ex.D.1. Wherein, he has admitted the borrowing and issuance of cheques however claims that he has discharged the same. Thus, the burden of presumption that the cheques were issued by him for enforceable debt is attempted to be rebutted through defence Exhibits, which were marked in the appeal.

13. When the burden of presumption in respect of consideration and enforceable debt is rebutted, on the side of the complainant the Ex.P.10 and Ex.P.11 which are promissory notes executed by the accused are relied. The pro-notes are admitted by the accused. It is a strong evidence in favour of the complainant that the accused borrowed a sum of Rs.50,000/- and executed a pro-note Ex.P.10 dated 10.01.2008 and again borrowed a sum of Rs.1,50,000/- on 15.04.2008 under Ex.P.11 pro-note. To discharge these two debts, the cheques Ex.P.1 and Ex.P.2 dated 10.07.2010 were issued. The contention of the accused that the pro-notes were not proved in accordance with law and the witness Varadharaj was not examined is unsustainable, since under Section 138 of Negotiable Instrument Act, the issuance of cheques for discharge of debt has been called up to be proved. The cheques being admitted and issuance of pro-notes being admitted, it is the burden of the accused to prove that he has discharged the said debt arising under the Pro-notes. The accused has not adduced any proof to believe that he had discharged these two debts. Any oral evidence contrary to documentary proof has to fail. Therefore, the finding of the trial Court as far as these two cheques are erroneous.

14. In so far as, the third cheque Ex.P.3 is concerned, which is for Rs.60,000/- dated 10.07.2010, the complaint claims that he gave money out of faith and he did not obtain any security for that. Whereas, the accused claims that this money was discharged and blank cheque given to the complainant was misused. As far as Ex.P.3 cheque is concerned, when the accused has rebutted the presumption and the complainant fails to prove that this cheque was issued for enforceable debt, in such circumstances, the benefit of doubt has to be extended to the accused.

15. While applying the ratio laid by the Hon'ble Supreme Court, this Court finds that the complaint against the accused in respect of the cheques Ex.P.1 and Ex.P.2 are proved to be given to discharge the debt covered under the pro-notes Ex.P.10 and Ex.P.11. Therefore, the finding of the Lower Appellate Court is liable to be set aside.

16. As far as, the 3rd cheque Ex.P.3 is concerned, the finding of the Lower Appellate Court is to be upheld, since the complainant has failed to prove debt.

17. In fine, the complainant in respect of cheques (Ex.P.1) for Rs.50,000/- and (Ex.P.2) for Rs.1,50,000/- are proved to be given for discharge of debt. Therefore, the judgment of the Lower Appellate Court is set aside to that extent and the judgment of the trial Court is restored. As far as, 3rd cheque (Ex.P.3) for Rs.60,000/- is concerned, the finding of the Lower Appellate Court is upheld.

18. In the result, the Criminal Appeal is Partly Allowed. The respondent is guilty of issuing two cheques (Ex.P.1) and (Ex.P.2) for Rs.1,50,000/- and Rs.50,000/- respectively without "sufficient fund" and from the account which he has already closed. Hence, the accused is sentenced to undergo six months R.I and to pay a fine of Rs.5,000/-, in default 2 months S.I. The period of sentence if any already undergo, shall be set off under Section 428 of Cr.P.C.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The I Additional Sessions Judge, Tiruvallur.
2. The Judicial Magistrate, Fast Track Court. Tiruvallur.
3. The Section Officer, Criminal Section (Records),
High Court, Madras.

+1 cc to Mr.S.A.Rajan, Advocate, S.R.No.39268

PA(CO)
SSM(27/06/2019)

Criminal Appeal No.546 of 2014