IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.04.2019	Pronounced on: 23.04.2019

Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Appeal No.558 of 2014

Anju Sharma. ... Appellant/Complainant

/versus/

Jamuna,
W/o.Varadharaj,
No.15, Mettu Street, Periyakuppam,
Thiruvallur Taluk. ... Respondent/Accused

Prayer: This Criminal Appeal has been filed under Section 378 of the Cr.P.C., praying to call for records in C.A.No.95/2012 dated 22.04.2012 on the file of the I Additional Sessions Judge, Tiruvallur, and in C.C.No.11 of 2012 dated 08.11.2012 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 preferred by the complainant in C.C.No.11 of 2012 on the file of Judicial Magistrate (FTC-Magisterial Level), Tiruvallur.

2. For the sake of convenience, the parties are referred by their name. Tmt Anju Sharma (complainant/appellant) in her complaint filed under section 200 Cr.P.C r/w 138 of Negotiable Instruments Act has alleged that Mrs.Jamuna W/o.R.Varadharaj, Proprietor of “Jamuna sweets” (Accused/respondent) borrowed Rs.2,50,000/- from her to improve the business. Out of trust and confidence, no document was obtained from the Jamuna. Despite several request, Jamuna failed to repay the loan. Finally, gave the cheque bearing No.155169 dated 02.07.2010 drawn in favour Mrs.Anju Sharma for Rs.2,50,000/- from the account maintained at Catholic Syrian Bank, Tiruvallur Branch. When the cheque was presented for collection, it returned with endorsement “Account closed”. Hence, statutory notice dated 12.08.2010 was issued. Following

the statutory notice, she sent another notice dated 26.08.2010 stating that, in the earlier notice dated 12.08.2010 instead of mentioning her name, her husband name Mr.C.B.Sharma. S/o.Indrachand has been wrongly mentioned, so it should be read as Mrs. Anju Sharma. The rest of the content in the earlier notice remains the same. On receipt of the notice, the accused gave reply dated 26.08.2010 denying liability.

3. To prove her allegations in the complaint, Mrs.Anju Sharma has mounted the witness box and given evidence. She has marked the cheque as Ex.P-1, the memo issued by the bank indication the account closed as Ex.P-2, the statutory notice dated 12.08.2010 issued through the Advocate in the name of Mr.C.B.Sharma as Ex.P.3, the postal acknowledgement as Ex.P-4, the subsequent notice dated 26.08.2010 issued by Anju Sharma as corrigendum to the earlier notice as Ex.P-5, the postal acknowledgement as Ex.P-6 and the reply notice dated 28.08.2010 issued on behalf of Jamuna as Ex.P-7.

4. The trial Court held that the cheque Ex.P-1 admittedly issued by the accused from the account maintained by her. She has not discharged the burden of rebuttal. Hence, it is presumed that the cheque was issued to discharge the enforceable debt. The accused failed to prove that blank cheque given long before as security for the loan availed by her husband from the husband of the complainant not proved even by preponderance of probability.

5. Holding the accused guilty, the trial court convicted Jamuna to undergo 6 months R.I and to compensate the complainant Rs.2,50,000/-. Against the judgment Smt.Jumuna preferred appeal before the I Additional Session Judge, Tiruvallur. Sought permission under section 91 Cr.P.C., to call for her bank statement and the cheque book register. Same was called and marked as Ex.D-1 and Ex.D-2 by consent.

6. The Lower Appellant Court, after considering the evidence, allowed the appeal for the following reasons:-

1).The complainant failed to mention in her complaint as well as in her deposition when the accused borrowed Rs 2,50,000/- from her.

2). The complainant failed to prove her financial capacity to lend loan of RS 2,50,000/- to the accused without any security. Her explanation in the evidence that she borrowed money from her brother to advance loan to the accused is unbelievable.

3). From Ex.D-1 and Ex.D-2 marked during the appeal, the fact reveals from the cheque book register the accused lastly received the cheques book containing 25 cheques bearing No. 154901 to 154925 on 05.09.2006. She closed her account on 20.10.2006. The subject matter of the complaint is in respect of cheque bearing No.155169. There is no reference in the cheque book register that the subject cheque Ex.P-1 was issued to the accused.

4). The accused has rebutted the statutory presumption through preponderance of probability that she has not borrowed any money from the complainant and the cheque was not issued to the complainant for discharge of debt. Whereas the complainant failed to establish the subject cheque was issued by the accused to her for discharge of any debt on the date of cheque bears.

7. The learned counsel for the petitioner would submit that the Lower Appellate Court has wrongly applied the Principle of law and facts.

8. Once the drawer of the cheque admits the execution of it, it is the onus of the drawer to disprove the contrary that the cheques was not issued for discharge of legally enforceable debt. The respondent having admitted the borrower and the cheque, merely because she has denied the liability, even without any evidence, the Lower Appellate Court has dismissed the complaint on the ground that the complainant has not proved her financial capacity.

9. The cheque (Ex.P.1) is drawn in favour of Anju Sharma, which is dated 02.07.2010, it has been issued by V.Jamuna for Proprietor "Jamuna Sweets". The Catholic Syrian Bank, Tiruvallur Branch, has returned the said cheque dated 10.08.2010 stating that the SB Account was closed. Ex.P.3 Statutory Notice dated 12.08.2011 indicates that sum of Rs.2,50,000/- was borrowed by Jamuna on 02.08.2009 from one C.P.Sharma, S/o.Indrachand later by the rejoinder dated 26.08.2010 marked as Ex.P.5, it has been corrected as Anju Sharma.

10. The Lower Appellate Court, after considering the defence of the accused has taken note of the connected Criminal case initiated by C.B.Sharma, the husband of the revision petitioner herein against Varatharaj, the husband of the respondent herein.

11. Even before prior to the initiation of criminal prosecution by Anju Sharma against Jamuna and Sharma against Varadharaj, they had been some communication between Varadharaj and Sharma, regarding the dispute in their financial transactions.

12. When the accused received notice from N.C.Ravichandran, Advocate, issued on behalf of C.P.Sharma, she has given a reply denying that she does not know Sharma and she never received any money from Sharma. She has categorically said in the reply itself that the cheque No.155169 belongs to the cheque book of the year 2002. Her husband and Sharma had money transaction in the year 2000. Her husband Varadharaj borrowed a sum of Rs.1,00,000/- from C.P.Sharma and issued four blank cheques. Though, the loan was repaid, the cheques were not returned. Subsequently, her husband borrowed a sum of Rs.60,000/- in the year 2006 from Sharma, for which he gave two blank cheques in the year 2007. Though the loan was discharged in the year 2008, even those cheques were not returned. In this regard, when there was a threat from Sharma demanding Rs.2,00,000/- or else he will fill the blank cheques and present for collection to initiate prosecution, her husband has issued a notice dated 04.08.2010, explaining the circumstances under which the cheques were issued and requested Sharma from refraining to present those cheques in the bank. After receipt of the notice, Sharma has issued a statutory notice dated 12.08.2010 as if, Jamuna has received Rs.2,50,000/- loan and issued the cheque No.155169 to discharge the loan on 02.07.2010.

13. From the records, this Court finds that the statutory notice dated 12.08.2010 has been issued not by the complainant but in the name of her husband, which has invited a reply from the accused, containing a denial, as stated above. Meanwhile, realising that Jamuna has not issued cheque to C.P.Sharma but to his wife Anju Sharma and in the statutory notice, the name of C.P.Sharma has been wrongly mentioned, the 2nd notice (Ex.P.5) dated 26.08.2010 pointing out the mistake in the earlier notice (Ex.P.3) dated 12.08.2010, Ex.P.5 has been issued.

14. PW.1, the defacto complainant Anju Sharma, in her deposition admits that she is aware of the notice dated 04.08.2010 sent by Varadharaj husband of Jamuna. Through reply notice and defence Exhibits - Ex.D.1 and Ex.D.2 the accused has probabilised her case that the subject cheque was not issued to discharge any debt and not given to the complainant, in the manner in which the complainant has deposed in her evidence. While so, the complainant ought to have established the fact that (i). the cheque was issued from the account maintained by the accused, (ii) it was issued for legally enforceable debt and (iii). the same was returned for “insufficient fund” (iv) for which a proper statutory notice was issued as contemplated under Section 138 of Negotiable Instrument Act.

15. In this case, from the materials placed by the complainant and the accused, the fact remains that Ex.P.1 cheque dated 02.07.2010, surprisingly does not show the account number of the drawer. From the evidence of DW.1 [Vijayakumar], it is proved that the accused had closed her account maintained in Catholic Syrian Bank, Tiruvallur Branch, on 20.10.2006. The cheque bearing No.155169 of Catholic Syrian Bank, Tiruvallur Branch, was not issued to her. It's not the cheque relates to her account. Ex.D.2, the true copy of the cheque issuing register indicates that the last cheque book issued to the accused by the Catholic Syrian Bank, Tiruvallur Branch is cheque book covering 25 leaves bearing Nos.154901 to 154925.

16. When the accused has discharged the burden of rebuttal, the complainant has failed to prove the enforceable debt for the subject cheque. The trial Court has failed to consider the defence of the accused, whereas the Lower Appellate Court has rightly considered the defence of the accused and held that the accused has probabilised her case. Whereas, there is not even iota of evidence on the side of the complainant, except the cheque (Ex.P.1) to prove there was any financial transaction between the complainant Anju Sharma and the accused Jamuna.

17. In the said circumstances, when the view of the Lower Appellate Court is possible and supported by reasoning, there is no ground to interfere the finding of the Lower Appellate Court. Hence, the Criminal Appeal is dismissed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

bsm Sub Assistant Registrar

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.39267

Criminal Appeal No.558 of 2014

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