IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.03.2019

Coram::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.66 of 2014

K.Balachandran,
S/o.C.Kannan,
No.1, 5th Cross Street,
Sabari Nagar, Porur,
Chennai-600 116. ... Appellant/Complainant

/versus/

S.Murugan,
S/o.Sambandha Moorthy,
No.8,Thiru.Vi.Ka.Street,
Ethiraj Nagar, West Mambalam,
Chennai-600 033. ... Respondent/Accused

Prayer:- Criminal Appeal is filed under Section 378(4) of Cr.P.C, to set aside the order of the XV Additional Sessions Court (previously I Fast Track Court), Chennai dated 18.11.2013 passed in C.A.No.188 of 2012 in reversing the Judgment passed in C.C.No.847 of 2009 by the 7th Metropolitan Magistrate, George Town, Chennai dated 17.09.2012.

For Appellant : Mr.S.Thiruvengadam

For Respondent : Mr.B.Manoharan
Amicus Curiae

J U D G M E N T

This Appeal is directed against the acquittal of the accused by the Lower Appellate Court in the case arising out of under Section 138 of Negotiable Instrument Act.

2. The brief facts as found in the complaint before the Magistrate is that the appellant herein is a retired employee in the Hero Motors. After his retirement he wanted to carry Travels business hence, he took a premises at Shop No.1, 1st Floor, 391-A Dr.Lakshmanasamy Road, K.K.Nagar, Chennai and permitted the accused to manage and run the said business in the name and style of "Guest Cabs". It is alleged that after

gaining confidence of the complainant, the accused approached him for a loan to purchase a house at Valasaravakkam. Believing the words of the accused, the complainant gave Rs.7,30,000/- in two instalments first on 06.12.2006 and second on 15.12.2006. After receiving the money, the accused executed a pro-note on 15.12.2006. He agreed to re-pay the loan promptly. On 30.09.2008, the accused gave a cheque for Rs.7,00,000/- to discharge the loan. When the cheque was presented in the ICICI Bank, Ashok Nagar Branch, it was returned with memo dated 04.10.2008 indicating "funds insufficient". The statutory notice envisaged under Section 138 of Negotiable Instrument Act was issued on 28.10.2008, calling upon the accused to pay the cheque amount of Rs.7,00,000/- within 15 days from the date of receipt of the notice. The said notice was duly received by the accused on 05.11.2008. The accused neither paid the cheque amount nor replied to the legal notice. Hence, the complaint was presented before the Magistrate on 21.11.2008. It was taken on file subsequently and summon was issued to the accused.

3. The complainant has examined himself as PW.1. Marked 5 Exhibits. Ex.P.1 is the alleged promissory note dated 04.12.2006 executed by the accused in favour of the complainant. Ex.P.2 is the subject cheque dated 30.09.2008 for Rs.7,00,000/- issued in favour of Balachandran by the accused, Ex.P.3 is the Return memo, Ex.P.4 is the Legal Notice, Ex.P.5 is the acknowledgement card indicating that the notice was received by the addressee on 01.11.2008.

4. The trial Court, after considering the evidence has held that the cheque has been issued by the accused to discharge his debt, under the Pro-note Ex.P.1. Therefore, liable to be punishable for offence under Section 138 of Negotiable Instrument Act. Drawing the presumption under Section 139 of Negotiable Instrument Act and the failure of the accused to rebut the presumption, the Court held him guilt of offence under Section 138 of Negotiable Instrument Act. As a result, the trial Court sentenced the accused to undergo 6 months S.I and directed to pay compensation of Rs.7,00,000/- to the complainant, within a period of one month.

5. On appeal, the Lower Appellate Court after re-appreciating the evidence reversed the finding of the trial Court on the ground that the accused has rebutted the presumption by preponderance of probability. The complainant admits that on 04.12.2006, the date on which the alleged pro-note was executed, consideration was not passed. Even according to his own complaint and admission on oath, the payment was paid in two instalments one on 06.12.2006 and balance on 15.12.2006, whereas, in the cross examination there is contradictions about the number of instalments. He has stated that on 06.12.2006, he

paid Rs.5,50,000/-. In between 06.12.2006 and 15.12.2006, he paid the balance Rs.1,80,000/-. When Ex.P.1 pro-note indicates that on 04.12.2006, a sum of Rs.7,30,000/- was received by the accused contrary to it, the complainant himself admits that on that day, no consideration was passed. He did not pay Rs.7,30,000/- to the accused on 04.12.2006. When the passing of consideration becomes doubtful, in the absence of any other corroborative evidence to prove the payment, the cheque Ex.P.2 cannot be presumed to have issued to discharge the debt arose against Ex.P.1 pro-note. Therefore, the presumption under Sections 118 and 139 of Negotiable Instrument Act cannot be held in favour of the complainant. Holding, the accused has rebutted the presumption by preponderance of probability, the Lower Appellate Court has reversed the finding and acquitted to the accused.

6. Aggrieved by the same, the present appeal is filed.

7. The learned counsel appearing for the appellant/complainant would submit that the judgment of the Lower Appellate Court reversing the well considered judgment of the trial Court has to be set aside, in view of the improper application of law. The Court below failed to consider that the cheque was signed by the accused and he has executed a pro-note for the loan availed by him. When the complainant has established transaction of money and issuance of cheque to discharge the loan, the presumption under Sections 118 and 139 cannot be considered has rebutted on mere denial of passing of consideration or loss of cheque. The opportunity to rebut the presumption was available to the accused as soon as he received the notice. He has not availed this opportunity be giving reply. If the cheque was really lost, he should have lodged the complaint to police, which he has failed to do so. The minor discrepancy regarding the date of passing of consideration in the deposition of PW.1 will not lead to draw an inference that there was no consideration at all for the pro-note or the cheque was not issued to discharge the said liability. Having accepted the signature found in the cheque, as per the judgment of the Hon'ble Supreme Court rendered in Rangappa case, the burden of proof is on the accused. The fact of complainant being the retired employee of Hero Motors at Ludhiana and he had sufficient fund in his hand has been overlooked by the trial Court.

8. In spite of notice to the respondent, there was no representation. Hence, this court requested Mr.B.Manoharan, to assist the Court as Amicus Curiae, he willingly accepted the responsibility, took time to prepare the matter and he has made his submission as under.

9. The Lower Appellate Court is right in dismissing the complaint since, there is no material on record to show that the complainant had source of money to lend a huge a sum of Rs.7,30,000/-. The relationship between the complainant and the accused as found in the notice as well as in the complainant itself throws light about the falsehood in the complaint. The complainant claims that the Guest Gabs was started by him and the accused was appointed as Manager. Whereas, the subject cheque itself is issued only from the account maintained by Guest Gabs. The accused has signed as its Proprietor. Further, the contention of the complainant that a sum of Rs.7,30,000/- was given to the accused as cash on different dates for which the pro-note Ex.P.1 was executed by the accused on 04.12.2006 does not carry any truth, and same is established from the evidence of complainant himself. He admits that no money was paid to the accused on the date of executing Ex.P.1. Nowhere either in his complaint or in deposition, the complainant has specifically mentioned the amount and date on which he paid money to the accused. Merely because the complainant is in possession of a cheque signed by the accused, he cannot take advantage of the presumption clause in the statute and prosecute.

10. In support of his submissions, the Learned Counsel would relied upon the recent judgment of Hon'ble Supreme Court in ANSS Rajashekar Vs. Augustus Jeba Ananth, wherein, the Hon'ble Supreme Court has held that when the complainant fails to establish the source of fund, which is alleged to have utilised for the dispersal of the loan, then it should be presumed that the complainant has failed to establish the fact that cheque was issued for discharge of legally enforceable debt.

11. Taking cue from the Larger Bench judgment of Hon'ble Supreme Court in Rangappa Vs.Sri Mohan reported in (2011) 11 SCC 441. The learned counsel for the respondent would submit that the accused has not only given a possible explanation as a rebuttal but has raised a defence, which is probably and possible of being accepted. When it is proved that the pro-note Ex.P.1 was not executed after receiving consideration, the cheque which is alleged to have been issued to discharge the debt arising from the pro-note also falls to floor for want of corroborative evidence. Since, the complaint has failed to place on record about the source of income and exact date on which he has lend the money to the accused, the presumptions either under Section 118 or under Section 139 of Negotiable Instrument Act gets attracted in favour of the complainant.

12. Per contra, the learned counsel for the appellant/complainant would rely upon the judgment of Hon'ble Supreme Court in Rangappa Vs.Sri Mohan reported in (2010) 11 SCC

441 would submit that the respondent/accused has merely denied the transaction and has not rebutted the presumption in probable or possible manner. Further, the learned counsel for the appellant also rely upon the judgment of the Hon'ble Supreme Court K.N.Beena Vs.Muniyappan and another reported in AIR 2011 SCC 2895 wherein, the Hon'ble Supreme Court has held that the burden of proving and passing of consideration for a dishonoured cheque is not on the complainant but, on the accused to prove the contrary. The Hon'ble Supreme Court in this judgment has held that under Section 118 of Negotiable Instrument Act, unless the contrary is proved, it is to be presumed that the Negotiable Instrument has been made or drawn for a consideration and under Section 139 of Negotiable Instrument Act, the Court has to be presumed unless the contrary is proved, that the holder of the cheque received the cheque for discharge in whole or in part of a debt or liability.

13. The learned counsel for the appellant would also rely upon the judgment of this Court rendered in Umarani Vs. Velan, (MANU/TN/7982/2007) to emphasis his submission that if really the subject cheque was lost by the accused, he should have preferred a complaint to the police at the earliest point of time or he should have atleast replied to the statutory notice mentioning about the loss of the cheque. It is also contending that the lost cheque theory cannot be considered unless, there is material to show that the accused has lost the possession of the cheque and had been landed in the hands of the complainant, without any passing of consideration.

14. The judgment of the Supreme Court rendered in Rangappa Case cited supra is clear and had settled the issue regarding shifting the burden of proof. The reverse burden which is cast upon the drawer of the cheque under Section 139 of Negotiable Instrument Act can be rebutted either by way of reply notice or through own witness or dislodged the case of the complainant through cross examination. The accused can shift the burden by placing facts, which will render the documents relied upon by the prosecution, invalid or inadmissible.

15. The look into the fact of this case, the complainant consistently claim that he started the Travels business in the name of Guest Gabs wherein, the accused was employed as its Manager. Have a look at the cheque Ex.P.2, it is drawn from the account of Guest Gabs, signed by the accused as its Proprietor. It is the case of the complainant that a sum of Rs.7,30,000/- was borrowed by the accused between 06.12.2006 and 15.12.2006. It is also the case of the complainant that this money was paid in cash. He claims as a retired employee in the Hero motors, he got the funds during his retirement. But he admits that when Ex.P.1 was executed, he did not pay any money but he has obtained this document in advance on 04.12.2006

thereafter, in instalments paid a sum of Rs.7,30,000/- between 06.12.2006 and 15.12.2006. In the notice, he has not mentioned the dates and amount on which the money was paid. The notice is very vague by mentioning he paid money in two instalment one on 06.12.2006 another on 15.12.2006 and for which a pro-note was executed on 15.12.2006 whereas, the said pro-note marked as Ex.P.1 indicates it executed on 04.12.2006 itself. Thus the inconsistency in the notice and the document as well as the deposition of PW.1 would clearly show that the passing of consideration as against the pro-note marked as Ex.P.1 is highly doubtful.

16. Now when we come to the case of the cheque Ex.P.2, as pointed out earlier it is dated 30.09.2008 issued from the account of Guest Gabs signed by the accused for Guest Gabs as Proprietor. It is the contention of the complainant that the cheque was issued to discharge the loan covered under Ex.P.1. As pointed out earlier Ex.P.1 itself being doubtful for bereft of details and doubtful whether the consideration for Ex.P.1 was passed to the accused, the corollary that Ex.P.2 was issued to discharge the said loan under Ex.P.1 also becomes doubtful.

17. When the presumption is rebutted by the accused through probable and possible manner, the Hon'ble Supreme Court in Rangappa Case, has held that it is burden of the complainant to place substantive evidence regarding the debt which he is entitled to enforce and to correlate the debt with that of the subject cheque. Here the complainant has miserably failed to do so.

18. It is not the law that whenever a cheque is signed and issued Sections 118 and 139 of Negotiable Instrument Act are statically to be applied. The presumption under Section 118 and 139 of Negotiable Instrument Act are rebuttal presumptions which swings between the accused and the complainant. The probability of discharging the burden is of lesser degree for the accused. Once the accused has probabilized his defence, the complainant has to prove his case beyond reasonable doubt. In this case, right from inception the case of the complainant is very uncertain. The admission of the complainant in his statutory notice as well as complainant and deposition probabilizes the case of the defence that there was no legally enforceable debt, for the cheque marked as Ex.P.2. The Lower Appellate Court have gone into the content of the pro-note as well as the complaint and has accepted the defence which has probabilized and discharge his burden. Therefore, this Court concerts the view of the Lower Appellate Court and uphold the same.

19. In the result, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To,

1. The XV Additional Sessions Judge
(Fast Track Court No.1), Chennai

2. The 7th Metropolitan Magistrate, George Town, Chennai.

3. The Section Officer, Criminal Section(Records) High Court, Madras.

+1cc to Mr.S.Thiruvengadam, Advocate sr.no.28783

Criminal Appeal No.66 of 2014

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nr 09/07/2019