IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :01.04.2019

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CRIMINAL APPEAL NO.45 OF 2014

A.SUBRAMANIAM ..Appellant

-Vs-

1.M/s.New Win Export,
rep.by its Managing Partner
P.Kumaraswamy @ Ganesh

2.P.Kumaraswamy @ Ganesh ..Respondents

Criminal Appeal has been filed under Section 378(4) of Criminal Procedure Code praying to set aside the order dated 08.11.2013 in CA.No.23 of 2012 on the file of the Principal Sessions Judge at Tiruppur acquitting the accused and reversing the order of conviction under Section 138 of the Negotiable Instruments Act made vide order dated 16.10.2012 in STC.No.61 of 2012 on the file of the Judicial Magistrate, FTC, Tiruppur.

For Appellant : Mr.Sharath Chandran
for Mr.V.Raghavachari
For R1 and R2 : Mr.C.Samivel, Legal aid counsel

J U D G M E N T

Records perused. Despite receipt of notice, the respondent has not entered appearance in person or through his counsel. So, this Court has requested the Legal Services Authority to appoint Legal Aid Counsel to represent for the respondent/accused and assist the Court. Accordingly, one Mr.C.Samivel was nominated by the Legal Services Authority.

2. This appeal is filed by the complainant aggrieved by the order passed by the lower appellate Court reversing the finding of the trial Court and acquitting the respondents herein from charges under Sections 138 and 141 of the Negotiable Instruments Act.

3. The brief facts of the case is that the complainant A.Subramaniam, son of Appukutty is known to the second respondent Kumaraswamy. For improvement of his business, Kumarasamy borrowed hand loan of Rs.5,25,000/- from Subramaniam on 06.08.2006. Kumarasamy promised to repay the money within a

month. In view of the long standing friendship, the money was advanced to Kumarasamy. To discharge the said debt, Kumarasamy issued a cheque dated 06.09.2006 for a sum of Rs.5,25,000/- drawn at Union Bank of India, Tiruppur branch from the account maintained by M/s.New Win Export. The complainant was made to believe that the second respondent Kumarasamy and his brother Govindaraj are partners of M/s.New Win Export. On return of the cheque with an endorsement "insufficient of funds", Subramaniam caused a statutory notice to M/s.New Win Export represented by the Managing partners and to Kumarasamy and Govindaraj in their personal capacity. On receipt of the said statutory notice, the second respondent Kumarasamy, who was signatory of the said cheque gave a reply through his counsel, wherein he has denied the transaction with Subramaniam son of Appukutti. He has also stated in the reply notice that his brother Govindaraj is not a partner in the said business. He has nothing to do with the firm M/s.New Win Export. The specific case of the second respondent as asserted in his reply notice is that the subject cheque was issued to one Suryalakshmi Finance in which the Subramaniam, Velliangiri and Sekar were partners. The cheque was issued as security for a loan of Rs.1,00,000/- borrowed in the year 2000. The same was not returned. But, later misused by presenting in the year 2006. With this averment, a complaint filed by Subramaniam was taken on file and tried before the trial Court.

4. The complainant was examined as PW.1. 6 Exhibits were marked on his behalf. In defence, the Accountant of the accused firm Umanathan and the second accused Govindaraj were examined as DW.1 and DW.2. 3 Exhibits were marked.

5. On appreciating the evidence, the trial Court held that the complainant has proved the case that the cheque Ex.P1 dated 06.09.2006 was issued by the second respondent from the account maintained in the name of the first respondent firm. Therefore, his liability has been prima faciely proved by the complainant, whereas the accused has not rebutted the presumption under Section 139 of Negotiable Instruments Act, even by preponderance of probability. Hence, convicted the second accused/second respondent and sentenced him to undergo one year Simple Imprisonment. Since the first respondent being a firm represented by the second respondent no separate sentence was imposed.

6. Aggrieved by the sentence and conviction, the accused preferred the appeal in C.A.No. 23 of 2012 before the Principal Sessions Judge, Tiruppur. Not satisfying with the sentence, Crl.R.P.No.14 of 2013 was preferred by the complainant for enhancement of the sentence. Pending appeal, the accused also filed an application under Section 391 Cr.P.C., for production of the statement of account maintained by them.

7. The lower appellate Court along with the appeal has taken up two miscellaneous petitions mentioned above. The lower appellate Court after considering the submissions made by the respective parties has allowed the appeal for the following reasons:

(i) The complainant while admitting that he was one of the partners of Sree Suryalakshmi Finance, had retracted in the cross-examination that he is not run Suryalakshmi Finance business and not connected with the business.

(ii) Though in the statutory notice preferred by the complainant, Govindaraj was mentioned as one of the partners, he has not impleaded as an accused. Also while cross-examining, he has admitted that he has not seen Govindaraj, when he advanced the loan of Rs.5,25,000/-.

Therefore, the presumption under Section 139 of Negotiable Instruments Act has been rebutted by the accused through reply notice as well as eliciting of certain facts of cross-examination of PW.1.

8. The lower appellate Court has also accepted the contention raised by the accused that for any transaction over and above of Rs.20,000/-, the payment should be made only by Demand Draft or Account Payee cheque, whereas it is admitted case of the complainant that Rs.5,25,000/- was given by way of cash and the same was not reflected in his account. The non production of documents to prove the source of money is sufficient to hold that the accused rebutted the presumption and the complainant has failed to prove any debt legally enforceable. Aggrieved by the finding of the lower appellate Court the present appeal is filed.

9. In the appeal, it is contended that the lower appellate Court had failed to appreciate the evidence properly and applied the law appropriately. The non inclusion of Govindaraj in his complaint was pursuant to reply given by the accused along with document which show Govindaraj was not a partner in the first accused firm M/s. New Win Exports. When the complaint under Section 138 of Negotiable Instruments Act was filed after due statutory notice against the firm and the signatory of the cheque, non inclusion of the other partners will not render the complaint in proper.

10. The learned counsel appearing for the appellant would submit that the principle laid down by the Hon'ble Supreme Court in Rangappa Vs. Sri Mohan reported in 2011(11) Supreme Court Cases 441 was not properly considered by the lower appellate Court. The reverse onus of presumption has not been established by the accused in this case. The learned counsel would submit that the reply notice of the accused alleging that he had some money transaction with Suryalakshmi Finance and the said cheque

was issued as security for the loan borrowed in the year 2000, though the loan was discharged, subsequently the cheque was not returned. His mere denial without any substance and DW.1 Umanathan has not spoken any thing about the transaction between the complainant and the accused to rebut the presumption.

11. Regarding payment of cash instead of cheque or bank transaction, the learned counsel would submit that time and again it is reiterated by the Hon'ble Supreme Court that if at all there is any violation by the complainant under Income Tax Act, the person who violated can be prosecuted under that Act. The said violation cannot be a handle for a defaulter and cheats

12. The admission of the signatory found in the cheque. the relationship between the account holder namely M/s.New Win Exports with that of the signatory, prima facie, leads to inference that the cheque was issued for discharging enforceable debt. While the accused contended that the cheque was issued to somebody else other than the complainant, he should have placed material which has prima facie indicate the stand. Neither the evidence of DW.1 nor the evidence of DW.2 leads to any inference to substantiate the defense. In such circumstances, the lower appellate Court ought not to have reversed the well considered judgment of the trial Court quoting that the complainant has not disclosed the source of income.

13. The perusal of the lower appellate Court judgment clearly indicates the non application of mind and perversity. In Rangappa Vs. Sri Mohan the Hon'ble Supreme Court after considering the catena of judgments rendered by the Apex Court has laid down dictum. When the reverse onus of discharging the presumption will arise, though the degree of proof for an accused is only a preponderance of probability, a mere denial or vague denial without probablise the defence will not amount to discharge of the reverse burden.

14. In this case, the accused would deny the transaction with the complainant. He has attempted to project transaction only with Suryalakhsmi Finance in the year 2000, whereas the present cheque is dated 06.09.2006. The defence of the accused taking advantage of the provision of Income Tax Act is not a ground to probablise that there was no legally enforceable debt. After amendment of the Negotiable Instruments Act and introduction of Section 138, rebuttal of presumption has to be based on evidence either by adducing documents by the accused or disproving the documents and the evidence adduced by the complainant.

15. In this case, the accused has failed to rebut the

presumption taking recourse to either of the above method. The lower appellate Court has carried away by the vague denial of the accused. The content of the reply notice has not been substantiated through any material evidence. Therefore, the lower appellate Court judgment is set aside.

16. In the result, this Criminal appeal is allowed and the judgment of the lower appellate Court is set aside. The judgment of the trial Court in STC.No.61 of 2012 is restored. The period of sentence already undergone by the accused shall be set off. The second respondent/accused is directed to surrender before the trial Court to undergo the remaining period of sentence imposed by the trial Court.

rpl

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To
1.The Principal Sessions Judge
at Tiruppur.

2.The Judicial Magistrate,
FTC, Tiruppur.

3. -Do- Tho' The Chief Judicial Magistrate,
Coimbatore.

Copy to:-

The Section Officer,
Criminal Section,
High Court, Madras - 104.

+1cc to Mr.C.Samivel, Advocate, SR.No.30866

Crl.A.No.45 of 2014

Kak(30/05/2019)