BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.(MD)No.338 of 2009

Jeni ... Appellant / Complainant

-Vs-

A.Davidson Dharmaraj ... Respondent / Accused

PRAYER: Criminal Appeal filed under Section 378 Cr.P.C., to set aside the judgment dated 16.09.2008 made in S.T.C.No.2256 of 2007, on the file of the learned Judicial Magistrate No.I, Tirunelveli, punish the accused in accordance with law.

For Appellant : Mr.N.Mohideen Basha
For Respondent : No Appearance

JUDGMENT

The private complainant is the appellant herein. He has filed this appeal against the order of acquittal passed in S.T.C.No.2256 of 2007, dated 16.09.2008, by the learned Judicial Magistrate No.I, Tirunelveli.

2.The case of the prosecution is that the respondent has borrowed a sum of Rs.4,00,000/- (Rupees Four Lakhs Only) as hand loan and executed a cheque bearing No.242712, dated 04.08.2007. When the said cheque was presented for collection before his bank, the same was returned for want of sufficient funds on 14.08.2007. Therefore, the appellant has sent a statutory notice by RPAD to the respondent / accused on 16.08.2007, calling upon the respondent to pay the cheque amount, within 15 days from the date of receipt of the said notice and even after receipt of the notice, the respondent has not paid the amount, whereas he has sent a reply on 01.09.2007, containing false averments. Therefore, the appellant was constrained to file a private complaint before the learned Judicial Magistrate No.I, Tirunelveli for the offence under Section 138 r/w 142 of the Negotiable Instruments Act.

3.After observing necessary formalities, the learned Judicial Magistrate No.I. Tirunelveli taken the complaint on file in S.T.C.No.2256 of 2007.

4.To substantiate his case, the appellant has examined himself as P.W.1 and Exs.P.1 to P.4 were marked. On behalf of the respondent, he himself has examined as D.W.1 and Exs.R.1 to R.3 were marked.

5.The learned Judicial Magistrate, after considering both oral and documentary evidence, found that the appellant has not established his case beyond reasonable doubt and therefore, dismissed the complaint of the appellant and acquitted the respondent / accused, by the judgement dated 16.09.2008.

6.Challenging the said judgment dated 16.09.2008, made in S.T.C.No.2256 of 2007, the complainant has filed this Criminal Appeal before this Court.

7.The learned counsel appearing for the appellant would submit that the respondent has admitted his signature in the cheque, whereas, he has stated that he has not borrowed any money from the appellant and not executed the cheque in favour of the appellant. While sending reply, he has stated that the cheque was issued to one M/s.Selvi Hire Purchase & Leasing Private Limited on 28.08.2003 and there was no existing liability towards the appellant and no cheque was issued to him. However, he has not established that the cheque was issued to one M/s.Selvi Hire Purchase & Leasing Private Limited on 28.08.2003. Though he has stated that a complaint has been given to the police, he has not produced any document, showing that based on that complaint, as to whether any case was registered against M/s.Selvi Hire Purchase & Leasing Private Limited. Therefore, in the absence of any materials mere bald denial that he has not received any money and not executed the cheque in favour of the appellant, is not sufficient. The appellant has proved his initial burden that the cheque was executed by the respondent in favour of the appellant. The appellant himself has examined as P.W.1 and produced the cheque and the respondent has not denied the signature found in the cheque. There is a statutory presumption under Sections 118 and 139 of Negotiable Instruments Act and the cheque is executed for valid consideration and the cheque is issued to discharge the legally enforceable debt. No doubt, the said presumption is rebuttable presumption and the accused has to rebut the presumption in the manner known to law, not mere bald denial. Therefore, in this case, the appellant has proved his initial burden, then it is for the Court to draw a statutory presumption that the cheque was issued to discharge the legally enforceable debt and it is for the accused to rebut the presumption. But in this case, the respondent / accused has not rebutted the presumption in the manner known to law.

8.He further submitted that the learned Magistrate has held that though the respondent has not denied the signature, the appellant has not proved his means and also as an Advocate, having income, he has not produced any income tax returns and also on the date of execution of the borrowal, he has not produced any documents and therefore, the appellant has failed to prove his case beyond reasonable doubt. The learned Magistrate has failed to consider the legal presumption that once execution of cheque is proved by the appellant / complainant, it is for the respondent / accused to rebut the presumption in the manner known to law. In this case, the respondent has not rebutted the presumption in the manner known to law. The learned Magistrate has failed to consider the legal presumption and wrongly came to the conclusion that the appellant has not established his case and therefore, dismissed the complaint, which warrants interference of this Court.

9.Heard the learned counsel appearing for the appellant and perused the materials available on record carefully. None appeared on behalf of the respondent.

10.A perusal of the records shows that the respondent, even in the reply notice sent by him, has stated that he has not borrowed any money from the appellant and not executed the cheque in favour of the appellant. He has stated that he has only executed the cheque in favour of one M/s.Selvi Hire Purchase & Leasing Private Limited and also has stated that the respondent has preferred the complaint before the police. The appellant has stated that the respondent has borrowed a sum of Rs.4,00,000/- and executed a cheque in favour of him. When it was presented before his bank, the same was returned for want of sufficient funds. Subsequently, he has sent a statutory notice. The respondent has also sent a reply, denying the contentions of the appellant.

11.On reading of the entire evidence, it is seen that the respondent has not denied the signature and also the only denial is that the cheque was not issued to the appellant and issued only in favour of M/s.Selvi Hire Purchase & Leasing Private Limited. The appellant himself appeared before the Court and examined himself as P.W.1 and produced original cheque, return memo of the bank, statutory notice and also reply given by the accused. The respondent has not denied the signature. Once original cheque is produced by the appellant and stated that the cheque was issued by the respondent / accused, the Court has to draw statutory presumption that the cheque was issued for the valuable consideration under Section 118 of the Negotiable Instruments Act and issued to discharge the legally enforceable debt under Section 139 of the Negotiable Instruments Act. No doubt, the said presumption is rebuttable presumption. Though the accused need not rebut the presumption by producing direct evidence, it can be rebutted either by preponderance of probabilities or probable defence, even otherwise through cross examination of the witnesses. However, in this case, though the respondent has appeared and also examined himself as D.W.1 and has denied the execution of cheque in favour of the appellant, he has admitted his signature found in the cheque. Though he has stated in his reply that the cheque was issued to one M/s.Selvi Hire Purchase & Leasing Private Limited, the respondent has given the complaint. The appellant has denied the same and stated that the cheque was issued in favour of him. But when the cheque is in the hands of the appellant and the respondent has not denied his signature, the respondent has to rebut how the cheque has gone to the appellant and also established that to whom he has issued the cheque. Though he has stated that he has preferred a complaint against M/s.Selvi Hire Purchase & Leasing Private Limited, admittedly, there is no First Information Report and as to whether any case is registered against M/s.Selvi Hire Purchase & Leasing Private Limited and also not proved that what happened the complaint given before the police. Therefore, mere bald allegations are not enough to rebut the presumption, it must be supported by some materials. Though the signature found in the cheque has not been denied by the respondent, the same is with the possession of the appellant. Therefore, the Court has to necessarily draw statutory presumption that the cheque was issued to discharge the legally enforceable debt. When the respondent / accused has not denied the signature, it is for him to rebut the presumption that the cheque was not issued to discharge the legally enforceable debt.

12.On reading of the entire evidence, it is seen that the learned Magistrate though has admitted the legal preposition, he has stated that the complainant has not proved his means and has not submitted income tax returns and on the date of borrowal, he has not obtained any documents. Once the signature is admitted, it is the legal presumption that the cheque has been issued to discharge the legally enforceable debt. The appellant has clearly stated in his evidence that though he is not doing any business and he has having sufficient means to give hand loan to the respondent. The respondent has clearly stated during the examination that the appellant is a known person and further, the appellant has not stated that he is invested any money in the bank or also received from somebody, but he has stated that he has lent hand loan out of his saving. Therefore, under these circumstances, the appellant has clearly stated that he has lent money to the respondent and produced the cheque before the Court and the Court has to necessarily draw the statutory presumption and it is for the respondent / accused to rebut the statutory presumption in the manner known to law. Therefore, mere non-filing of the income tax return before the income tax authorities as per the Income Tax Act or non-obtaining any documents on the date of lending money, is not the ground to reject the case of the appellant. Therefore, once the cheque is produced by the appellant and stated that the respondent borrowed hand loan and issued cheque to discharge the legally enforceable debt, the Court has to draw statutory presumption in favour of the appellant / complainant that the respondent issued cheque to discharge the legally enforceable debt. No doubt, the said presumption is rebuttable one and as stated above, the respondent need not rebut the presumption by direct evidence. It can be rebutted either by preponderance of probabilities or probable defence, even otherwise during the cross examination of the witnesses.

13.On careful reading of the evidence, this Court finds that the respondent has not rebutted the presumption in the manner known to law and therefore, mere bald denial is not the proof to rebut the presumption. Therefore, under these circumstances, to rebut the presumption, this Court expect little more substance from the accused and this Court finds that the respondent / accused has not rebutted the presumption in the manner known to law. Therefore, under these circumstances, this Court finds that the judgment of the learned Magistrate is perverse and he has not properly appreciated the legal proposition laid down by the Hon'ble Apex Court in various decisions and also has not properly understood the scope of Section 139 of the Negotiable Instruments Act. Therefore, the judgment of the learned Magistrate deserves to be set aside and accordingly, it is set aside and this Criminal Appeal is allowed.

14.This Court, as the appellate Court, has got every power to re-appreciate the evidences independently and give an independent findings. Accordingly, this Court finds that the appellant has proved his case beyond reasonable doubt. The respondent has not rebutted the statutory presumption in the manner known to law and has committed the offence under Section 138 of the Negotiable Instruments Act and therefore, the respondent is directed to appear before this Court for question of sentence to be asked during the next special sitting.

15.The Registry is directed to post this matter before next special sitting for question of sentence.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

Myr

To

The Judicial Magistrate No.I,
Tirunelveli.

CRL.A.(MD)No.338 of 2009

23.11.2019

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