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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	23.11.2021
Pronounced on	15.12.2021

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Criminal Appeal No.16 of 2015

Ramesh ..Appellant/Respondent/Complainant

Vs.

Jayakumar ..Respondent/Appellant/Accused

PRAYER: This Criminal Appeal filed under Section 378 Cr.P.C., to call for the records in C.A.No.119 of 2009 dated 24.03.2014 on the file of Special Court and EC Act cases and reversing the conviction and sentence imposed in C.C.No.40 of 2013 on the file of Judicial Magistrate-III, Salem, dated 05.10.2009 and to set aside the same.

For Appellant : Mr.R.Sankarasubbu

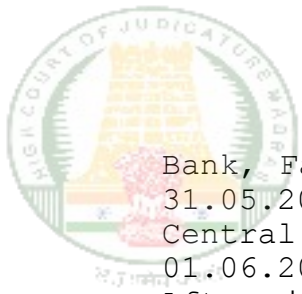
For Respondent : Mr.C.K.M.Appaji

JUDGMENT

This Criminal Appeal has been preferred by the appellant/complainant, challenging the judgement of the learned First Additional District and Sessions Judge, Salem dated 24.06.2014 in C.A.No.119 of 2009.

2. The facts of the case in brief are as follows:

This case has arisen out of a private complaint given by the appellant on the allegation that the respondent had borrowed a sum of Rs.2,50,000/- from him and promised to repay the same within a period of 3 months. On 30.05.2002, the respondent issued a cheque for Rs.2,50,000/- for discharging the above loan; the cheque was drawn on Salem Central District Cooperative



Bank, Fairlands. When the cheque was presented for collection on 31.05.2002 with the appellant/complainant's bank viz, The Central Bank of India, Shevapet Branch, the same was returned on 01.06.2002 for the reason that there was 'Insufficient funds'. After issuing a statutory legal notice and following the legal mandates, the complainant has filed the private complaint against the respondent/accused for the offence under Sec.138 of the Negotiable Instruments Act,1881.

2.1. During the trial Court on the side of the complainant 3 witnesses have been examined as PW.1 to 3 and Exs.P1 to 5 were marked. The respondent /accused examined himself as DW.1 and 4 documents were marked as ExD1 to D4 and three exhibits were marked as Exs.C1 to C3.

2.2. After concluding the trial and on consideration of the materials available on record, the learned Trial Judge had found the accused guilty for the offence under Sec.138 of the Negotiable Instruments Act,1881 and sentenced him to undergo 10 months simple imprisonment and imposed a fine of Rs. 2,000/- in default to undergo 2 months simple imprisonment. Aggrieved over that, the respondent /accused had preferred an appeal before the Sessions Court in CrI.A.No.119/2009. The Appellate Court had allowed the appeal by setting aside the judgement of the trial Court. Hence the complainant has challenged the same by way of filing this Criminal Appeal.

3. Heard the submissions of Mr.R.Sankarasubbu, learned counsel for the Appellant and Mr.C.K.M.Appaji, learned counsel for the respondent.

4.The point for consideration is

Whether the judgment of the lower Appellate Court in setting aside the judgment of conviction and sentence imposed by the Trial Court is correct or not?

5. The learned counsel for the appellant submitted that the First Appellate Court had misled itself and reversed the well founded judgement of the trial Court. It is further submitted that when the respondent /accused admitted the execution of the cheque and then contradicted his own statement, the benefit of presumption under Sec.139 of the Negotiable Instruments Act ought to have been given in favour of the complainant.

6. The learned counsel for the respondent/accused submitted that the appellant /complainant had failed to prove before the Court that the cheque was issued only for a legally enforceable debt. Since the accused had successfully rebutted the initial



presumption that arose in favour of the complainant, the learned Appellate Court is correct in setting aside the judgement of the trial Court.

7. There is no dispute about the fact that the impugned cheque was dishonoured for insufficient fund. Thereafter the statutory legal notice has also been duly sent to the respondent/accused. There is no disagreement on the legal position that once the executant of the cheque admits its execution an initial presumption has to be taken under Sec.139 of the Negotiable Instruments Act that the cheque has been issued for a legally enforceable debt. Once the complainant gets into the box and substantiates his allegation with oral and documentary evidence that would become the conclusive proof against the accused unless the accused proves the contrary.

8. The defence of the respondent/accused is that he knew only the father of the complainant namely Periyasamy. It is further submitted that the accused was in the habit of having money transaction with the father of the complainant, Periyasamy from the year 1996. It is further submitted that Periyasamy was running a Finance company by name 'Royal Finance' and hence he himself has opened an account in the name of the accused and credited a loan of Rs.25,000/- on 15.2.1999 in his account and the same was settled with interest. The respondent/ accused produced Ex.D2 series of the receipts to show the repayment made to Periyasamy/Royal Finance. It is alleged by the accused that during the said transactions with Periyasamy, he had issued his signed blank cheques by way of security and after repaying the loan he failed to get back the cheques from Periyasamy. He has stated further that he could not get back the cheque from the Finance Company because he learnt that Periyasamy under who had the custody of the cheque fell sick.

9. The defence of the respondent/ accused is that the complainant who is the son of the said Periyasamy had also been inducted as a partner for Royal Finance and he made use of the cheque in order to file this case against the respondent/accused. The learned trial Court had appreciated the defence of the accused on the basis of his statements before the Court.

10. It is seen from the evidence of PW.1 that the accused was taking a dual stand. At one stage the accused has stated that he availed a loan of Rs.1,00,000/- from Periyasamy and that was settled. At another stage he has stated that he availed a loan of Rs.25,000/- and settled it already. During questioning under Sec.313 Cr.P.C., the accused denied his very signature on the cheque. Despite the learned trial Judge has appreciated the contradictions and given the benefit in favour of the



complainant, the learned Appellate Judge has chosen to overlook the same.

11. The learned Appellate Court has adverted into the evidence of the appellant/complainant where he has stated that he had no connection with Royal Finance. By taking adverse presumption against the complainant for such denial, the learned Appellate Judge had concluded that there is preponderance of probabilities in favour of the respondent/accused and by which the accused had rebutted the initial presumption. The allegation of the complainant is that he had given the loan to the respondent/accused during the first week of January 2002 only and all those transactions which the accused had with the Royal Finance pertained to the years 1996-99. The respondent/accused has claimed that he had paid all those loans due to Royal Finance on 24.12.2000 itself. During the evidence of D.W.1, he has stated that he availed three loans only from Royal Finance and out of this, two loans were to the tune of Rs.25,000/- each and one was for Rs.10,000/-. If the complainant wanted to make use of his position as the partner of Royal Finance, nothing could have prevented him or any other person in charge of Royal Finance from filling the cheque in favour of Royal Finance itself.

12. During the cross examination of P.W.1, it was suggested on behalf of the respondent/accused that he availed the loan of Rs.1,00,000/- from Royal Finance and gave a cheque as security for the said amount. When the accused was examined as D.W.1, he has stated about the three loans and the total of which comes only to Rs.60,000/-. During Sec.313 Cr.P.C, questioning, the accused completely denied the execution of cheque. The learned trial Judge had appreciated those inconsistencies in the defence statements and rejected the same.

13. The consistency of a statement has got more probative value than an inconsistent statement. If the respondent / accused prefers to take a stand that his transactions with Royal Finance had occasioned him to issue the impugned cheque and that was misused for the purpose of this case, his contention about the same should be consistent. This is especially so, when his alleged transactions with Royal Finance and the case transactions are claimed to be pertaining to different periods.

14. It is true that for the purpose of rebutting the initial presumption under Sec.139 of the Negotiable Instruments Act, the accused is at liberty to explore the improbabilities in the case of the complainant himself and use it in his favour. In this context it is relevant to refer the judgement of the Hon'ble Supreme Court reported in 2019(5) SCC 418 [Basalingappa Vs.Mudibasappa]. The relevant portion is under:



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"18. A Three-Judge Bench of this Court in Rangappa Vs. Sri Mohan, (2010) 11 SCC 441 had occasion to elaborately consider provisions of Sections 138 and 139. In the above case, trial court had acquitted the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed the judgment of the trial court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In Paragraph No.13, following has been laid down:-

"13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2- 2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."

19. After referring to various other judgments of this Court, this Court in that case held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No.26, following was laid down:-

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence



wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

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20. Elaborating further, this Court held that Section 139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant-accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:-

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the



complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

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21. After referring to various other judgments of this Court, this Court in that case held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No.26, following was laid down:-

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

22. Elaborating further, this Court held that Section 139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant-accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:-

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28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

15. As per the above decision, it is not always essential that the standard of rebuttal proof is strict liability like beyond reasonable doubt and it can be a through preponderance of probabilities. But in the case in hand the rebuttal circumstances taken up by the defence is not even consistent enough to rebut the initial presumption drawn in favour of the appellant /complainant.

16. The case of the appellant/complainant is not improbable in the absence of a consistent defence. The accused did not challenge the financial capability of the appellant /complainant to lend the cheque amount as loan. The complainant's denial about his partnership with Royal Finance is of no consequence to the accused, when the accused himself has given confusing statement about his transactions with Royal Finance. Though the learned trial Judge had appreciated this difference in the given time of the respective transactions and other circumstances, the learned Appellate Judge omitted to do so. Though the learned Sessions Judge had applied the right principle of law, that is not applicable to the facts and evidences available in the present case. Hence I feel that the judgement of the Session's Court is liable to be set aside.



In the result, this Criminal Appeal is allowed and the judgement of the learned Special Judge for EC Act cases, Salem, dated 24.06.2014 in C.A.No.119 of 2009 is set aside and the judgement of the conviction and sentence imposed in C.C.No.40 of 2013 on the file of the learned Judicial Magistrate-III, Salem, is confirmed. Consequently, connected miscellaneous petitions if any are also closed.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

jrs

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- 1.The Special Court for EC Act cases,
Salem.
- 2.The Judicial Magistrate-III,
Salem.
- 3.Through The Chief Judicial Magistrate, (For information)
Salem.
- 4.The Record Keeper, Criminal Section,
High Court, Madras.

+2ccs to Mr.R.Sankarasubbu, Advocate SR. No.66826 & 67387
+1cc to Mr.C.K.M.Appaji, Advocate SR. No.67421

Cr1.A.No.16 of 2015

JPL (CO)
PR (21/01/2022)