IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.12.2021

CORAM :

THE HONOURABLE MS.JUSTICE R.N.MANJULA

CRL.A.NO.196 OF 2015

S.Kamalakannan ...Appellant / Respondent

Vs.

S.Palanivel ...Respondent / Appellant

PRAYER : Criminal Appeal has been filed under section 378 of Criminal Procedure Code to set aside the order of acquittal dated 22.12.2014 made in Criminal Appeal No.33 of 2013 on the file of the Principal Sessions Court, Salem reversing the order of conviction and sentence dated 04.04.2013, on the file of the Judicial Magistrate No.II, Salem in S.T.C.No.671 of 2012.

For Appellant : Mr.P.Mathivanan

For Respondent : Mr.A.K.Kumarasamy, Senior Adv.
For Mr.S.Kaithamalai Kumaran

JUDGMENT

This Criminal Appeal has been preferred challenging the judgment of the learned Principal Sessions Judge, Salem, dated 22.12.2014 made in C.A.No.33 of 2013, reversing the judgment of the learned Judicial Magistrate No.II, Salem dated 04.04.2013 made in S.T.C.No.671 of 2012.

2. The appellant is the complainant before the trial Court. The case has arisen out of a private complaint given by the appellant by alleging that on 19.01.2012, the complainant gave a loan of Rs.30,00,000/- to the accused and for which, the accused has given a post dated cheque for a sum of Rs.30,00,000/- dated 20.02.2012. When the complainant presented the cheque for collection, it was returned with an endorsement “Insufficient Funds”. After issuing statutory notice and after complying the legal mandates, the complainant has filed the complaint against the accused for an offence under Section 138 r/w 142 of the Negotiable Instruments Act (hereinafter referred as N.I.Act). The case was taken on file by the learned Judicial Magistrate No.II, Salem, in S.T.C.No.671 of 2012 and the accused was questioned. Since the accused pleaded innocence, the trial was conducted.

3. During the course of trial, on the side of the complainant, complainant examined himself as PW.1 and 9 documents have been marked as Exs.P1 to 9. On the side of the defence, the accused examined himself as DW.1 and 3 documents were marked as Exs.D1 to 3.

4. After the conclusion of the trial and on consideration of the materials available on record, the learned trial Judge found the accused guilty for the offence under Section 138 of N.I.Act and convicted and sentenced him to undergo simple imprisonment for 6 months and also awarded a sum of Rs.30,36,000/- as compensation payable to the complainant; in default to undergo S.I for further period of 6 months. The accused challenged the above judgment by way of preferring first appeal before the learned Principal Sessions Judge, Salem and same was allowed on 22.12.2014 and the judgment of the learned Judicial Magistrate No.II, Salem was set aside. Aggrieved over that, the appellant has preferred this Criminal Appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the respondent.

6. The learned counsel for the appellant/complainant submitted that the respondent/accused did not deny the execution of the cheque but his only defence is that the cheque was stolen from his staff by name Sridhar and later it was misused for the purpose of filing the case; the respondent/accused had the knowledge about the dishonour of the cheque immediately after it was dishonoured and got SMS to his cell phone in this regard; the respondent/accused is known to the family of the complainant, since the accused and the father of the complainant are partners in a business firm called M/S.Surya Blue Metals; the probability of the defence was not established satisfactorily before the trial Court due to non-examination of the said Sridhar in whose custody the respondent/accused is said to have entrusted the said blank cheque; despite the same, the learned appellate Judge mislead himself and reversed the well reasoned judgment of the learned Judicial Magistrate No.II, Salem, without any basis. Hence the appeal has to be allowed.

7. The learned counsel for the respondent/accused submitted that the accused was a student at the time of the alleged transaction and it is not possible for him to lend a huge sum of Rs.30,00,000/- to the accused in cash; during his cross-examination, he admitted his financial status; the father of the complainant is enemical towards the accused due to certain misunderstanding between them in connection with the business run by them jointly; by stealing a cheque of the respondent/accused from the custody of staff Sridhar, the father of the appellant managed to file this case through the

appellant; the learned trial Judge omitted to appreciate the improbabilities in the case of the complainant and the learned appellate Judge has rightly appreciated the material on record and reversed the judgment of the trial Court; hence the appeal has to be dismissed.

8. Points for consideration:

"Whether the sentence and judgment of the lower Appellate Court reversing the judgment of the learned trial Judge is unfair, improper or not legal and in conformity with the offence proved to have committed by the accused?"

9. The fact that the appellant and the respondent are known to each other is not in dispute. The father of the appellant is a partner along with the respondent in a firm by name M/S.Surya Blue Metals as it is seen from Ex.P7. The signature on the cheque is not denied by the respondent/accused. When the execution of the cheque is not denied, a mandatory initial presumption has to be drawn in favour of the complainant under Section 118 and 139 of N.I.Act, that the impugned cheque was given for discharging a legally enforceable debt or liability. However, it is up to the accused to disprove the same through rebuttal evidence. It is well settled position of law that the standard of proof for the rebuttal evidence is not strict liability like proof beyond reasonable doubt, but it is through preponderance of probabilities.

10. In the case on hand, the respondent/accused has taken the defence that his blank cheque given to his staff by name Sridhar for paying the recurrent dues during his absence was stolen by the father of the appellant and later it was misused. The respondent/accused has not preferred any complaint immediately, when he came to know about the dishonour of the cheque. But he could expose through the cross-examination of PW.1 that PW.1 did not have any source of income to lend a huge loan of Rs.30,00,000/- to the accused.

11. Despite the appellant has filed income tax return, his evidence would reveal that such return has been filed only subsequent to the issuance of the statutory notice. The alleged loan amount was said to have been given by the appellant/complainant by way of hot cash. It is not established before the Court how he got such huge sum of Rs.30,00,000/- for advancing the same to the accused. In the complaint, the appellant has stated that after mobilizing the amount, he advanced the loan to the accused. So, it is obligatory for the appellant/complainant to show how he generated the said sum of Rs.30,00,000/- for the purpose of advancing it to the accused. The alleged transaction pertains to January 2012. The evidence of DW.1 would reveal that he had completed his study only during

April 2011. He had the acquaintance of the accused through his father. But however he has stated that he did not enquire anything as to the repaying capability of the accused. Despite the accused was known to the appellant's father and his father was also a partner in the same firm, where the accused is also a partner, the complaint is said to have taken the risk of lending money to the accused without enquiring the repaying capability of the accused. The above said facts would only enhance the improbabilities of the transaction.

12. The learned counsel for the respondent/accused submitted that the accused was the student at the time of transaction and did not have any independent source of income to mobilize a huge sum of Rs.30,00,000/-. Even according to the income tax returns filed by the appellant/complainant, it is seen that his annual income is somewhere between Rs.6 to 7 lakhs alone. Though the initial presumption is under Section 139 of N.I.Act should always given in favour of the complainant, when the accused could establish his prima facie defence on the basis of some reliable facts and circumstances, the burden would again shifted on the complainant to establish his case beyond the level of initial presumption. In the case in hand from the cross examination of PW.1 itself, it is proved that the complainant was only a student and he did not have financial capacity to generate a huge sum of Rs.30,00,000/- in order to give it as a loan to the accused.

13. Already certain disputes are pending between the father of the appellant and the accused. In fact some civil litigations have been filed by the father of the complainant and it is pending before the civil Courts. During the cross examination of DW.1, it was suggested to him that even before 14.10.2012, the father of the defacto complainant has filed a civil suit against the accused and others. In such a case, it is not possible that for the complainant to believe and lend a huge sum of Rs.30,00,000/- to a person who is in loggerheads with his own father.

14. Regarding the rebuttal that has to be produced by the accused in the cases of this nature, the accused need not necessarily prove his defence by way of letting in evidence or producing documents from his side. Even without doing so, the rebuttal proof can also been culled out from the improbabilities from the case of the complainant. Or in other words, the improbabilities in the case of the complainant would serve as preponderance of probability in favour of the accused. In this context, it is relevant to refer the decision of the Hon’ble Supreme Court rendered in Basalingappa -vs- Mudibasappa reported in 2019 (5) SCC 418. In the said judgment, it is held as under:-

13. This Court in Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35] had occasion to consider Section 118(a) of the Act. This Court held that once execution of the promissory note is admitted, the presumption under Section 118 (a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In para 12, the following has been laid down : (SCC pp. 50-51)

> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon his failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be

held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

14. S.B. Sinha, J. in M.S. Narayana Menon v. State of Kerala [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] had considered Sections 118(a), 138 and 139 of the Act, 1881. It was held that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, the following was held in para 28 : (SCC p. 49)

"28. What would be the effect of the expressions "may presume", "shall presume" and "conclusive proof" has been considered by this Court in Union of India v. Pramod Gupta [Union of India v. Pramod Gupta, (2005) 12 SCC 1] , in the following terms : (SCC pp. 30-31, para 52)

'52.…It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section

42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof".' "

15. It was noted in M.S. Narayana Menon case [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] , that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, 1872 the following was laid down in para 30 : (SCC p. 50)

> "30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant

could be relied upon."

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20. A three-Judge Bench of this Court in Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] had occasion to elaborately consider the provisions of Sections 138 and 139. In the above case, the trial court had acquitted the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed [Mohan v. Rangappa, 2005 SCC OnLine Kar 783] 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 para 13, the following has been laid down : (SCC p. 446)

"13. The High Court in its order [Mohan v. Rangappa, 2005 SCC OnLine Kar 783] 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."

15. In the present case, the improbabilities in the case of the complainant has been shown to the Court by proving that the complainant himself was a student and did not have his own source of income and he had filed income tax returns only subsequent to the notice sent in this case. It is further shown that the father of the defacto complainant was having some business misunderstanding with the respondent/accused. In these

circumstances, it is highly unbelievable that the young boy like the complainant has lent a huge sum of Rs.30,00,000/- by way of cash to a person who was not in cordial term with his father. The learned First Appellate Judge had adverted to this improbabilities in the case of the complainant and chosen to appreciate the same as the preponderance of probability in favour of the accused and in consequence, thereof, the judgment of the trial Court, was reverted. Hence I find no reason to interfere with the judgment of the lower appellate Court.

16. In the result, this Criminal Appeal is dismissed. The judgment of the Principal Sessions Court, salem, dated 22.12.2014 passed in C.A.No.33 of 2013 is confirmed.

Sd/-
Assistant Registrar

// True Copy //

Sub Assistant Registrar

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To

1.The Principal Sessions Judge,
Salem.

2.The Judicial Magistrate No.II,
Salem.

3.The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to M/s.S.Kaithamali Kumaran, Advocate SR.No.66849

Crl.A.No.196 of 2015

VG-II(CO)
RVM(24/01/2022)