



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	15.11.2021
PRONOUNCED ON	16.12.2021

CORAM :

THE HONOURABLE MS.JUSTICE R.N.MANJULA

CRIMINAL APPEAL NO.781 OF 2017

V.Valarmathi ...Appellant / Respondent/ Complainant

Vs.

N.Chitra ...Respondent / Appellant / Accused

PRAYER : This Criminal Appeal filed under Section 378 Cr.P.C., against the order of acquittal dated 02.06.2017 made in C.A.No.179 of 2016 on the file of the II Additional District and Sessions Court, Erode reversing the Order dated 03.10.2016 made in S.T.C.No.153 of 2014 on the file of the Judicial Magistrate, FTC, No.II, Erode.

For Appellant : Mr.Arun Anbumani
for Mr.G.Guruprasad

For Respondent : Mr.N.Manokaran

JUDGMENT

This Criminal Appeal has been filed by the appellant/complainant to set aside the order of acquittal dated 02.06.2017 made in C.A.No.179 of 2016 on the file of the II Additional District and Sessions Court, Erode, reversing the Order dated 03.10.2016 made in S.T.C.No.153 of 2014 on the file of the learned Judicial Magistrate, Fast Track Court, No.II, Erode.

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

This case has arisen due to dishonour of the cheque issued by the respondent /accused. The appellant in this appeal is the complainant before the trial Court. The appellant/complainant has filed a private complaint against the respondent/accused to punish him for the offence under Sec. 138 of the Negotiable Instruments Act. 1883.

2.1. It is alleged in the complaint that the accused had availed a loan of Rs.25,00,000/- from the complainant on



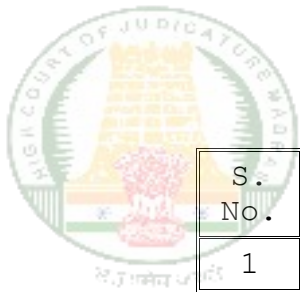
10.01.2013; on the same day, the accused had issued a post dated cheque (Ex.P.1) dated 21.01.2014 for a sum of Rs.25,00,000/-, drawn on City Union Bank, Thiruchengodu Branch. When the complainant presented the cheque for collection through his Karur Vysya Bank, Erode Branch, it was returned on 25.01.2014 as "Payment Stopped by the drawer". Thereafter, the complainant issued a statutory notice to the accused on 25.01.2014 and the notice was returned on 28.01.2014 as refused, and thereafter, the complainant has filed the private complaint before the Court against the accused for the commission of offence under Sec.138 of the Negotiable Instruments Act.

2.2. Thereafter, the case was taken on file and during the course of trial, on the side of the complainant, the complainant was examined herself as PW.1 and six documents were marked as Exs.P.1 to P.6. On the side of the accused, three witnesses have been examined as DWs.1 to D.W.3 and Exs.D.1 to D.9 were marked.

3. After the conclusion of the trial and on considering the materials available on record, the learned trial Judge found the accused guilty for the offence under Sec.138 N.I. Act and convicted and sentenced him to undergo one year simple imprisonment and imposed a fine of Rs.5000/-, in default to undergo three months simple imprisonment. The accused challenged the above judgement by filing an appeal before the II Additional Sessions Court, Erode in CrI.A.No.179 of 2016 and the same was allowed and the judgement of the trial Court was set aside. Aggrieved over that, the complainant has preferred this Criminal Appeal.

4. Heard the submissions of Mr. Arun Anbumani, learned Counsel for the Appellant/complainant and Mr. N.Manokaran, learned Counsel for the respondent/accused.

5. The learned counsel for the appellant submitted that the learned Appellate Judge has himself held that the preponderance of probabilities is in favour of the respondent/accused and that the alleged transaction between the appellant/complainant and the respondent/accused is false and that the cheque was not issued for legally enforceable debt. It is further submitted that if the executants admits the execution of the cheque, the holder of the cheque is entitled to a presumption that the cheque was issued for a legally enforceable debt. But the learned Appellate Judge had wrongly dislodged the said presumption and acquitted the accused by accepting the improbable defence taken up by the respondent/accused. In support of his arguments, the learned counsel for the Appellant/complainant relied on the following citations:



WEB COPY

S. No.	Name of the parties	Citation particulars
1	Rangappa Vs Sri Mohan	2010(11)SSC 441
2	Uttam Ram Vs. Devinder Singh Hudan and another	2019 (10) SCC 287
3	Sumeti Vij Vs. Paramount Tech Fab Industries	2021(2)CTC 579

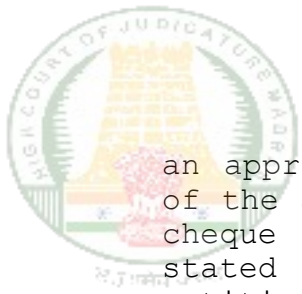
6. The learned counsel for the respondent/accused submitted that the impugned cheque was not issued by the respondent/accused for discharging any legally enforceable debt; but it was stolen by the appellant/complainant and it was misused to file this case. Further the petitioner/complainant does not have any financial capability to give such a hefty sum of Rs.25,00,000/- as loan to the accused. Though the initial presumption lies in favour of the complainant, if the same was rebutted through contrary proof offered by the accused, then the initial presumption as to legally enforceable debt will get reversed. It is further submitted that in order to disprove the initial presumption the accused need not even get into the box and substantiate his defence and it is sufficient if the improbabilities of the case of the complainant is exposed before the Court. The learned counsel for the respondent relied on the following decisions in support of his defence:

S. No.	Name of the parties	Citation particulars
1	Basalinga Vs.Mudibasappa	2019(5) SCC 418
2	John K.Abraham Vs. Simon C.Abraham	2014(2) SCC 236
3	John K.John Vs. Tom Varghese and another	2007(12) SCC 714
4	Kumar Exports Vs. Sharma Carpets	2009(2) SCC 513
5	Chandrappa and others Vs. State of Karnataka	2007(4) SCC 415

7. The point for consideration is

Whether the judgment of the learned Sessions Judge in acquitting the accused from the offence under sec.138 of the Negotiable Instruments Act basing on the materials available on record is fair and proper?

8. The complainant and the accused are already known to each other as family friends. The respondent/ accused is working as



an appraiser in the City Union Bank, Thiruchencode. The husband of the accused is doing jewellery business. The signature in the cheque (Ex.P.1) was not disputed by the accused. However she has stated that since the cheque was stolen by the petitioner/complainant she advised her banker to stop payment. It is claimed by the petitioner/complainant that the presumption under Sec.139 of the Negotiable Instrument Act cannot be denied to the complainant if the execution of the cheque was not disputed and no rebuttal evidence is produced to shatter the said presumption.

9. Both the presumption contemplated under Sec.118 and 139 of the Negotiable Instruments Act are mandatory presumptions. It is relevant to extract the provisions:

"Section 118 in The Negotiable Instruments Act, 1881
118 Presumptions as to negotiable instruments. -Until the contrary is proved, the following presumptions shall be made:-

(a) of consideration -that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date -that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance -that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer -that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements -that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps -that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course -that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 139- Presumption in favour of holder-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of nature



Rs.25,00,000/- as loan to the accused during the month of November-2013.

14. Before advertng into the probative value of the rebuttal circumstances or proof, it is relevant to highlight the defence of the accused. According to the respondent/accused, four cheques bearing cheque Nos.001055, 001056, 001057 and 001058 were stolen. The account statement of the accused has been produced by the defence and it is marked as Ex.D4 series. It is seen from Ex.D4 that on 20.09.2013 in connection with the cheque No.001055, a sum of Rs.112.36 has been debited from the account of the respondent towards bank charges.

15. It is interesting to note from the evidence of PW.1 that the earlier cheque given by the accused for a sum of Rs.5,00,000/- was dishonoured on 19.9.2013, 'for want of funds'. When it was suggested to PW.2 that the earlier dated cheque for Rs.5,00,000/- was returned only because the holder stopped the payment, she asserted that it was returned due to 'insufficient funds'. It is difficult to understand why the defacto complainant had given a very hefty loan of Rs.25,00,000/- to a person in the month of November-2013 to a person, when the earlier cheque issued for the very same person in the month of September-2013 for a sum of Rs.5,00,000/- was dishonoured.

16. PW.1 has stated in her evidence that she did not have any proof to show that she was in possession of Rs.25,00,000/- during the relevant period in order to give it as a loan to the respondent/accused. As it stated already the standard for rebuttal proof can be inferred even from the improbabilities exposed in the case of the prosecution. When the financial capability of the complainant is challenged by showing a prima-facie proof or circumstance, it is obligatory on the part of the complainant to substantiate her financial potential for lending the amount involved in the cheque to the accused. But the petitioner/complainant has failed to undertake such an exercise and rebuild the presumption once again in her favour.

17. In this context of reverse burden on the part of the accused, it is relevant to refer the judgement of the Supreme Court reported 2019(5) SCC 418 [Basalingappa Vs.Mudibasappa]. The relevant portion is under:

"20. 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,



WEB COPY

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."

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



WEB COPY

standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence."

18. So the standard of rebuttal proof that need to be produced by the accused is not necessarily strict proof beyond reasonable doubt. It is sufficient if the probabilities are proved through preponderance. Hence, the accused need not necessarily get into the box and subject himself for examination or produce any records of his own. And it is sufficient that he could bring out the improbable facts and circumstances from the case of the complainant. Because the object of punishment contemplated u/s 138 N.I. Act for dishonour of cheque is for improving the creditability of the Negotiable Instruments exchanged during commercial transactions and to ensure business viability and not the deterrence of criminals.

19. Though it is open to the accused to cull out the improbabilities from the case of the complainant, in the present case, the respondent /accused had come to the box and got herself examined. She was also subjected to the examination by the complainant. The admissions given by PW.1 during her cross-examination, the materials produced as defence side documents coupled with the evidence of DW.3 would show that the accused did not take a casual defence.

20. Though, it might be an exaggeration on the part of the accused to state that the complainant had stolen away her cheques when she came to her house in order to see her sick husband, there are materials to probablise her defence that the impugned cheque was not supported by consideration and it was not given for discharging a legally enforceable liability or debt. A person, who already aggrieved due to non payment of a money-due by a debtor, would not dare to give an another enhanced loan to the same debtor and that too without any security. This is especially clear from the fact established by



the defence through Ex.D2/receipt that after the sale transaction between the complainant and the accused, the accused did not owe any money to her.

21. The appellate Court has evaluated the facts and circumstances and other materials available in this case and gave due weight to the preponderance of probabilities established by the defence. Since the case of the defence is more probable and strong enough to improbabilise the case of the complainant, it has chosen to reverse the judgement of the Trial Court. In my opinion, the judgement of the learned II Additional District and Sessions Court, Erode does not suffer from any factual or legal infirmity and hence it does not warrant any interference.

22. In the result this Criminal Appeal stands dismissed and the Judgement of the learned II Additional District and Sessions Judge dated 02.06.2017 made in C.A.No. 179 of 2016 is upheld. Connected Criminal Miscellaneous Petitions if any are also closed.

Sd/-

Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

jrs

Copy to

- 1.The II Additional District and Sessions Court,
Erode.
- 2.The Judicial Magistrate,
FTC, No.II, Erode.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Record Keeper,
Criminal Section,
High Court, Madras.

+1cc to M/s.N.Manokaran, Advocate Sr.No.67764

+1cc to Mr.M.Guruprasad, Advocate Sr.No.68062

CrI.A.No.781 of 2017

SRA (CO)
RVM(30/12/2021)