IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.04.2023

PRONOUNCED ON: 26.04.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

Crl.A.No.172 of 2022

B.Sukumar ... Appellant

Vs.

M.Kasturi ... Respondent

PRAYER: Criminal Appeal filed under Section 378 of Cr.P.C. to set-aside the judgment and order dated 26.02.2021 in C.C.No.3465 of 2017 passed by the learned Fast Track Magistrate – I, Allikulam, Egmore at Chennai.

For Appellant : Mr.P.Ravishankar

For Respondent : Mr.R.Anand Kumar

JUDGMENT

Challenging the judgment of acquittal passed by the learned Metropolitan Magistrate, Fast Track Court No.1, Egmore, Chennai in C.C.No.3465 of 2017 dated 26.02.2021, the present Criminal Appeal has been filed.

2. The fact of the case is that the appellant is the complainant and the respondent is the accused in C.C.No.3465 of 2017 on the file of the Metropolitan Magistrate, Fast Tract Court – I, Egmore, Chennai. The case of the appellant/complainant is that the accused, being a family friend of the complainant, requested Rs.12 lakhs as a hand loan from the complainant. So the complainant gave that amount on 20.07.2015. The accused agreed to repay the above amount with 27% interest and he has also executed a mortgage upon his property in favour of the appellant/complainant towards the hand loan obtained by her. Since the accused has not repaid the interest promptly, the complainant demanded the amount with interest. In order to repay the amount, the accused issued two cheques drawn on Axis Bank,

Nungambakkam Branch for a sum of Rs.5 lakhs bearing cheque No.041472 dated 27.03.2017 and another cheque for a sum of Rs.3 lakhs bearing cheque No.041473 dated 03.04.2017. When the appellant/complainant presented the cheques in his bank for encashment, the cheque for Rs.5 lakhs was returned with an endorsement 'signature differs' on 30.03.2017 and the second cheque issued for a sum of Rs.3 lakhs was returned on the ground of 'funds insufficient' on 07.04.2017. After issuing legal notice to the accused through his lawyer, calling upon the respondent/accused to pay the cheque amount, since the amount remained unpaid, the complainant filed a complaint for the offence under section 138 of Negotiable Instruments Act. Before the trial Court, the complainant examined himself as P.W.1 and filed 7 documents. The accused examined herself as D.W.1 and filed 3 documents. On consideration of the evidence of the parties, the trial Court found the accused not guilty and acquitted the accused from the offence under section 138 of the Negotiable Instruments Act. Aggrieved by the acquittal Order, the complainant filed the present appeal.

3. The learned counsel appearing for the complainant would submit

that the acquittal Order of the trial Court is against the evidence on record and law. The trial Court has not properly considered the evidence and documents filed by the complainant. The accused had not denied his signature in the disputed cheques. The complainant has discharged his burden that the cheques have been issued towards lawful debt and it is for the accused to discharge the presumption under sections 118 and 139 of the Negotiable Instruments Act that the cheques have not been issued towards discharge of legally enforcible debt. In this case, the accused failed to discharge his burden and not properly rebutted the presumption under section 139 of the Negotiable Instruments Act. The trial Court over looked the two presumptions under sections 118 and 139 of the Negotiable Instruments Act and thus pleaded to allow this Criminal Appeal and to convict the accused.

4. The learned counsel appearing for the respondent/accused would support the acquittal order passed by the trial Court and contended that the cheques issued by the respondent/accused were only towards collateral

security wherein the respondent mortgaged her property in favour of the appellant bearing S.No.28/11 comprising of 1199 sq.ft of landed building in South Chennai Registration district Alandur Sub Registration District Kanchipuram District Ullagram Village which was registered as document No.2870/2015. He further submitted that at the time of constructing the house, as the respondent was in need of money, she borrowed a sum of Rs.5,00,000/- from one Mr. Chandrasekar by way of pledging her property. Thereafter, since the amount borrowed from Mr.Chandrasekar was not sufficient, the respondent approached the appellant, who was introduced by her sister and obtained a loan of Rs.12 lakhs from the appellant by pledging her property. At the time of obtaining the loan, the respondent has stated to the appellant that she had already pledged her property for a sum of Rs.5,00,000/- to another person and after payment of the said loan, she would transfer that mortgage in the favour of the Appellant, for which the appellant also accepted. Thereafter, the respondent repaid the loan to the said Chandrasekaran and the appellant directly received the mortgage cancellation deed and retained the same with him. After receiving the cancellation deed, the respondent issued two blanks cheques, without signature or date or amount filled in was the cheques and on receipt of the cheques, the appellant gave a sum of Rs.5,50,000/- and when the respondent asked for the remaining amount, the appellant gave details in a paper indicating Stamp expenses, Registration charges, car diesel expenses, car driver expenses, hotel expenses and cancellation charges for the earlier document and advocate fees for himself in all totaling to a sum of Rs.1,50,000/-. But in reality the entire expenses towards the cancellation deed and charges were borne equally by the respondent and the said Chandrasekar. It is the further contention of the respondent that the Appellant was always trying to grab property of the respondent in one way or the other, for instance though having filed this complaint, fearing and knowing that he would not succeed in the same, immediately in the year 2018, he filed an Original Suit in O.S.No.54 of 2018 on the file of the Additional District Judge at Chengalput and a decree came to be passed in his favour on 17.10.2022. Hence, pleaded to dismiss the criminal appeal as the trial Court rightly acquitted the accused. There is no ground for interference with the finding of the trial Court.

5. I have considered the case in the light of the submissions made by the learned counsel for the parties and also perused the materials available on record carefully.

6. The case of the complainant is that the respondent/accused had borrowed a sum of Rs.12 lakhs as a hand loan from the complainant and agreed to repay the amount with 27% interest. The respondent paid interest only for a short period and not paid the interest as agreed. On demanding repayment of the loan amount, the accused gave two cheques i.e., drawn on Axis Bank, Nungambakkam Branch for a sum of Rs.5 lakhs bearing cheque No.041472 dated 27.03.2017 and another cheque for a sum of Rs.3 lakhs bearing cheque No.041473 dated 03.04.2017. When the appellant/complainant presented the cheques in his bank for encashment, the cheque for Rs.5 lakhs was returned with an endorsement 'signature differs' on 30.03.2017 and the second cheque issued for a sum of Rs.3 lakhs was

returned on the ground of 'funds insufficient' on 07.04.2017. Hence, after issuing legal notice, the complaint has been filed.

7. The appellant/complainant's case is that the respondent/accused towards repayment of hand loan of Rs.12 lakhs advanced by the appellant/complainant to the respondent/accused had issued two cheques, i.e., Ex.P.2 Axis Bank Cheque bearing No.041472 dated 27.03.2017 for a sum of Rs.5 lakhs and Ex.P.4 Axis Bank Cheque bearing No.041473 dated 03.04.2017 for a sum of Rs.3 lakhs. Among the above two cheques, one cheque i.e., Ex.P.2 Cheque bearing No.041472 dated 27.03.2017 for a sum of Rs.5 lakhs was returned by the bank vide Memo Ex.P.3 on 28.03.2017 for the reason 'drawer's signature differs'. Another cheque Ex.P.4 bearing No.041473 dated 03.04.2017 for a sum of Rs.3 lakhs was returned vide bank Memo Ex.P.5 dated 06.04.2017 for the reason 'funds insufficient'.

Section 138 Negotiable Instruments runs as follows :

138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [20] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

A reading of the said provision makes it clear that the offence under section 138 of the Negotiable Instruments will attract if the disputed cheque was returned by the bank unpaid either because of the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank. So far as this case is concerned, Ex.P.2 cheque bearing No.041472 dated 27.03.2017 for a sum of Rs.5 lakhs has been returned for reason drawer's signature differs. So, it will not make an offence attracting Section 138 of the Negotiable Instruments Act. Therefore, the prosecution with regard to the cheque Ex.P.2 bearing No.041472 dated 27.03.2017 for a sum of Rs.5 lakhs is unsustainable. With regard to another cheque Ex.P.4 bearing No.041473 dated 03.04.2017 for a sum of Rs.3 lakhs, the same was returned as per Memo Ex.P.5 for the reason 'funds insufficient'.

8. The Honourable Supreme Court in Hitn P. Dalal Vs. Bratindranath Banerjee reported in [2001] 6 SCC 16 has held that held that Sections 138 and 139 of the Negotiable Instruments Act require that the Court shall presume liability of the drawer of the cheques for the amounts for which the cheques are drawn and in view of the Section 139 of the Negotiable Instruments Act, it has to be presumed that the cheque was issued in discharge of any debt or other liability. But the presumption can be rebutted by adducing evidence. In this case, the accused has sufficiently let in evidence that the disputed cheque was not given in discharge of repayment of the liability of the amount and only as a security, given along with the mortgage deed. Further, upon the mortgage deed, the complainant has already filed a suit in O.S.No.54 of 2018 on the file of the Additional District Court, Chengalpet and decree has also been passed in the above suit

on 17.10.2022. The trial Court in its impugned judgment in para 29 has discussed about the rebuttal of the presumption by the accused.

9. In the light of evidence on record indicating the circumstances in which the cheque Ex.P.4 was given by the accused to the complainant as security and that the accused had satisfactorily let in evidence that the cheque was not issued towards discharge of the loan obtained from the complainant. The loan was obtained based on the mortgage deed, for which the complainant had already filed a suit in O.S.No.54 of 2018 and obtained a decree on 17.10.2022. In the totality of the above circumstances, the trial Court has perfectly justified in its conclusion that the complainant had failed to make a case against the accused and the trial Courtacquitted the accused from the offence under section 138 of the Negotiable Instruments Act. Therefore, I do not find no ground to interfere with the finding of the trial Court. there is no merit in this Criminal Appeal.

10. Accordingly, this Criminal Appeal stands dismissed and the

Judgtment of the trial Court in C.C.No.3465 of 2017 is confirmed.

26.04.2022

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To

The Metropolitan Magistrate,
Fast Track Court No.1, Chennai.

V.SIVAGNANAM, J.

vrc

Judgment in

Crl.A.No.172 of 2022

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