IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.01.2023

PRONOUNCED ON : .03.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

Crl.A.No.681 of 2022

Kumar ... Appellant

Vs.

P.K.Raja ... Respondent

PRAYER: Criminal Appeal filed under Section 378 of Cr.P.C. to set-aside the order passed by the Hon'ble III Additional District and Sessions Judge, Kallakurichi in Criminal Appeal No.61 of 2018 against the order in C.C.No.182/2016 dated 26.07.2018 by the learned Fast Track Judicial Magistrate, Kallakurichi, allowing the Criminal Appeal by set asiding the conviction and sentence passed by the Court.

For Appellant : Mr. Mohammed Aseef G. Raja

For Respondent : Mr. D. Vijaya Babu

ORDER

Challenging the order passed by the III Additional District and Sessions Judge, Kallakurichi in Crl.A.No.61 of 2018, dated 29.03.2019 by setting aside the conviction and sentenced passed by the learned Judicial Magistrate, FTC Court, Kallaurichi in C.C.No.182 of 2016, dated 26.07.2018, the present Criminal Appeal has been filed.

2. The case of the prosecution is that in the month of January 2014, the respondent/accused had borrowed a sum of Rs.45 lakhs for his urgent family expenses from the petitioner/complainant. Though the petitioner/complainant asked to repay the said amount, the respondent/accused failed to repay the same. Thereafter, the

respondent/accused gave a cheque bearing No.446833, drawn on State Bank of India, Chinnasalem Branch in favour of the petitioner/complainant. When the cheque was presented for collection in the Central Bank of India, Kallakurichi Branch, it was returned with an endorsement "insufficient funds." Thereafter, on 03.06.2015, the petitioner/complainant issued a legal notice to the respondent, in turn, he sent a reply dated 06.06.2015. Since the respondent/accused gave a cheque to the petitioner without having sufficient funds in his bank account, only with an intention to cheat the petitioner/complainant, a complaint under section 138 of Negotiable Instrument Act has been given.

3. After recording the sworn statement of the complainant and after perusal of the documents, the Trial Court taken cognizance of the offence under section 138 of N.I.Act and on questioning, the accused denied the same as false. In order to prove the case of complainant, he examined himself as P.W.1 and Ex.P.1 to Ex.P.7 were marked.

4. When the incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. To prove his case, he examined himself as RW1 and marked Ex.R1 to Ex.R9.

5. Having considered all the materials, the Trial Court convicted the accused under Section 138 and 142 and sentenced to under go simple imprisonment for one year and to pay a fine of Rs.45 lakhs as compensation, in default, to under go simple imprisonment for 3 months. Challenging the above conviction and sentence, the accused preferred an appeal before the lower appellate Court in Crl.A.No.61 of 2018 and the lower Appellate Court, by order dated 29.03.2019, allowed the same by setting aside the order passed by the Trial Court. Challenging the same, the appellant/complainant is before this Court with this appeal.

6. The learned counsel for the appellant/complainant submitted that the appellant is the complainant and the respondent is the accused. The

respondent/accused borrowed a sum of Rs.45 lakhs from the complainant in the month of January 2014. To repay the said amount, the accused gave a State Bank of India cheque bearing No.446833, dated 06.05.2015 for a sum of Rs.45 lakhs. The complainant presented the cheque for encashment, which was dishonoured by the Bank due to insufficient funds in his account. Thereafter, the complainant sent a legal notice as required by Act demanding payment of the cheque amount, but not paid by the respondent. Thereafter, filed the complaint under Section 138 of N.I.Act.

7. Before the Trial Court, the accused took the defence that he has not borrowed the amount of Rs.45 lakhs and he has no financial capacity to pay the amount. The Trial Court, considered all the aspects and evidence and by invoking the presumption under Section 139 of NI Act, found that the accused failed to rebut the presumption under Section 118 and 139 of NI Act and found him guilty and convicted him.

8. Aggrieved by this, the accused filed an appeal in Crl.A.No.61 of 2018 on the file of the III Additional District and Session Court, Kallakurichi. The lower appellate Judge without appreciating and considering the presumption in favour of the complainant under Section 139 of Negotiable Instrument Act and without considering the evidence adduced by the complainant, materially erred in acquitting the accused. Further contended that the accused had admitted issuance of cheque and his signature in the cheque. Therefore, there is a presumption under Section 139 of N.I.Act in favour of the complainant. The onus thereafter would be upon the accused to rebutt the presumption. For that, the accused has to let in evidence, but, he had not let in sufficient evidence to rebutt the presumption. Therefore, the lower appellate court materially erred in acquitting the accused. Hence, prayed to set aside the acquittal order passed by the lower Appellate Court and thus pleaded to convict the accused.

9. In support of his argument, the learned counsel placed the following decisions:

(i) 2021 (5) SCC 283 (Kalamani Tex & anr /vs/ Balasubramanian)

(ii) 2019(18) SCC 106 (Rohit Jivanlal Patel /vs/ State of Gujarat & anr)

(iii) 2020(12) SCC 724 (APS Forex Services Private Ltd /vs/ Shakthi Internation Fashion Linkers & ors)

(iv) 2019 (10) SCC 287 (Uttaram /vs/ Devindra Singh Hudan & anr)

(v) 2019(4) SCC 197 (Bir Singh /vs/ Mukesh Kumar)

(vi) 2015 SCC online Ker 26020 (K.V.Hameed /vs. State of Kerala)

(v) 2001 (6) SCC 16 (Hiten Dalal /vs/ Bratindranath)

10. The learned counsel appearing on behalf of the accused supported the acquittal order passed by the Lower Appellate Court. Further contended that the appellate Court has not committed any error in acquitting the accused. The accused admitted his signature in the cheque. But, the complainant failed to let in evidence to show his financial capacity to pay Rs.45 lakhs to the accused on the alleged debt. Under such circumstances, he pleaded to dismiss the appeal. The learned counsel also placed the

judgments of the Hon'ble Supreme Court in ***2019(5) SCC 418 (Basalingappa /vs/Mudibasappa), 2010(11) SCC 441 (Rangappa /vs/ Srimohan), 2013(3) SCC 86 (Vijay /vs/ Laxman & another*** and ***2014(2) SCC 237 (John k.Abraham /vs. Simon C.Abraham & another)***

11. I have considered the argument placed by the learned counsel for the parties and perused the records.

12. The appellant is the complainant and the respondent is the accused. According to the complainant, the accused borrowed a sum of Rs.45 lakhs from the complainant for his business and family expenses in the month of January 2014. At that time, the complainant possessed sufficient money by selling his house on 12.12.2013. The accused did not repay the amount at request he gave a State Bank, Chinnasalem Branch, cheque bearing No.446833, dated 06.05.2015 for the amount of R.45 lakhs. The complainant presented it for encashment, which was returned for the reason of insufficient funds. Hence, he had issued legal notice on

03.06.2015. The accused received the notice on 06.06.2015, but the amount remain unpaid. Hence, lodged the complaint for the offence committed under Section 138 of NI Act. On perusal of records and evidence, it is noticed that the signature on the cheque Ex.P.1 is not denied by the accused, hence, the presumption under Sections 118 and 139 of NI Act shall be raised, that, the cheque was issued in discharge of any debt or liability.

13. The question whether the accused had to pay the money to the complainant and whether the accused had issued cheque as well as all other question on fact have to be established on evidence. Section 139 of the Act, which lays down:-

> " *It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability"*

14. Section 139 creates a statutory presumption that a cheque, received in the nature referred to under Section 138 of the Act, is always issued in discharge of debt or other liability. Therefore, it is not necessary for a complainant to specifically plead that the cheque, which was issued to him and dishounoured by the Bank was in fact issued in the discharge of a debt or a liability. However, it is for the accused to show that the cheque was not issued in discharge of any debt or other liability. By reading Sections 138 and 139 of the Act together, it becomes abundantly clear that it is or the accused to show that the cheque issued by him and dishonoured by the Bank was not in the discharge of any debt or liability.

15. Further on a perusal of the impugned judgment and the order of acquittal passed by the lower appellate Court, I find there is no re-appreciation of the entire evidence on record in detail while acquitting the respondent/accused. The lower appellate Court only reproduced the written argument filed by the accused. There is no re-appreciation of the entire evidence on record in detail, which ought to have done by the lower

appellate court while dealing with the order of judgment and conviction passed by the trial Court. Since it is the appeal on the order of conviction passed by the Trial Court, it is required to re-appreciation the entire evidence on record and also the reasoning given by the Trial Court while convicting the accused. Non re-appreciation of evidence on record may affect the case of either the prosecution or even the accused, being the appellate Court, the District and Sessions Judge ought to have re-appreciated the entire evidence on record without any legal limitation. The approach of the Lower Appellate Court in non dealing of evidence is illegal to meet the ends of justice.

16. Therefore, I am of the opinion that the impugned order passed by the Lower Appellate Court has to be set aside acquitting the respondent/accused without any re-appreciation of evidence and to the reasons given by the Trial Court while convicting the accused without re-appreciating the entire evidence on record in detail cannot be sustained and the same deserves to be set aside and therefore, the matter deserves to be

remanded back to the lower appellate court to deal with the appeal afresh in accordance with law and on its own merits.

17. In view of the above and for the reason stated herein above and without going to the merits of the case, the present Criminal Appeal is allowed and the order dated 29.03.2019 passed by the III Additional District and Sessions judge, Kallakurichi in Crl.A.No.61 of 2018 acquitting the accused from the offence under Section 139 of NI Act is hereby setaside and the matter is remanded back to the lower Appellate Court to deal with the appeal afresh. The Lower Appellate Court is directed dispose the appeal in accordance with law on its own merits within a period of two months from the date of receipt of a copy of this order.

01.03.2023

mrp

To

1. The Sessions Judge,
   III Additional District and Sessions Judge, Kallakurichi.

2. The Judicial Magistrate,
   Fast Track Court, Kallakurichi,

V.SIVAGNANAM, J.,

mrp

Pre-delivery order in

Crl.A.No.681 of 2022

01.03.2023