IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :26.02.2024

CORAM

THE HONOURABLE MRS. JUSTICE R. KALAIMATHI

Crl.A.No. 457 of 2018

A. Senthilkumar ... Appellant

Vs.

R.Mahesh Kumar ... Respondent

PRAYER: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, to set aside the judgment of acquittal passed in Crl.A.No.133 of 2016 dated 14.10.2017 by the learned V Additional District & Sessions Judge, Coimbatore and confirm the judgment of Conviction of the Respondent in C.C.No. 36 of 2014 dated 26.09.2016 by the Judicial Magistrate, Fast Track Court No. II, (Magistrate level), Coimbatore.

For Appellant : Mr. L.S.M. Hasan Fizal

For Respondent : Mr. V.Sivakumar

JUDGEMENT

Being aggrieved by the order of acquittal passed in Criminal Appeal No. 133 of 2016 dated 14.10.2017 by the V Additional District & Sessions Judge, Coimbatore, the complainant has preferred this criminal appeal.

2. In the complaint presented before the Judicial Magistrate, Fast Track Court No. II, (Magistrate level), Coimbatore under Section 138 of N.I Act, the accused was convicted and sentenced to undergo one year simple imprisonment and to pay a fine of Rs. 10,000/- and directed to pay compensation of Rs. 3,15,000/- being the cheque amount to the complainant within one month as per section 357(2) of Criminal Procedure Code.

3. The case of the complainant in brief is as follows:-

(i) The accused herein borrowed a sum of Rs. 3,15,000/- from the complainant on 14.07.2011 for his urgent business expenses, promising to repay the said amount within a period of six months from the date of borrowal. The accused issued a post dated cheque dated 19.01.2012 bearing No. 226236 drawn on Bank of Rajastan Limited, SVMHSS, Coimbatore Branch, Velandipalayam for the above said amount.

(ii) Upon the assurance of the accused after six months period, the complainant deposited the cheque for encashment through his banker, Corporation Bank, GKNM Branch, Coimbatore on 19.01.2012 and the cheque was dishonoured for the reason “insufficient funds” in the account of the accused by way of return memorandum dated 24.01.2012.

(iii) The complainant issued statutory notice dated 02.02.2012 calling upon the accused to pay the cheque amount within 15 days from the date of receipt of the notice (through registered post) and the same was received by the accused on 03.02.2012.

(iv) The accused neither sent reply notice nor came forward to repay the debt. Alleging that the accused having the knowledge of dishonour of cheque and without arranging sufficient funds in his bank account, issued the cheque; despite the receipt of notice, he did not chose to pay the debt, thereby, he has committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

4. The defence set up by the accused is that the complainant does not have financial capacity to lend the said amount. Without obtaining any other document, apart from the cheque, for the loan said to have been given to the accused is unbelievable. Signature of the accused found in the cheque is denied by the accused.

5. The learned counsel appearing for the appellant/complainant vehemently contended that for the loan borrowed by the accused, he issued a cheque to the complainant for an amount of Rs. 3,15,000/-. As the cheque

was returned for the reason “Insufficient Funds” on 24.01.2012, the complainant issued a legal notice to the accused on 02.02.2012. It is his further argument that as the accused denied the receipt of the notice, P.W.2 P.R.Vasthakumar Post Master and P.W.4 Krishnamoorthy Post man were examined. Such issuance of cheque was not admitted by the accused. In order to prove the same, the P.W.3 Branch Manager of ICICI Bank, Sai Baba Colony branch was examined.

6. The learned counsel would further contend that the ingredients of Section 138 of Negotiable Instruments Act, 1881 have duly been complied with and it was amply proved that the cheque was issued by the accused. Then, presumption under Section 139 of N.I.Act comes into play. As it is a rebuttable presumption, the accused has utterly failed to rebut the presumption. The first Appellate Court having seen that the complainant saving pass book miscarried that he is man of no means. Therefore, the finding of the First Appellate Court warrants interference by this Court.

7. The learned counsel appearing for the respondent per contra, strenuously contented that in the legal notice issued by the complainant, date of borrowal is not mentioned. The complainant has simply stated that his wife is also earning but her salary details have not been given. He

would further contend that the complainant has no financial capacity to lend the money. The learned Appellate Court having observed the evidence of D.W.1 and Ex.D4 accounts statements has categorically held that the complainant has no financial capacity to lend money to the accused. The learned Appellate Court did not believe the words of complainant that except the cheque, no other document was obtained from the accused.

8. It has come on record through the evidence of P.W.1 that A.Senthilkumar/Complainant is working as Plumber in a private Hospital and earning a sum of Rs. 7000/- per month (less deductions) in the year 2011. Besides that he would further state that he was also working as electrical contractor. Monthly rental for his house is Rs.2,500/-. It is his further evidence that as the accused is a friend and therefore, the complainant obtained post dated cheque and he did not charge any interest. As regards Ex.P1 cheque, it is his evidence that filled in cheque was handed over by the accused to the complainant.

9. In order to prove that, legal notice issued by the complainant was served to the accused, relevant Post Master and his Post man were examined. P.W.2 Post Master of Peedampalli Post Office would state that signature in Ex.P4 acknowledgement card was obtained through his office

by his Post man, Krishanamoorthy and the endorsement is made by the said Krishanamoorthy on 03.02.2012 as “served to the addressee”. The said Post man Krishanamoorthy P.W.4 in his evidence has stated that the endorsement made in Ex.P4 is made by him. To evidence the service, there is no post office seal on the Acknowledgement Card (Ex.P4). But, it is his evidence that for having served the Tapal delivery, seal is affixed on the Ex.P4 Acknowledgement Card. Therefore by examining the Post Master as well as the concerned Post man, service of notice to the accused has clearly been established by the complainant. Ex.P4 Acknowledgement Card itself clearly establishes the fact that the legal notice was served to the accused.

10. The main defence of the accused is that he did not issue any cheque to the complainant and he has denied the signature found in the cheque. In order to substantiate the said details, P.W.3 - Branch Manager of ICICI Bank, Saibaba Colony Branch has been examined. It is her evidence that Mahesh Kumar was maintaining a Saving Bank Account in their Bank and the Bank Account Number is 86130111089. Earlier, he had an account in Bank of Rajasthan and the said bank was merged with ICICI Bank in the year 2010. She would acknowledge that the return memo Ex.P2 was issued by their bank.

11. From the evidence of P.W.3, it is pellucid that the accused was maintaining an account at the Bank of Rajasthan and the said bank was merged with ICICI Bank. In order to show that the complainant has no financial capacity at all to lend huge sum of money, the Complainant's banker was examined as D.W.1. D.W.1 is the Branch Manager of Corporation Bank, GKMN Branch, Coimbatore. The statement of account of the complainant is Ex. D3 and Ex.D4 and the amount of Rs.6299/- is alone in his account as on 02.06.2011.

12. In ***Tedhi Singh v. Narayan Dass Mahant***, reported in ***2022 LiveLaw (SC) 275***, the Hon'ble Supreme Court has held that initially, the complainant need not to prove the financial capacity of the accused but the accused is at liberty to establish that the complainant did not have financial capacity to lend the money through oral or documentary evidence or even through the evidence of P.W.1.

13. It is the evidence of P.W.1 that he is working as a plumber and earning a sum of Rs. 7000/- per month less deductions and his monthly house rent is Rs. 2500/-. It is his further evidence that his wife is also working. In particular P.W.1 has stated that besides his plumber work he

has been doing electrical contract work and money lent to the accused was kept at his residence. It is also his evidence that when the accused received the loan except him no body was present. Therefore, taking into account of the evidence of P.W.1, this Court gets convinced as to the financial capacity.

14. From the evidence of complainant, P.W.1 and the accused banker P.W.3 it is proved that Ex. P1 cheque was issued by the accused. Therefore the presumption under Section 139 of N.I. Act comes into play to the effect 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. As mentioned supra, the initial burden is discharged by the complainant that the cheque was issued by the accused and the signature in the cheque is that of the accused. The said presumption is a rebuttable one. The law is well settled that the accused may rebut the said presumption through oral or documentary evidence, even through the evidence of the complainant. Thereafter it is for the accused to have proved the contrary.

15. As mentioned supra, the complainant presented the Ex.P1 cheque to is banker was returned on 24.01.2012 with an endorsement as “insufficient funds”. The complainant issued legal notice Ex. P3 was

received by the accused is evidenced by Ex.P4 Acknowledgement Card. Though these details were denied by the accused, the complainant has examined the relevant Post master and the Post man in order to establish that the accused was served with legal notice Ex. P3.

16. It is not his evidence that he withdrew the money from the bank or got through some other person. The accused raised his strong voice in order to contend that the complainant has no financial capacity at all to lend money to him which was concluded against the accused.

17. It is relevant to note that the accused is complainant's relative. When the accused was questioned about the offence on his appearance, he has answered that it is a false case.

18. Originally, the accused was questioned under Section 313 of Cr.P.C, after examination of P.W.1, wherein he has answered that it is true that he received the amount but not quantified. When he was questioned whether he wanted to say anything about the case. He has answered that he accepts the case. Thereafter, on application complainant had examined the three witness namely P.W.2 to P.W.4 (Post Master, banker of the accused and Post Man). Then, on 30.10.2015, he was again questioned under Section 313(1)(b) of Criminal Procedure Code. When the incriminating

portion of his evidence was brought his notice, he has answered that evidence is false and he does not know about the same.

19. The core issue now is whether the defence is probable or not. The financial capacity of the complainant was put in question and it is found that there is no substance and bonafides in the evidence of D.W.1.

20. From taking into account of oral and documentary evidence, it is clearly discernible that the complainant and the accused are friends. For the business purpose, the complainant has lent a hand loan of Rs.3,15,000/-. Under what circumstances, the cheque of the accused went to the hands of the complainant was not explained by the accused.

21. Therefore, once it is found that the signature found in the cheque is that of the accused then the presumption arises that the complainant received the cheque for discharge, in whole or in part of debt or liability.

22. As regards presumption under Section 139 of the N.I. Act, the Honourable Supreme Court of India in the case of ***K.N.Beena V. Muniyappa,*** reported in ***(2001) 8 SCC 458*** has observed that:-

> "*Under Section 118 of the N.I .Act, unless the contrary is proved, it is to be presumed that the negotiable instruments, (including a cheque) had been made or drawn for consideration, It is further observed and held that under*

Section 139, this court has to presume, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. It is further observed that thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that the cheque has not been issued for a debt or liability is on the accused."

23. In the case of ***Rangappa v. Sri Mohan***, reported in ***2010 11 SCC 441,*** the Apex Court has held about the Section 118(a) and 139 of N.I. Act is as follows:-

"*It is observed and held that there exists a presumption which favours the complainant. It is further observed that the presumption under Section 139 of the N.I. Act is in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein there is existence of legally enforceable debt or liability can be contested. In Paragraph 27 this court observed and has held as under:*

"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 or proof."

24. Reverting back to this case, the defence set up by the accused that the complainant had no lending capacity and the omission to mention the date of loan are turned down. Normally, the High Court will be very slow in interfering in the order of acquittal. In this case, having gone through the evidence of P.W.1, both sides documents and the answers given by the accused during initial questioning and during the questioning under Section 313 Cr.P.C. (twice) it is made clear that his defence is not probable one.

25. Therefore, the judgement of acquittal passed in Crl.A.No. 133 of 2016 dated 14.10.2017 by the V Additional District and Session Court need to be interfered and the judgement of the V Additional District and Session

Court stands set aside.

26. In the result, the judgement of conviction and sentence passed by the Judicial Magistrate No. II, Coimbatore is upheld. Transactions are of the year 2011. For payment three months from this day. Failing which, the Trial Court shall issue warrant to secure the accused and send him to serve the sentence imposed by the learned Trial Court.

26.02.2024

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Index:Yes/No
Speaking Order : Yes/No
Neutral Citation Case : Yes/No

To

1. The V Additional District & Sessions Court,
   Coimbatore.

2. Judicial Magistrate,
   Fast Track Court No. II, (Magistrate Level),
   Coimbatore.

3. The Public Prosecutor,
   High Court, Madras.

4. The Section Officer,
   VR Section, High Court, Madras.

R. KALAIMATHI.J

nsl

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