IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:27.02.2024

CORAM:

THE HONOURABLE MRS. JUSTICE R. KALAIMATHI

Crl.A.No.480 of 2018

N.Vinoth .. Appellant

/versus/

Mrs.S.Ramya
W/ Sampath Selvam,
17-B, Chettipalayam Road,
Pothanur, Coimbatore 23

Office at,
Customer Service,
Indigo Airlines,
Airport Civil Aerodrome Post,
Coimbatore 641 014. .. Respondent

Prayer: Criminal Appeal has been filed under Section 378 of Cr.P.C., against the judgment dated 28.01.2018 passed in C.A.No.19 of 2017 by the Hon'ble III Additional District and Sessions Court, Coimbatore, Chennai-1, allowing the appeal and setting aside the order dated 20.12.2016 passed in C.C.No.297 of 2012 by the Hon'ble Judicial Magistrate, Fast Track Court No.1 @ Magisterial Level, Coimbatore, convicting and sentencing the accused to undergo simple imprisonment of a period of six months and shall pay the compensation of Rs.7,13,000/- failing which the accused shall undergo default sentence of 2 months simple imprisonment for the offence under Section 138 of Negotiable Instruments Act.

For Appellant : Mr. P.V.Sanjeev

For Respondent : Mr. R.N.Amarnath

JUDGMENT

This Criminal Appeal is preferred by the complainant against the judgment passed by III Additional District and Sessions Court, Coimbatore in C.A.No.19 of 2017 allowing the appeal by setting aside the conviction and sentence imposed by the Judicial Magistrate, Fast Track at Magisterial Level-1, Coimbatore.

2. The Judicial Magistrate, Fast Track Court No.1 at Magisterial Level, Coimbatore, convicted the accused to undergo Simple Imprisonment for a period of six months and ordered to pay the compensation of Rs.7,13,000/- within two months from the date of that judgment.

3. Case of the complainant in brief:-

The accused, a relative of the complainant approached the complainant for availing loan to do travel business along with her husband stating that she is floating business in the name and style M/s Iswarya Travels.

(i) The complainant advanced loan to the accused in parts from the period from April 2010 to 13.01.2011 and she agreed to repay the loan with interest at 18% p.a.

(ii) Initially, the accused repaid Rs.1,00,000/- and on 14.11.2010, the accused repaid Rs.6,00,000/- and total repayment is Rs.9,40,000/-. By observing these repayments, the complainant further advanced loan, totalling an amount of Rs.15,33,500/- as on 13.01.2011.

(iii) The loan details have been acknowledged by the accused in the complainant's diary.

(iv) On repeated demands and negotiations, the complainant and the accused mutually agreed to settle for a sum of Rs.7,13,000/- and for that amount, the accused issued a cheque bearing No.209822, dated

01.08.2011, drawn on M/s Axis Bank Limited towards the above said legally enforceable debt and she assured that the above cheque will be honoured on presentation.

(v) Upon her assurance, the complainant presented the above said cheque with his banker IDBI Bank, Coimbatore, on 07.10.2011 [with the same banker] and it was dishonoured for a reason "Insufficient Funds" on 08.10.2011.

(vi) Statutory notice was caused to be issued to the accused on 15.10.2011 and the same was received by her addressed to [office] on 17.10.2011 and she sent a reply notice dated 04.11.2011 with baseless allegations.

(vii) As the accused issued the above cheque with a malafide intention in order to defraud the complainant without arranging sufficient funds to honour the above cheque; she has committed an offence under Section 138 of Negotiable Instruments Act, 1881 and she is therefore, liable to be punished.

4. The defence set up by the accused is that she never received any loan from the complainant and she did not repay any debt. There was no settlement or any agreement entered upon with the complainant by the accused. She issued the cheque for security purpose.

5. Mr. P.V.Sanjeev, Learned Counsel appearing for the appellant/Complainant strenuously argued that the accused is a relative of the complainant and she was working as Air Hostess in Indigo Airlines. Upon their request (Accused and her husband), the complainant advanced loan in parts to the accused from the month of April 2010 to January 2011. Totally a sum of Rs.15,33,500/- was advanced. She repaid a sum of Rs.9,40,000/-. By mutual agreement, the amount due was arrived at Rs.7,13,000/- and accordingly, the accused issued the cheque for the said amount. It is his further argument that though the accused is at liberty not to let in any oral evidence and it is discernible for the cross examination of PW-1 that she has accepted the receipt of the loan. He also drew the attention of this Court by referring to the cross examination of PW-1 that a suggestion was made to PW-1 that the cheque was issued by the accused only for security purpose is utilized to lay a false claim against the accused in order to get undue advantage was denied by him. Therefore, issuance of cheque has also been admitted by the accused. Mr.P.V.Sanjeev, Learned Counsel would further contend that based on these admissions, the trial Court convicted the accused, as she has admitted to have signed the cheque.

6. Mr. P.V.Sanjeev, Learned Counsel for the appellant would further argue that in order to show that she repaid the amount due to the complainant in 12 instalments, she could have filed the proof for the same. But she has not filed any proof. When she has stated that she has paid the dues in 12 instalments to the complainant, the trial Court went wrong in stating there is no material to show that there was a compromise. The Learned Counsel appearing for the appellant would argue that the accused is the relative to the complainant. It would go to show that she had transactions with the complainant and through the cross examination of PW-1, a suggestion was posed that the cheque was issued to the complainant for security purpose was answered in negative.

7. To buttress his arguments, the following judgments were referred to:-

(i)D.K.Chandel vs. M/s Wockhardt Ltd., and another in Crl.A.No.132 of 2020 dated 20.01.2020;

(ii)Sampelly Satyanrayana Rao vs.Indian Renewable Energy Development Agency Limited reported in [(2016)10SCC 458];

(iii)Don Ayengia vs. State of Assam and another reported in [(2016)3 SCC 1];

(iv)Rangappa vs. Sri Mohan reported in [2010(4) CTC 118];

(v)H.Pukhraj vs. D.Parasmal reported in [(201517SCC 368];

(vi)Kishan Rao vs. Shankargouda reported in [(2018)8 SCC 165];

(vii)T.P.Murugan (dead)through Legal representatives vs. Bojan reported in [(2018)8 SCC 469];

(viii)BIR Singh vs. Mukesh Kumar reported in [(2019)4 SCC 197];

(ix)Rohitbhai Jivanlal Patel vs. State of Gujarat and another reported in [(2019)18 SCC 106];

(x)Rajeshbhai Muljibhai Patel and others vs. State of Gujarat and another reported in [(2020)3 SCC 794];

(xi)Kalamani Tex and another vs. P.Balasubraanian reported in [(2021) 5 SCC 283];

(xii)Triyambak S.Hedge vs. Sripad reported in [(2022) 1 SCC 742(FB)];

(xiii)Tedhi Singh vs. Narayan Dass Mahant reported in [(2022) 6 SCC 735];

(xiv)P.Rasiya vs. Abdul Nazer and another in Crl.A.nos.1233-1235 of 2022 dated 12.08.2022.

(xv)Oriental Bank of Commerce vs. Prabhodh Kumar Tewari reported in [2022 SCC Online SC 1089];

(xvi)M.S.Narayana Menon Alias Mani vs. State of Kerala and another reported in [(2006) 6 SCC 39];

(xvii)Rahul Sudhakar Anatwar vs. Shivkumar Kanhiyalal Shrivastav reported in [(2019) 10 SCC 203];

(xviii)The Hon'ble Supreme Court in Jain P.Jose vs. Santosh and another reported in [2022 Livelaw (SC) 979];

(xix)Rajesh Jain vs. Ajay Singh reported in [(2023) 10 SCC 148].

8. In ***D.K.Chandel vs. M/s Wockhardt Ltd., and another in Crl.A.No.132 of 2020, dated 20.01.2020,*** it has been held that the appellant accused purchased the pesticides on credit basis from the respondent-company and made part payments. Both the appellant and the respondent were maintaining the running accounts. For the payment due, the accused issued a cheque on 30.04.1999 of Rs.4,17,148/- drawn on State Bank of India at Bathinda (Punjab). When the cheque was presented for collection, the same was returned with an endorsement "Insufficient Funds". A case under Section 138 of NI Act was filed at the trial Court was allowed. On appeal before the Additional Sessions Judge, Bathinda, the appeal was allowed by holding that the complainant did not produce cash and account books to prove that the amount was due and payable by the appellant. Then, on appeal before the High Court, the High Court set aside the judgment of the learned Sessions Judge and allowed the appeal of the respondent. On appeal before the Hon'ble

Supreme Court, it was held that "As rightly observed by the High Court, production of the account books/cash book may be relevant in the civil Court, but may not be so in the criminal case filed under Section 138 of the Negotiable Instruments Act, 1881”. This is because of the presumption raised in favour of the holder of the cheque and ultimately, the judgment of the trial Court was modified and the accused was convicted under Section 138 of Negotiable Instruments Act, 1881.

9. In ***Ragappa v. Sri Mohan*** reported in ***[2010 (4) CTC 118]***, the Hon’ble Supreme Court held that the presumption under Section 138 of Negotiable Instruments Act, 1881, includes existence of a legally enforceable debt or liability. Section 139 of Negotiable Instruments Act, 1881, is an example of a reverse onus clause that has been included in furtherance of legislative objective of improving credibility of Negotiable Instruments. Section 139 of Negotiable Instruments Act, 1881, specifies a strong criminal remedy in relation to dishonour of cheques. Rebuttable presumption under Section 139 of Negotiable Instruments Act, 1881, is a device to prevent undue delay in course of litigation. Section 138 can be described as a regulatory offence. When an accused has to rebut the presumption under Section 139, standard of proof for doing so, is that of preponderance of probabilities. Complaint discloses existence of a legally enforceable debt. The accused admitted his signature in cheque. Statutory presumption comes into play and the same has not been rebutted.

10. In ***Triyambak S.Hedge v. Sripad*** reported in ***[(2022)1 SCC 742],*** the Hon'ble Supreme Court has summarised the principles with regard to the presumptions, that may be raised under Sections 118 and 139 of the Negotiable Instruments Act, 1881, and the rebuttal thereof.

> "*(1)Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
>
> *(2)The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
>
> *(3)To rebut the presumption, it is open for the accused to rely on evidence led by him or the 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.

(4)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.

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

Whether there is rebuttal or not would depend on the facts and circumstances of each case."

11. Per contra, Mr.R.N.Amarnath, Learned Counsel appearing for the respondent/accused would vehemently contend that as per the details of the complaint, the total due amount is said to be Rs.15,33,500/. The complainant states that an amount of Rs.9,40,000/- was repaid for which no document was filed. How the amount was arrived at, was not explained in the complaint. In the legal notice [Ex.P6], it has been stated that the accused has acknowledged the debt details in the complainant's diary. But the said diary was not filed by the complainant and is fatal to the complainant's case, which was not looked into by the trial Court.

12. The learned counsel appearing for the respondent Mr.R.N.Amarnath, would further contend that the diary, which was being maintained by the complainant, was not produced, is held to be fatal to the complainant's case and the appellate Court has also held that the compromise as narrated in the complaint was also not proved by the complainant. Therefore, the appellate Court has taken a right stand and rejected the claim of the complainant may be sustained.

13. At trial, the complainant has examined himself as PW-1. 9 documents were marked. Ex.P1 is the cheque for an amount of Rs.7,13,000/-. Ex.P6 is the copy of statutory notice. Ex.P9 is the reply notice. No witness was examined by the accused.

14. It has come on record through the evidence of PW-1 that the accused is his relative, who was working as Air Hostess in Indigo Airlines. In order to run the travel business, upon her request, from the month of April 2010 to 13.01.2011, on instalments, totally he gave the loan amount of Rs.15,33,500/-. She repaid an amount of Rs.9,40,000/-. It is his further evidence that with regard to the total amount due, it was arrived at by both complainant and the accused as Rs.7,13,000/-.

15. Ex.P1-cheque is drawn on Axis Bank Ltd., Chennai 42, with Cheque No.209822, was presented for encashment for the second time on 07.10.2011 and it was dishonoured with the endorsement as "Insufficient Fund" on 08.10.2011.

16. The complainant issued legal notice on 15.10.2011 and the same was received by her on 17.10.2011 and on 04.11.2011 she sent a reply notice with untenable allegations.

17. In the complaint as well as the proof affidavit of PW-1, it has been stated that the accused has acknowledged the details of loans availed, in the complainant's diary. But this diary of the complainant was not marked by the complainant side. This was taken as a major ground by the learned Appellate Court to negative the contents of the complainant. Law is settled that in business transaction, cash book/accounts book/ledger are supposed to be filed to make out the case against the accused. However, it is relevant to note, even in such cases, the Hon'ble Supreme Court in ***D.K.Chandel v. M/s Wockhardt Ltd. and another in Crl.A.No.132 of 2020, dated 20.01.2020***, both the complainant and the accused though were maintaining the running accounts, non-production of cash book, account books may not be relevant in the criminal case filed under Section 138 of Negotiable Instruments Act, 1881. Therefore, this Court is of the considered view that when the complainant and the accused are known persons and they have the loan transactions, the non-production of the diary will not cause a dent on the case of the complainant.

18. In the reply notice [Ex.P9], the accused has denied the entire details of legal notice. How the amount is arrived at and the non-production of the diary by the complainant were not raised by the accused at the earliest point of time.

19. The only evidence available on record is the evidence of the complainant (PW1). Therefore, the cross examination details of PW-1 gets so much significance. The two suggestions posed by the accused namely (i) the accused repaid the loan amount obtained from the complainant in 12 instalments and (ii) she has no due, were denied by the complainant. Therefore, the accused has tacitly accepted the receipt of loan amount though not quantified. Secondly, the unfilled cheque utilized to lay a false complaint against her was also denied by the complainant(PW-1). The said suggestion indicates the fact that the accused issued a cheque to the complainant. Nowhere during the cross examination of PW-1, the accused has denied her signature found in Ex.P1-cheque. The signature found in Ex.P1-cheque is not denied and for the reasons mentioned supra, the presumption under Section 139 of Negotiable Instruments Act, 1881, comes into play in favour of the complainant.

20. To elaborate further, in ***Rangappa v. Sri Mohan*** reported in ***[2010(4) CTC 118]*** and recently, the Hon'ble Supreme Court in ***Rajesh***

Jain vs. Ajay Singh reported in ***[(2023) 10 SCC 148]*** has held that the signature on the cheque having not been disputed and the presumption under Sections 118 and 139 of Negotiable Instruments Act, 1881 having taken effect, the complainant's case, held satisfied every ingredient necessary for sustaining conviction under Section 138 of Negotiable Instruments Act, 1881.

21. Once the complainant discharges his burden to prove that the cheque was issued for discharge of debt, as per Section 139 of Negotiable Instruments Act, 1881, the burden gets shifted on the accused to prove otherwise. The presumption is a rebuttable one. The accused is at liberty to let in oral evidence or through marked through documents. Even she is permitted to rely upon the cross examination of the complainant's witness. Therefore, as regards the standard of proof to rebut the presumption is not heavy. The complainant shall meet standard of preponderance of probabilities. As regards the accused, he or she to rebut the presumption is always entitled to raise a probable defence.

22. In order to know the entire scenario, the legal notice (Ex.P6), reply notice (Ex.P9); contents of the complaint; the evidence of PW-1; other exhibits marked by the complainant and the answers given by the accused in questioning under Section 313 of Cr.P.C were seriously gone into.

23. Now, the only point to be decided is whether the accused has succeeded in raising a probable defence or not?

24. In this process, the accused has not let in any oral or documentary evidence. The accused may rely upon the circumstantial evidence and it is relevant to note that if the circumstances, which are relied upon are acceptable then, the burden shifts on the complainant. In order to rebut the presumption and to prove the contrary, it is open to the accused to raise probable defence, wherein the existence of a legally enforceable debt or liability can very well be questioned?

25. The words “until contrary is proved” occurring in Section 139 of the Negotiable Instruments Act, 1881, do not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability. But, the accused has the option to ask the Court to consider the non existence of debt/liability. So, probable that a prudent man ought, under the circumstances of the case, to have acted upon the supposition that the debt/liability did not exist.

26. The accused has sent a reply notice by denying the contents of the legal notice. Therefore, her defence set up has necessarily to be drawn from the cross examination of PW-1, as mentioned supra.

27. The accused was questioned on 28.02.2014. She is said to be an Air Hostess and running a Travels business along with her husband. For the first questioning under Section Cr.P.C, about issuance of the cheque and the return of the cheque. She has answered that it is a false case and while she was questioned under Section 313 Cr.P.C, she has answered the same. Though she has stated that she has got witness on her side to examine, no witness was examined.

28. The accused though has in toto denied the receipt of debt and issuance of cheque in the reply notice, through the cross examination of PW-1, it has come on record that she had loan transactions with the complainant. Taking into the account of the totality of the circumstances of this case, this Court is of the view that the accused has utterly failed to raise a probable case. The appellate Court negatived the case of the complainant on two grounds. (i) non-production of the diary by the complainant; (ii) no material to show that there was any such compromise on the given day, how the cheque amount was arrived at. The accused has failed to shift the evidential burden placed on her.

29. Normally, the High Court will be very slow in disturbing the order of acquittal. Nevertheless the complainant has succeeded in proving this case, as per Section 138 of Negotiable Instruments Act, 1881. Hence, the Criminal Appeal stands allowed by setting aside the judgment of III Additional District and Sessions Judge, Coimbatore made in C.A.No.19 of 2017 dated 28.02.2018 and the judgment passed by the trial Court namely, the Judicial Magistrate, Fast Track at Magisterial Level-1, Coimbatore in C.C.No.297 of 2012, dated 28.02.2018, is confirmed. The trial Court shall secure the accused to undergo the period of sentence imposed by the trial Court, less the period already undergone by the accused. Fine amount as imposed by the trial Court, if not paid, shall be paid. No order as to costs.

27.02.2024

Index:yes/no
Speaking order/non speaking order
Neutral Citation:yes/no
ari

To

1.III Additional District and Sessions Court, Coimbatore, Chennai-1.

2.Judicial Magistrate, Fast Track Court No.1 at Magisterial Level, Coimbatore.

R. KALAIMATHI, J.

ari

Crl.A.No.480 of 2018

27.02.2024