
(2012) 08 MAD CK 0113

Madras High Court

Case No: Criminal Appeal No. 1204 of 2004

M. Palanisamy

APPELLANT

Vs

K. Karvannan

RESPONDENT

Date of Decision: Aug. 3, 2012

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 138(b), 139, 142

Citation: (2012) 08 MAD CK 0113

Hon'ble Judges: R. Mala, J

Bench: Single Bench

Advocate: E.C. Ramesh, for the Appellant; K.V. Sundararajan, for the Respondent

Final Decision: Dismissed

Judgement

Honourable Ms. Justice R. Mala

1. The criminal appeal arises out of the judgment of acquittal dated 30.07.2004, made in C.C. No. 250 of 2003 on the file of the Judicial Magistrate's Court, Rasipuram, Namakkal District. The appellant as a complainant preferred a private complaint under Sections 138 and 142 of Negotiable Instruments Act, stating that on 31.01.2002, the respondent/accused borrowed a sum of Rs. 2,75,000/- from the appellant/complainant for his business purpose and agreed to repay the same with interest at rate of 12% per annum and also paid one year interest in advance and issued a post-dated cheque bearing No. 591852, dated 31.01.2003 for Rs. 2,75,000/-. When Ex.P1 cheque was presented into the Salem Central Co-operative Bank for encashment on 31.01.2003, it has been returned as "insufficient funds" on 04.02.2003 and the return memos were marked as Exs.P2 and P3. Hence, the appellant issued a statutory notice Ex.P4 u/s 138(b) of Negotiable Instruments Act on 18.02.2003. The postal receipt was marked as Ex.P5. The respondent received the same under Ex.P6 acknowledgment card and sent a reply under Ex.P7. But the respondent/accused did not repay the amount. The respondent knowing fully well that there was no sufficient funds in his account, issued a

cheque and thereby committed offence u/s 138 of Negotiable Instruments Act.

2. The learned Magistrate after following the procedure framed necessary charges against the accused. Since the accused pleaded not guilty, the learned Magistrate examined P.W.1 to P.W.3 and marked Exs.P1 to P11 and placed the incriminating evidence before the accused and the accused denied the same. On his side, D.W.1 and D.W.2 were examined and Exs.D1 to D4 were marked. On considering oral and documentary evidence, the trial Court acquitted the accused/respondent stating that the cheque was not issued by the respondent for discharging his legally enforceable debt, since the appellant herein has no financial status to lend him money, against which, the present appeal has been preferred by the appellant/complainant.

3. Learned counsel for the appellant/complainant submitted that the respondent borrowed a sum of Rs. 2,75,000/- from the appellant and he also paid one year interest in advance and he sought for one year time to repay the amount, hence he issued the post-dated cheque, dated 31.01.2003 for discharging his liability. But the trial Court held that the respondent has issued 25 cheques to one Lakshmi Saraswathi Finance Company, since he is availing vehicle loan and repaying the same in monthly installment. As soon as he paid the monthly installments, he received the respective cheques one by one. Likewise, the appellant, who was working as Collection boy, had also gone to the Finance Company and paid the amount and received the respective cheques on behalf of the respondent and one of the cheques has been utilised for this purpose. But the respondent did not examine any one as his witness from Lakshmi Saraswathi Finance Company to prove his contention raised in the defence. It is further submitted that since the signature in the cheque has been admitted by the respondent, he is entitled to rebut the presumption under Sections 118 and 139 of Negotiable Instruments Act, but the evidence let in by the respondent is not sufficient to rebut the presumption u/s 139 of Negotiable Instruments Act, which is not considered by the trial Court. He further submitted that there is a difference between legally subsisting liability and other liabilities in 138 N.I. Act, in which, it was specifically mentioned as "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." But it comes under liability. Hence, he prayed for setting aside the order passed by the learned Magistrate. To substantiate his arguments, he relied upon the decision reported in [Rathikumar Vs. Santhamma](#),

4. Resisting the same, the learned counsel for the respondent submitted that the appellant has no financial status to lend such huge amount of Rs. 2,75,000/- and he did not file any document to show that he is having such financial status. The appellant stated that on that date, he is having only a sum of Rs. 50,000/- and he borrowed money from his father-in-law and his friend Rajendran. But, to prove the same, he has not examined his father-in-law and friend Rajendran. So the trial Court considered this aspect and came to the correct conclusion that the appellant is not having any financial status to lend amount to respondent, as he is only a sundry worker. The respondent has rebutted the

presumption u/s 139 of N.I. Act, by way of examining himself as D.W.1. The defence has proved by preponderance of probabilities. The respondent has also rebutted the presumption by way of examining D.W.2, an officer from Sub-registrar office, through him, a partition deed was marked, in that, the description of house property alone given, it would not show the financial status of the appellant. To substantiate his arguments, he relied upon the decision of Apex Court reported in [Krishna Janardhan Bhat Vs. Dattatraya G. Hegde](#), and prayed for dismissal of the appeal.

5. Considered the rival submissions made on both sides and the materials available on record.

6. On perusal of record, it is seen that Ex.P1 is a cheque for Rs. 2,75,000/- dated 31.01.2003. The first and foremost question has to be decided that whether Ex.P1 cheque has been issued by the respondent for discharging his legally enforceable debt. It is true, the signature in Ex.P1 has been admitted by the respondent. As soon as the cheque has been presented into the Bank, it was returned as "insufficient funds" as per Ex.P2 return memo. So the appellant issued a statutory notice on 18.02.2003 under Ex.P4 and the same has been received by the respondent under Ex.P6 acknowledgment card and he sent a reply under Ex.P7. In his reply notice, respondent stated that the appellant was working as a collection boy in the financial institution that was run by his close associates and six months ago, the appellant had left the employment and joined with others who are inimically disposed of the respondent. So the cheque has been fabricated by the appellant. In the reply notice, it was further stated that Ex.P1 cheque has not issued in favour of the appellant. In such circumstances, it is the duty of the appellant to prove that he is the lawful holder of the document. Admittedly, P.W.1/appellant, the witnesses P.W.2 and P.W.3, who are Manager and Officer in the Bank, were examined. But no independent witness was examined to prove that the amount of Rs. 2,75,000/- has been given by the appellant to respondent as a loan.

7. The learned counsel for the appellant vehemently argued that as per Section 20 of N.I. Act, the appellant is entitled to fill up the blank cheque, which was given by the respondent. Now it is appropriate to incorporate Section 20 of N.I. Act, which reads as follows:

20. Inchoate stamped instruments. Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 2[India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument any thing in excess of the amount intended by him to be paid thereunder.

As per Section 20 of the Act, holder of the cheque alone authorised to fill up the blanks. But here, the respondent disputed that he did not issue cheque to the appellant. So the initial burden is on the appellant to prove that the cheque is issued by the respondent for discharging his legally enforceable debt. Except the evidence of P.W.1/complainant, no other evidence was examined to prove that P.W.1 lent a sum of Rs. 2,75,000/- to the respondent on 31.01.2002 and to discharge the same, the respondent had issued a post dated cheque, dated 31.01.2003.

8. While perusing cross-examination of P.W.1, he stated that he possessed only Rs. 50,000/- on 31.01.2002 and hence, he borrowed Rs. 1,00,000/- from his father-in-law and Rs. 1,25,000/- from his friend Rajendran. But he has not examined those persons to prove the same. At this juncture, it is appropriate to consider the defence raised by the respondent. In his evidence, he stated that the appellant herein has no financial status to lend Rs. 2,75,000/- and that has been probalised by the cross-examination of P.W.1. In his oral evidence itself, P.W.1 stated that he had only possessed Rs. 50,000/- and he borrowed Rs. 1,00,000/- from his father-in-law and Rs. 1,25,000/- from his friend Rajendran. But he has not examined those persons to prove that he borrowed Rs. 2,25,000/- from them and lent Rs. 2,75,000/- to the respondent. In such circumstances, I am of the view, the appellant has not proved that Ex.P1 cheque has been issued by the respondent to him.

9. It is not the case of the appellant that he lent money to the respondent previously. There is no evidence to show that what prompted the appellant to borrow money from others to lend the money to respondent. But the respondent probalised the defence raised by him that he did not borrow any money and he did not issue any cheque to the appellant, since P.W.1 himself admitted that he has been borrowed money from his father-in-law and his friend.

10. Even though in the grounds of appeal, the learned counsel for the appellant did not raise a plea that the appellant is entitled to invoke Section 20 of N.I. Act, during his reply argument, he stated that the appellant is entitled to invoke Section 20 of N.I. Act. On a perusal of Ex.P1 cheque, it would reveal that two different inks are used to put signature and used for other writings. As already stated that once cheque has been issued to the appellant for discharging the legally enforceable debt, he is authorised to fill up the endorsement. But there is no evidence to show that Ex.P1 cheque has been issued to the appellant with due authorisation to fill up the blanks in the cheque. Hence, I am of the view, the appellant is not entitled to invoke Section 20 of N.I. Act.

11. It is true, as per Section 139 of N.I. Act, the appellant is entitled to presumption, that the cheque has been issued for discharging legally enforceable debt, once issuance of cheque is admitted by the respondent. But in the case on hand, the respondent has specifically denied that he had not issued any cheque to the appellant and his defence is that he had issued cheque only to Lakshmi Saraswathi Finance Company that too for the loan availed by him. The eighth installment has been paid by way of cash by the

appellant, who was working as Collection boy, at that time, he took up the blank cheque, which was signed by the respondent and that has been concocted for this purpose, has been probalised by the respondent.

12. At this juncture, it is appropriate to consider the grounds of appeal raised by the appellant. The learned counsel for the appellant submitted that the respondent has raised one defence in the written statement and another one in the evidence, which falsifies the case of the defence. In my opinion, the argument advanced by the learned counsel for the appellant, does not hold good. In a criminal jurisprudence, the complainant must prove the guilt of the charges levelled against the accused beyond all reasonable doubt. But the respondent has probalised his defence and he need not prove the same by beyond all reasonable doubt.

13. The first and foremost point of the appellant/complainant is to prove that Ex.P1 cheque has been issued to him. But here, there is no evidence to show that cheque has been issued to the appellant on 31.01.2002. In his evidence, he fairly conceded that he has no financial status. Furthermore, the defence raised by the respondent has been proved by way of preponderance of probabilities. In such circumstances, it is the duty bound upon the appellant to examine his father-in-law and friend Rajendran, to prove that he obtained the amount of Rs. 1,00,000/- and Rs. 1,25,000/- from them respectively.

14. One more adding circumstance is that admittedly P.W.1 is not having any bank account. He opened bank account in the year 2003 for the purpose of presentation of Ex.P1 cheque. It shows that the cheque has not been issued by the respondent for discharging his subsisting liability on 31.01.2002, since the appellant has not proved that he lent money of Rs. 2,75,000/-.

15. Learned counsel for the appellant relied upon the decision of Kerala High Court reported in [Rathikumar Vs. Santhamma](#), in para-6, it reads as follows:

6. The notice of demand very clearly stated that the amount was borrowed and as security for repayment the cheque was issued. It is true that the word "security" is repeated twice in notice. But it would be myopic to come to the conclusion from that expression employed in the notice that the cheque was not issued for the discharge of any legally enforceable debt/liability. When repayment is assured by issue of a cheque, in common parlance the laity may refer to such handing over of the cheque for discharge of the liability as a conduct to assure and secure payment and discharge of the liability. It would be impermissible from that expression used, which, only conveys that the lending/borrowal was on the strength of the cheque issued for the discharge of the liability, to conclude that the cheque was not issued for the discharge of any liability. The inexact expression used in the notice of demand even assuming that it does not mean "on the strength of" and means "on the security of" cannot in any way deliver any advantage to the petitioner. The cheque will continue to be one issued for the discharge of liability as contemplated u/s 138 of the N.I. Act.

But the above citation is not applicable to the facts of the present case. Because in the case on hand, the appellant did not prove the issuance of cheque by the respondent beyond reasonable doubt.

16. Learned counsel for the respondent relied upon the decision of Apex Court reported in [Krishna Janardhan Bhat Vs. Dattatraya G. Hegde](#), and submitted that as per the evidence of appellant, he has no financial status to lend money and he borrowed money from his father-in-law and his friend. There is no necessity for the appellant when admittedly he has no financial status, to borrow money from his father-in-law and his friend and lent the same to respondent. Furthermore, he has not filed any document to show that he lent money to the respondent. It is further submitted that any advance taken by way of loan of more than Rs. 20,000/- had to be made by an account payee cheque only. In the case on hand, it is unbelievable that the appellant had paid a sum of Rs. 2,75,000/- by way of cash. To substantiate his arguments, he relied upon para-34 and 35 of the above judgment, which read as follows:

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

35. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

17. It is appropriate to incorporate Section 139 of N.I. Act, which is extracted hereunder:

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 the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

Presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

18. Considering the object of Section 139 of N.I. Act along with the facts of the present case, as per the evidence of P.W.1/appellant, he has no financial status to lend money and he is having only a sum of Rs. 50,000/- and borrowed money from his father-in-law and friend Rajendran, but he did not examine those persons. Furthermore, the appellant has not obtained any documents to show that he lent money to the respondent. Simply,

he obtained only a post-dated cheque from the respondent, is unbelievable. Per contra, in Ex.P7 reply notice sent by the respondent, he stated that the appellant was working as a collection boy in the financial institution, which was run by his close associates and he used to go to Lakshmi Saraswathi Finance Company to pay the amount on behalf of respondent. The cheque issued for eighth installment is utilised by the appellant for this purpose. Hence, I am of the view, the appellant herein has not proved Ex.P1 cheque has been issued by the respondent for discharging his legally subsisting liability, since the respondent has not borrowed any money from him. The trial Court considered all the aspects in proper perspective and came to the correct conclusion. Therefore, the judgment of acquittal passed by the trial Court does not warrant any interference and hence, it is confirmed. In fine, Criminal Appeal is dismissed. Judgment of acquittal passed by the trial Court is hereby confirmed.