

(2003) 03 MAD CK 0238

In the Madras High Court

Case No : Criminal Appeal No's. 1486 and 1487 of 2002 and Criminal O.P. No's. 26422 and 26423 of 2002

Jayam Company and Senthil Murugan Company

APPELLANT

Vs

T. Ravichandran

RESPONDENT

Date of Decision : 04-03-2003

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2003) 2 BC 584 : (2003) CriLJ 2890 : (2004) 2 LW(Cri) 662 : (2003) 3 RCR(Criminal) 154

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : R. Shanmugasundaram for B. Gobikrishnan and C.M. Gunasekaran, for the Appellant; J.J.R. Edwin, for the Respondent

Judgement

V. Kanagaraj, J.—Both the above criminal appeals have been preferred by different appellants, who were the complainants before the trial court, the Court of XIII Metropolitan Magistrate, Egmore, Chennai-8 in different calendar cases registered against one and the same accused respectively in C.C. Nos. 4219 and 4220 of 2001 and both the above complaints, since came to be dismissed by the trial court, the accused being acquitted of the charges, aggrieved, the complainants in those cases have come forward to prefer the above appeals on certain grounds as pleaded in the grounds of appeal.

2. Since the facts and circumstances in both the above cases are similar and the accused are same and both orders are on common grounds, with consent of parties, both the above appeals are decided in this common judgment.

3. From the materials placed on record and upon hearing the learned counsel for the appellants and the respondent as well, it comes to be known that the amount borrowed by the accused from the complainant in the first of the above criminal appeals is Rs.6,44,275/= and the same in the second of the above criminal appeals is Rs.12,55,525/=; that the dates on which the post dated cheques

issued were respectively 10.2.2001 and 7.2.2001 and they have been presented on the same date and since the same had been returned for "insufficiency of funds" on 9.2.2001, on receipt of the returned cheques on 20.2.2001 and with no reply given to the notice issued by the appellants, the complaints have been lodged on 21.3.2001.

4. On the part of the learned Senior Counsel appearing on behalf of the appellants, it would be submitted that on two grounds in both the above complaints, the accused has been acquitted;

i) that there was no legally enforceable liability since the cheque was obtained by force with the help of the Police (para-8 of the judgment) and

ii) that the complaint was barred by limitation (para-9 of the judgment)

5. On the contrary, the learned Senior Counsel would exhort that the cheques have been issued only for liability and the said complaints have been filed within the limitation period. The learned counsel for the appellants would point out that there was no reply, nor any denial of the legal notice issued by the appellants and at this juncture, the learned Senior Counsel would cite three judgments respectively;

i) 2001 SCC Cri 960 (HITEN P. DALAL V. BRATINDRANATH BANERJEE) wherein the Honourable Apex Court has held:

"The burden was on the appellant to disapprove (sic. disprove) the presumptions under Sections 138 & 139, a burden which he failed to discharge at all. The averment in the written statement of the appellant was not enough. Incidentally, the defence in the written statement that the four cheques were given for intended transactions was not the answer given by the appellant to the notice u/s 138. Then he had said that the cheques were given to assist the Bank for restricting (Ext. H). It was necessary for the appellant at least to show on the basis of acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or to establish that the effect of the material brought on the record, in its totality, rendered the existence of the fact presumed, improbable. The appellant has done neither. In the absence of any such proof the presumptions under Sections 138 and 139 must prevail."

" Sections 138 and 139 of the Negotiable Instruments Act require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn as noted in State of Madras Vs. A. Vaidyanatha Iyer it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. " It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." Such a presumption is a presumption of law as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs.

Presumptions are rules of evidence and do not conflict with the presumption of innocence because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing reasonable possibility of the non-existence of the presumed fact.

ii) 2002 SCC Cri 14 (K.N. BEENA V. MUNIYAPPAN AND ANOTHER) wherein the Honourable Apex Court has held:

" u/s 118, unless the contrary was proved, it is to be presumed that the negotiable instrument (including a cheque) had been made or drawn for consideration. u/s 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complaints u/s 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 a cheque had not been issued for a debt or liability is on the accused. This Court in the case of Hiten P. Dalal vs. Bratindranath Banerjee has also taken an identical view.

iii) Suganthi Suresh Kumar Vs. Jagdeeshan, (Para-12)

" The total amount covered by the cheques involved in the present two cases was Rs.4,50,000. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial or revision before the High Court of this Court. If the amounts had been paid to the complainant there perhaps would have been justification for imposing for a flea-bite sentence as had been chosen by the trial court. But in a case where the amount covered by the cheque remained unpaid it should be the lookout of the trial Magistrate that the sentence for the offence u/s 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him lightly. The very object of enactment of provisions like section 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case."

On such arguments, the learned Senior Counsel would conclude saying that the judgments of the Court below were erroneous and would pray this Court to set aside the same.

6. In reply, the learned counsel appearing on behalf of the respondent-accused would submit that both the cases are similar; that both the complainants in their cross-examination deposed that they do not know each other however, the fact remains that they are cousins. But still each of them would come forward to depose that they were not connected in any manner, in spite of their being related by blood; that the complainants failed in the trial court to establish the legal liability; that the accused has not been given any opportunity to file his

counter; that the father of the accused was running a Chit Company and for loss, he committed suicide and the entire family got evacuated from Madras. On such arguments, the learned counsel would conclude that the trial court has arrived at the right conclusion and would pray to dismiss both the above criminal appeals.

7. It is the strong case of the appellants that the accused in this case has admitted his signature in Ex.P2 cheques and therefore, the legal presumption operates in favour of the complainants that the cheques have been issued only to discharge the legal liability and therefore, the trial court ought not to have acquitted the accused on flimsy reasons much against the legal presumption created. The further point on which stress was laid by the appellants is that the complaints have been presented on 21.3.2001 that the date of return of the cheques was on 9.2.2001; that the legal notices have been issued on 19.2.2001, which have been received on 20.2.2001 and the accused is permitted a time of fifteen days thereafter to settle the dues as per the legal notice, which shall be computed from the date of receipt of the notice by the accused on 20.2.2001. Hence, the fifteen days came to close on 10.3.2001 and the complaints having been filed on 21.3.2001, they were well within the time.

8. A perusal of the judgments of the trial court would reveal that the trial Court has conducted a trial with due opportunities for both parties to exhaust their remedies during which three witnesses have been examined on the part of the appellants as P.Ws.1 to 3 and two witnesses have been examined on the part of the accused as D.Ws.1 and 2. Apart from these oral evidences let in, eight documents have also been marked on the part of the appellants as Exs.P1 to P8, Ex.P1 being the General Power of Attorney, Ex.P2 being the cheque, Ex.P3 being the Return Memo., Ex.P4 being the Debit Advise, Ex.P5 being the copy of the legal notice, Ex.P6 being the acknowledgment card, Ex.P7 being the Statement of Account of Complainant's Bank and Ex.P8 being the Statement of Account of the accused's bank. This is the order in which the documents have been marked in both the cases by the trial court. So far as the defence documents are concerned, two defence documents were marked as Exs.D1 and D2. Ex.D1 being the xerox copy of the letter from the appellants to the accused and Ex.D2 being the letter given by the complainants to the accused in bond paper, but in the second case connected to the second criminal appeal above, only one document would be marked as Ex.D1 that is the letter given by the complainants to the accused in bond paper.

9. In appreciation of these evidences, the trial Judge without attaching the least importance for the legality on the subject that whenever the bounced cheques are produced before the Court for having returned, the same to the complainants on account of 'insufficiency of funds', the presumption of liability as given u/s 139 of the Negotiable Instruments Act in favour of the holder of the cheque is that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque of the nature referred to in Section 138 of the Act for discharging in whole or in part of any debt or other liability. This aspect has

never been dealt with by the trial court at all in its judgments, as a result of which the trial court has highlighted that the complainants have not produced any record for payment of money, but have vaguely alleged that in the month of December, 2000 between 10th and 15th, the amount has been paid to the accused and would wonder such huge amounts have been given without sufficient records.

10. The learned Magistrate has gone very deep into maintaining the accounts on the part of the complainants and the payment of income tax but has failed to analyse that it is the admitted case of the accused that he gave the cheques in favour of the complainants and attributes different reasons stating that he was made to issue those cheques in the Police Station when the complainants lodged the complaints against the accused in the Police Station on account of non-payment of their amounts. However, very simply the trial court has overlooked the non-payment of the amounts borne by the cheques by the accused and even the failure to give a reply rebutting the allegations of legal notice issued by the complainants to the accused, which are mandatorily to be complied with on the part of the accused. Regarding the cheques, the moment bounced cheques have been produced before the Court, presumption u/s 139 of the Negotiable Instruments Act legally operates and it is the duty of the Court to presume in the manner stipulated u/s 139 of the Negotiable Instruments Act and the only question that is to be posed is 'whether such a strong case preliminarily put up on the part of the complainants have been shattered or disproved by the accused with proper and strong evidence?'

11. It is not the defence case of the accused that he did not borrow from the complainants much less the cheque borne amounts. The admitted case on the part of the accused is that he was terribly in debt and was absconding without honoring his commitments, as a result of which the complainants lodged criminal complaints before the Police against him. Without deciding this issue, the Magistrate has jumped to the second stage of having extracted from the accused these cheques in exercise of undue influence or coercion in the Police Station. The non-compliance of the legal notice issued by the complainants cannot so easily be overlooked as it has been done by the trial court, since on receipt of legal notice either without complying with the requirement of law in settling the amount within fifteen days on the receipt of such notice or even keeping quiet without even denying the allegations by a reply, the only conclusion that could be arrived at is that the accused is presumed to have admitted those which have been averred in the notice and this is a case of such nature, wherein the accused has not only failed to settle the amount but also failed to issue a reply in time. The trial Magistrate has miserably failed to consider that the defence was taken only later by the accused at the time of trial to the effect that the cheques in issue have been obtained from him in the Police Station forcibly and on coercion, as spoken to by the defence witnesses D.Ws.1 and 2 but not immediately after he received the notice. If the defence taken later was true even on the date of receipt of the legal notice issued by the complainants, the accused should have

promptly stated those reasons in his reply and the defence should have been taken at this opportunity itself for him and since he failed to make use of this opportunity, the later version that the cheques were forcibly obtained under coercion in the Police Station cannot be considered to be a valid defence and the same has to be thrown to the ground, as the result of after thought, which the Magistrate failed to consider since they are the legal requirements for arriving at the valid conclusion.

12. Likewise, the limitation point has not been properly dealt with by the Magistrate. Since it is the admitted case of the accused that the statutory notice was received by him on 20.2.2001, which is not disputed by the complainants also and according to the Magistrate, he would never come forward to say when the complaint was presented before the Court but he would only come forward to say that he put his signature on 24.4.2001, which is beyond the limitation period, which would be assailed on the part of the complainants stating that after very many returns ultimately the Magistrate has put his signature, in the complaints filed as early as on 21.3.2001 in spite of the time being left with till 5.4.2001 and therefore, the complaint was well within time. The Magistrate must know that it is relevant for computation of period, the date of presentment of the complaint before the Court and not the date on which the Magistrate puts his signature or when it is being numbered and therefore, since the Magistrate has failed to offer the date of actual presentment of the complaint before the Court but held on malicious grounds that the complaint has not been presented in time, the same cannot be accepted as reasonable and therefore, at this score also the judgment of the trial court fails.

13. In short, the judgments of the trial court suffer from patent errors of law and perversity in approach and therefore become only liable to be set aside and hence the following judgment:

In result,

- i) Both the above criminal appeals succeed and they are allowed.
- ii) The judgments dated 23.8.2002 rendered in C.C. Nos. 4219 & 4220 of 2001 by the Court of XIII Metropolitan Magistrate, Egmore, Chennai are set aside.
- iii). The accused is found guilty of the offence u/s 138 of the Negotiable Instruments Act in both the cases above and sentenced to undergo conviction for a period of six months in each case and to pay a compensation double the amounts of the cheques within thirty days from the date on which the copy of this judgment is made ready.

Consequently, connected Crl. O.Ps are closed.