(2008) 11 MAD CK 0044

In the Madras High Court

Case No : Criminal A. No. 762 of 2002

Kumaraguru Finance APPELLANT

Vs

M. Ganesan Proprietor Raja Lorry Service RESPONDENT

Date of Decision : 14-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 255(1)
Evidence Act, 1872 — Section 3, 4
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2008) 11 MAD CK 0044

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : A. Ramesh for Ram and Ram Associates, for the Appellant; D. Shivakumaran, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Arumugaperumal Adityan, J.—This appeal has been preferred against the Judgment in C.C. No. 163 of 2001 on the file of Court of

Judicial Magistrate No. 1, Namakkal. The unsuccessful complainant before the trial Court is the appellant herein.

2. According to the complainant in the complaint, the accused had borrowed a sum of Rs. 1,00,000/- from the complainant agreed to pay interest

at the rate of 18% p.a, had executed a promissory note and also his wife had executed a mortgage deed dated 4.12.1998 as a security for the loan

borrowed by the accused. Till 13.7.2000, the accused had paid the interest for the said loan amount. The amount due as on 9.3.2001 inclusive of

interest comes to Rs. 1,30,000/-. To discharge the said loan amount, the accused had drawn a cheque for Rs. 1,30,000/- in favour of the

complainant. For the loan along with interest , the amount due from the accused comes to Rs. 1,28,800/- and for the balance of Rs. 1,200/-, the

accused had received the said amount by way of cash. When the said cheque was presented for encashment on 9.3.2001 before Lakshmi Vilas

Bank, Namakkal, the said cheque was dishonoured by the bank on the ground of ""insufficient funds"". Hence the complainant has preferred the

complaint against the accused u/s 138 of the Negotiable Instruments Act.

3. The complaint was taken on file by the learned Judicial Magistrate, after taking cognizance of the same and after the accused appeared on

summons, copies u/s 207 of Cr.P.C were furnished to the accused, and when the offence was explained to the accused, he pleaded not guilty.

4. Before the trial Court,on the side of the complainant, P.Ws 1 to 3 were examined and Exs P1 to P21 were marked. P.W. 1 is the complainant.

P.W.2 is the Branch Manager of Lakshmi Vilas Bank, Namakkal and P.W. 3 is the Deputy Manager of Maharastra Bank where the accused is

having his account.

5. After going through the evidence both oral and documentary, the learned trial Judge finding no material to convict the accused u/s 138 of the

Negotiable Instruments Act had dismissed the complaint thereby acquitting the accused u/s 255(1) of Cr.P.C. Aggrieved by the findings of the

learned trial Judge, the complainant has preferred this appeal.

6. Now the point for determination in this appeal is whether the charge u/s 138 of the Negotiable Instruments Act has been proved beyond any

reasonable doubt against the accused to warrant conviction under the said provision of law?

7. Heard Mr. A. Ramesh, Senior learned Counsel for the appellant and Mr. D. Shivakumaran, learned Counsel for the respondent and considered

their rival submissions.

8. The only moot point for decision in this appeal is whether the impugned cheque Ex P11 dated 9.3.2001 was drawn by the accused to discharge

a subsisting loan due to the complainant?.

9. POINT:- According to P.W. 1, the complainant, the accused had borrowed from the plaintiff''s Finance Corporation Rs. 1,00,000/- and on the

date of drawal of Ex P11 impugned cheque dated 9.3.2001, a sum of Rs. 1,28,800/- was due to the complainant. After receiving Rs. 1,200/-by way of cash to round of the loan, the accused had drawn the impugned cheque for Rs. 1,30,000/-. To substantiate this claim that the complainant

had lend Rs. 1,200/- by way of cash, Ex P9 Cash Book for the year 2000-01 was produced on the side of the complainant. But the Ledger

maintained by the complainant, to show that the corresponding entry in the ledger dated 7.3.2001 was also made for the payment of Rs. 1,200/-

by way of cash to the accused was not produced. As rightly contended by the learned Counsel appearing for the respondent/accused, if the

complainant would have paid Rs. 1,200/- by way of cash to the accused certainly the complainant would have obtained a voucher for the said

payment of Rs. 1,200/-. There is an entry in Ex. P9 to show that the payment of Rs. 1,200/- is reflected in Folio 133. Ex P8 is the loan ledger

maintained by the complainant for the accused for the loan borrowed from the complainant. A perusal of Ex P8 ledger shows that on 13.11.1998

a sum of Rs. 1,00,000/- was borrowed by the accused from the complainant and thereafter periodical entries for the payment of interest are made

in the said ledger. But the entries stopped with the date 19.6.2000 and there is no entry for 7.3.2001 to show that a sum of Rs. 1,200/- was paid

to the accused by way of cash. Under such circumstances, it cannot be said that the payment of Rs. 1,200/- by the complainant to the accused on

7.3.2001 has been proved beyond any reasonable doubt.

10. Further P.W. 1 in his evidence would admit that the impugned cheque Ex P11 contains only the signature of the accused and in the impugned

cheque Ex P11 the amount was written both in letters as well as in numerical only by the complainant. Section 138 of the Negotiable instrument

Act reads that only if a cheque drawn by a person in order to discharge a subsisting enforceable liability or debt, if on presentation in the bank is

dishonoured on the ground of insufficient funds alone is liable to be punished under the said provision of law.

11. The learned trial Judge at paragraph 12 of his Judgment has also observed that the amount due to the complainant from 14.7.2000 to

8.7.2001 ie., the date of filing of the civil suit in O.S. 398 of 2001 on the basis of the promissory note executed by the accused for a sum of Rs.

1,00,000/-comes to Rs. 1,21,240/- only and hence the complainant after calculating the interest at the rate of Rs. 3.60 instead of Rs. 1.80 per month is also in correct and that as claimed by the complainant, the amount due to the complainant on the date of drawal of Ex P 11 by the

accused will not be Rs. 1,28,800/- as on 7.3.2001, but it was only Rs. 1,21,240/-. The claim made by the complainant that the liability of the

accused on the date of drawal of the impugned cheque Ex P11 to the complainant was Rs. 1,28,800/- and to make it as a around sum of Rs.

1,30,000/- a sum of Rs. 1,200/- was paid by cash, are all not proved by the complainant beyond any reasonable doubt as rightly held by the

learned trial Judge.

12. The learned Counsel appearing for the respondent relying on a decision reported in M.S. Narayana Menon @ Mani Vs. State of Kerala and

Another, would contend that if the complainant has failed to prove the payment by way of cash to show that the cheque amount was only for

discharging a subsisting liability, the complainant is not entitled to the relief u/s 138 of Negotiable Instruments Act. The short facts of the said ratio

are that the second respondent was a member of Cochin Stock Exchange and the appellant used to carry on transactions in shares through the

second respondent in the said Stock Exchange. A complaint petition was filed by the second respondent against the appellant purported to be for

commission of an offence u/s 138 of Negotiable Instruments Act and in that case, it was contended that a sum of Rs. 3,00,033 was due to the

second respondent to the appellant in relation to the said transactions and a sum of Rs. 5,000/- was paid by way of cash and the cheque was

drawn for a sum of Rs. 2,95,033/- and when the said cheque was presented for encashment, got dishonoured due to insufficient funds in the

account of the appellant. During the Court proceedings , the appellant raised a plea that second respondent was in dire financial assistance and the

aforesaid cheque for a sum of Rs. 2,95,033 was given by way of loan so as to enable him to tide over his difficulties. He also adduced his evidence

before the trial Court. The trial Court has opined that the appellant failed to discharge the onus placed on him in terms of Section 139 of the

Negotiable Instruments Act. Thus, the trial Court convicted and sentenced the appellant u/s 138 of the Negotiable Instruments Act. However on

an appeal preferred by the appellant, the said Judgment was set aside. Thereafter the complainant ie., the second respondent filed a criminal appeal before the High Court which was allowed against which the the present appeal was preferred before the Honourable Apex Court. While disposing

of the said appeal, the Honourable Apex Court has observed as follows:

Presumptions both under Sections 118(a) and 139 of the Negotiable Instruments Act are rebuttable in nature. In terms of Section 4 of the

Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is

disproved. The words""proved"" and ""disproved"" have been defined in Section 3 of the Evidence Act. Applying the said definitions of ""proved"" or

disproved"" to the principle behind Section 118(a) of the Negotiable Instruments Act, the Court shall presume a Negotiable Instrument to be for

consideration unless and until after considering the matter before it, it either believes that the consideration does not exit or considers the non-

existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition

that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the

evidence adduced on behalf of the complainant could be relied upon. It is not necessary for the defendant to disprove the existence of

consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of

probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which the accused relies. The

accused need not disprove the prosecution case in its entirety. Moreover, the onus on an accused is not as heavy as that of the prosecution. It may

be compared with that on a defendant in a civil proceeding.

Here in the case on hand, the onus is heavily on the complainant to show that the impugned cheque Ex P11 was drawn to discharge a subsisting

liability. But in this case, the complainant has failed to prove that to discharge a subsisting liability of Rs. 1,30,000/- under Ex P11 impugned

cheque was drawn by the accused since there was no evidence for cash payment of Rs. 1200/- to the accused as claimed by the complainant.

13. The same principle was reiterated by me in an earlier Judgment reported in Meyyammani Proprietrix of Murugan Enterprises Kattoor

Coimbatore-641 009 v. India Engineering Corporation C-25, Private Industrial

Estate, Kuruchi and Ors. (2008) 1 M.L.J. 645. Under such

circumstances, the charge u/s 138 of the Negotiable Instruments Act has not been proved beyond any reasonable doubt against the accused. Point

is answered accordingly.

14. In the result, the appeal is dismissed confirming the Judgment in C.C. No. 163 of 2001 on the file of the Judicial Magistrate No. 1, Namakkal.

