Kamala S vs Vidyadharan M.J. & Anr on 20 February, 2007

Equivalent citations: AIR 2007 SC (SUPP) 1142, 2007 (5) SCC 264, (2007) 3 RECCRIR 865, (2007) 2 MAD LJ(CRI) 111, (2007) 1 BOMCR(CRI) 967, (2007) 58 ALLCRIC 884, (2007) 3 CIVLJ 242, (2007) 2 BANKJ 271, (2007) 2 CURCC 17, (2007) 2 BANKCAS 463, (2007) 3 KER LT 861, (2007) 3 SCALE 235, (2007) 2 SUPREME 611, (2007) 2 PAT LJR 121, 2007 CRILR(SC MAH GUJ) 457, (2007) 3 ALLCRILR 247, (2007) 2 ALLCRIR 1327, (2007) 2 CURCRIR 9, (2007) 1 NIJ 306, (2007) 2 BOM CR 570, (2007) 2 CRIMES 318, (2008) 1 GUJ LR 423, 2007 CALCRILR 2 163, (2007) 1 BANKCLR 584, (2007) 2 RAJ CRI C 491, 2007 (2) SCC (CRI) 498, (2007) 77 CORLA 139, (2007) 2 CTC 648 (SC), (2007) 1 JCC 82 (SC), (2007) 2 CIVILCOURTC 23, (2007) 136 COMCAS 281, AIRONLINE 2007 SC 28, (2007) 1 BANK CLR 584, 2007 CRI LR(SC MAH GUJ) 457, (2007) 1 BOM CR (CRI) 967, (2007) 2 JLJR 105, (2007) 2 BANK J 271, (2007) 77 COR LA 139, (2007) 2 ALL CRI R 1327, (2007) 3 REC CRI R 865, (2007) 58 ALL CRI C 884, (2007) 2 CAL CRI LR 163, (2007) 136 COM CAS 281, (2007) 2 CUR CC 17, (2007) 2 CIVIL COURT CASE 23, (2007) 2 CUR CRI R 9, (2007) 2 BANK CAS 463, (2007) 3 ALL CRI LR 247, (2007) 3 CIV LJ 242, 2007 CRI LR (SC&MP) 457

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:
Appeal (crl.) 233 of 2007

PETITIONER:
Kamala S

RESPONDENT:
Vidyadharan M.J. & Anr

DATE OF JUDGMENT: 20/02/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T [Arising out of S.L.P. (Crl.) No. 3410 of 2006] S.B. Sinha, J.

Leave granted.

Appellant herein was charged with commission of an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act') on the premise that a cheque issued by her on 05.09.1997 for a sum of Rs. 1 lakh drawn in favour of the respondent herein, when presented, was dishonoured for the reason "funds insufficient". A legal notice was sent to her, but despite the receipt thereof, she had not repaid the said amount. Before the learned Trial Judge, a defence was raised by the appellant herein that the cheque in question was not drawn in discharge of any debt or security but in fact was drawn for payment of a balance consideration for sale of a property in her favour by the wife of the respondent.

According to the appellant, Smt. Sathyabhama owned a property bearing old Survey No. 1363/3-1-1 measuring an area of 47 cents. She had executed two Sale Deeds, one in favour of Mr. Ramchandran Nair and another in favour of Thankamony conveying to them 20 cents and 27 cents respectively. The Sale Deeds were allegedly executed in favour of the aforementioned persons as a security in lieu of some amount paid in her favour. However, when the Thankamony and Ramchandran Nair demanded the money back from the wife of the respondent, the appellant was approached for purchase of the said property for a consideration of Rs. 5 lakhs. On 05.09.1997, the said Thankmony executed a Deed for Sale in favour of the appellant wherefor she had withdrawn a sum of Rs. 4 lakhs from bank. The said amount was paid to Sathyabhama which in turn was paid to Thankamony and Ramchandran Nair. However, as there was a dispute in regard to the exact area of the property and measurement therefor had not been taken, she had given a cheque to Sathyabhama in the name of her husband as demanded by Sathyabhama on an understanding that the consideration shall be reduced if the area found in the Sale Deed is found short. As upon measurement, the area of the property conveyed in his favour was found to be short by 4 cents, the appellant paid a sum of Rs. 20,000/- to the respondent on 27.11.1997. Allegedly, however the respondent had asked for a sum of Rs. 10,000/- more from the appellant, but a sum of Rs. 5,000/- was only given to him on 18.12.1997 towards full and final settlement thereof and in that view of the matter no further amount was due for her.

However, despite the same, a cheque was produced before a bank which, as noticed hereinbefore, was dishonoured.

A complaint petition was filed thereafter on the allegation that the appellant had borrowed a sum of Rs. 1 lakh from the respondent for purchasing a house and the same was to be repaid within a period of 5 months.

The learned Trial Judge considered the evidence adduced on behalf of the complainant and found the defence of the appellant to be a probable one and having regard to the facts and circumstances of this case, held that the presumption raised under Section 142 of the Act stood discharged and the complainant failed to discharge the onus placed on him stating :

> " This also suggests that Ext. P2 may be a signed blank cheque issued by the accused to PW1 as a security. Thus the facts and circumstances discussed above leads one to the conclusion that the defence set up by accused that he had issued a signed blank cheque as a security along with Ext. P1 agreement and Ext. P2 is that cheque he had

> issued is probable. The circumstances discussed above are badly damaging the prosecution case and they are sufficient to displace the presumptions available to the complainant. These circumstances in fact corroborates PW1 to show the reasonable possibility of the non existence of the presumed fact. The accused need not prove his defence case beyond reasonable doubt. Here the evidence tendered by DW1 together with the circumstances discussed above is seen sufficient to rebut the presumptions. Now the burden again shifts to the complainant and he is to prove by independent positive evidence the most material fact of existence of debt of the accused. The complainant had not produced sufficient evidence to prove his case beyond reasonable doubt, without the help of the presumptions "

On the said finding, the learned Trial Judge recorded a judgment of acquittal. On an appeal preferred by the respondent herein thereagainst, the High Court, however, reversed the said finding, opining that the appellant had not been able to discharge the burden of proof laid down under Sections 138 and 139 of the Act, which read as under :

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. 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, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"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, or any debt or other liability."

The High Court in arriving at the said conclusion, although accepted that the Sale Deeds had been executed in favour of the appellant herein, but despite the fact that the defence witnesses had fully supported her statement, who also examined herself as DW-1, held "There is no explanation for non- mentioning of the same" in the reply to the notice which had been served on her by the respondent.

On the aforementioned finding, the appellant was sentenced to imprisonment till rising of the Court and pay compensation of a sum of Rs. 1 lakh to the complainant in terms of Section 357(3) of the Code of Criminal Procedure; and in default thereof to undergo simple imprisonment for 6 months.

Mr. K.V. Viswanathan, the learned counsel appearing on behalf of the appellant, would submit that the High Court committed a manifest error in passing the impugned judgment, inasmuch as the learned Trial Judge keeping in view the entire materials on records had arrived at an opinion that the burden had fully been discharged by the appellant, and, thus, could not have reversed the said finding as the said defence was a probable one.

Mr. Rajeev, learned counsel appearing on behalf of the respondent, on the other hand, would draw our attention to a declaration made by the appellant herein contained in Annexure R-1, which is in the following terms :

> "I, Sukumaran Kamala at Baiju Bhawanam in Puthoor Mukku, Kadavoor Desom in Kadavoor Village hereby execute this agreement on 05.09.1997 (Nineteen Ninety Seven September five) and given to Vidhyadharan s/o Kunhikrishnan at Vidhyamandiram, at Error Amsom Desam in Eroor Village.
>
> I have obtained from you Rs. One lakh for the purpose of purchasing a property. I hereby undertake that I will repay Rs. One lakh within five months from this date. If I fail to repay Rs. One lakh within the due date you are entitled to this amount along with interest from such date and that you can realize from my properties.
>
> All the above stipulations have written with my full knowledge and consent and signed."

The learned counsel would contend that keeping in view the fact that in terms of the said document a cheque was drawn by the appellant herein within a period of 5 months from 05.09.1997, a presumption in terms of Section 139 of the Act was correctly raised by the High Court.

It was submitted that even if the defence raised by the appellant herein was true, she has failed to offer any explanation as to why the cheque had to be issued.

The Act contains provisions raising presumption as regards the negotiable instruments under Section 118(a) of the Act as also under Section 139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case.

The nature and extent of such presumption came up for consideration before this Court in M.S. Narayana Menon Alias Mani V. State of Kerala and Anr. [(2006) 6 SCC 39] wherein it was held :

> "30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the 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 exist 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 dos 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."

This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefor can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held;

> "33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

It was further observed that ;

> " 38. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a "fortiori" even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.
>
> 39. A presumption is a legal or factual assumption drawn from the existence of certain facts."

Indisputably, a sale deed was executed in favour of the appellant herein by the persons in whose favour the wife of the respondent had executed Deeds of Sale.

A sum of Rs. 4 lakhs had been withdrawn by the respondent from the bank.

The document was executed on the same day on which Exhibit P-1 was executed.

The learned Trial Judge as also the High Court had arrived at a finding of fact that the testimony of the appellant (DW-1) was supported by other witnesses examined on her behalf. The High Court, however, proceeded to hold that Ramchandran Pillai and Thankamony had not been examined nor the purported Deeds of Sale executed on their behalf by the wife of the respondent had been examined. Appellant, as noticed hereinbefore, examined herself. The wife of the complainant had been working in a school near her house. Her explanation in regard to the circumstances in which she had drawn a cheque was not controverted. Appellant also examined the scribe of the deed. According to the appellant, two Sale Deeds were executed showing considerations therefor as Rs. 80,000/- and Rs. 20,000/- only at the instance of the appellant although the agreed consideration therefor the same was Rs. 5 lakhs. DW-3, Shashi was also a document writer.

The testimonies of the said witnesses were relied upon by the learned Trial Judge.

A finding of fact was arrived at that the cheque was not signed 5 months after the execution of the agreement as contained in Ex. P-1 but on the same day. This finding was arrived at on comparison of the colour of the ink and 'letter pattern' obtaining in both the documents. A further finding of fact was arrived at by the learned Trial Judge that the same had been written by the same pen. The respondent who examined himself as PW-1 accepted that he had received a sum of Rs. 20,000/- after the execution of the said Deed of Sale, but raised a contention that said amount had not been paid in relation to another transaction; but what other transaction was entered into by and between the parties thereto had not been disclosed. Despite a definite stand taken by the appellant in that behalf, the respondent did not bring any fact to establish as to what the possible transaction could have been. It was, therefore, opined ;

> "...This also suggests that Ext. P2 may be a signed blank cheque issued by the accused to PW1 as a security. Thus the facts and circumstances discussed above leads one to the conclusion that the defence set up by the accused that he had issued a signed blank cheque as a security along with Ext. P1 agreement and Ext. P2 is that cheque he had issued is probable. The circumstances discussed above are badly damaging the prosecution case and they are sufficient to displace the presumptions available to the complainant. These circumstances in fact corroborates PW1 to show the reasonable possibility of the non existence of the presumed fact. The accused need not prove his defence case beyond reasonable doubt. Here the evidence tendered by DW1 together with the circumstances discussed above is seen sufficient to rebut the presumptions. Now the burden again shifts to the complainant and he is to prove by independent positive evidence the most material fact of existence of debt of the accused. The complainant had not produced sufficient evidence to prove his case beyond reasonable doubt, without the help of the presumptions. Thus the complainant failed to prove beyond reasonable doubt that the accused had issued Ext. P1 cheque towards the repayment of Rs. 1,00,000/- he had borrowed from PW1 as alleged...."

The High Court, on the other hand, only on the premise that said Ramchandran Pillai and Thankamony had not been examined and the appellant did not exhibit the Deeds of Sale executed in their favour by the wife of the respondent opined that the said finding was perverse. The reasonings of the learned Trial Judge had not been met by the High Court. Nothing has been stated as to why the findings of the learned Trial Judge were not probable.

Having considered the entire fact situation obtaining in the present case, we are of the opinion that the defence case cannot said to be wholly improbable one. If it was probable, the findings of the learned Trial Judge could not have been thrown out without meeting the reasonings therefor. The High Court, therefore, in our opinion was not correct in interfering with the said Judgment.

It is now well settled when two views are possible, the High Court while exercising its appellate power against a judgment of acquittal, shall not ordinarily interfere therewith. [See V. Venkata Subbarao v. State represented by Inspector of Police, A.P. 2006 (14) SCALE 125].

For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed.