BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 29.04.2015
CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Crl.R.C.(MD)NO.844 of 2011

Emerald .. Revision Petitioner

Vs.

V.Mohandas .. Respondent

Prayer: Criminal Revision Petition filed under Section 397 r/w 401 Cr.P.C., against the judgment of conviction imposed in C.A.No.283 of 2005 on the file of the District & Sessions Judge, Kanyakumari Division at Nagercoil dated 19.09.2011 confirming the judgment in S.T.C.No.3602 of 2004 on the file of the Judicial Magistrate No.2, Nagercoil dated 21.10.2005.

For Petitioner :: Mr.C.K.M.Appaji

For Respondent :: Mr.K.Sreekumaran Nair

O R D E R

The petitioner is the sole accused in S.T.C.No.3602 of 2004 on the file of the Judicial Magistrate, No.II, Nagercoil. The respondent is the complainant in the case. The respondent filed the said private complaint alleging that the petitioner had committed offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The trial Court by judgment dated 21.10.2005 convicted him under Section 138 of the Act and sentenced him to undergo simple imprisonment for 6 months and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for two months. Challenging the same, he filed an appeal in C.A.No.283 of 2005 on the file of the District and Sessions Judge, Kanyakumari Division at Nagercoil. The learned Sessions Judge, Kanyakumari District at Nagercoil, by judgment dated 19.09.2011 has dismissed the said appeal thereby confirming the conviction and sentence imposed on the petitioner.

2. I have heard the learned counsel for the petitioner and the learned counsel for the respondent and also perused the records carefully.

3. The case of the prosecution in brief is that the accused and the complainant were one time friends. During that period on 29.09.2003, the accused allegedly borrowed a sum of Rs.2,10,000/- from the complainant and on the same day, he issued the cheque in question by anti dating the same as 31.12.2003 for a sum of Rs.2,10,000/-, in discharge of the above said liability. The said cheque was later on presented for collection; dis-honoured by the bank for want of sufficient funds; Notice was issued under Section 138 of the Act and finally, the prosecution was launched.

4. Even before the above said statutory notice, the accused had issued notice to the complainant and others on 17.04.2004 itself, wherein, he had stated that he had borrowed money from one Mr.Sasikumar, a Development Officer working in Life Insurance Corporation of India under him. The accused was working as an Agent. In connection with the said loan, the cheque slip in question was issued to him and now, the same has been abused by him. It was the further stand of the accused that he did not borrow any amount from the complainant on 29.09.2003 at all. Thus, according to him, the cheque was never issued to the complainant, that too, as against any legally enforceable debt.

5. Before the trial Court, on the side of the complainant, he was examined as P.W.1 and 5 documents were exhibited. On the side of the accused, he was examined as D.W.1 and one Prabhakaran, the then Manager of the Bank was examined as D.W.2. As many as 6 documents were exhibited on the side of the defence. According to D.W.2, the cheque book containing the cheque in question was issued by the bank to the accused only on 03.10.2003. Thus, according to the case of the accused, the said cheque would not have been in the hands of the accused on 29.09.2003 and thus, the whole case of the complainant is false. Having considered the above materials, the trial Court found the accused guilty and accordingly, punished him. That is how, the accused is before this Court with this revision.

6. I have heard the learned counsel for the petitioner and the learned counsel for the respondent and also perused the records carefully.

7. The learned counsel for the petitioner would take me through the evidence of D.W.2 to say that the Bank itself issued the cheque book only on 03.10.2003. This is fortified by Exs.D5 and D6. The learned counsel for the petitioner would further submit that even before the cheque in question was presented by the complainant, the accused had issued notice on 17.04.2004 itself narrating the above happenings. The learned counsel for the petitioner would therefore, submit that the so called borrowal on 29.09.2003 cannot be true and that the cheque would not have been issued as against any legally enforceable debt.

8. The learned counsel for the respondent would very seriously dispute the evidence of D.W.2. He would point out that though in chief examination, he has stated that the cheque book was issued on 03.10.2003, during cross examination, he has stated that he cannot assertively say that the cheque was issued only on 03.10.2003. He has further admitted that he was not there in the office during that time. By taking me through the said witness during cross examination, the learned counsel for the respondent would submit that the cheque book would have been issued prior to 29.09.2003 and that is why the cheque in question was issued by him on 29.09.2003 by him. The learned counsel would further submit that the accused had admitted the execution of the cheque and therefore, the presumption under Section 139 of the Act should be drawn against the accused. He would further point out that the said presumption has not been rebutted by the accused.

9. I have considered the above submissions.

10. Admittedly, according to the case of the prosecution, the amount was borrowed only on 29.09.2003 and the cheque was issued on the same day by anti dating the same. A close reading of D.W.2's evidence,

who is not an interested witness, would go to show that the cheque book containing the cheque slip in question was issued only on 03.10.2003 by the Bank. This is fortified by Exs.D5 and D6. Though he has admitted during cross examination that he was not there in that branch during the relevant period and though he cannot assertively say that he issued the cheque book to the accused, it is immaterial. The reason being that the Bank is a public Organisation and every business of the Bank is recorded in the regular course of business. Ex.D6 is a Register regularly maintained by the Bank. The same would go to show that the cheque book was issued only 03.10.2003. At this juncture, I have to point out that the accused need not prove his case beyond reasonable doubts and it is enough to prove the defence by preponderance of probabilities. By examining D.W.2 and by proving Exs.D5 and D6, the accused has discharged the burden of disproving the case of the complainant.

11. After the burden was shifted to the complainant, the complainant has not let in any further evidence to show that the cheque book in question would have been issued prior to 29.09.2003. Thus, I hold that the accused has succeeded in establishing that the cheque book in question was issued by the bank only on 03.10.2003. If that the conclusion, which could be safely arrived at, then there may be no difficulty for this Court to come to the conclusion that on 29.09.2003, the cheque in question would not have been issued by the accused at all to the complainant. Similarly, the borrowal of money on 29.09.2003 cannot be disbelieved.

12. The learned counsel for the respondent would, however, submit that during cross examination the accused has admitted the execution of the cheque and therefore, presumption under Section 139 of the Act should be drawn against him. Assuming that the same is true, on facts, in my considered view, the presumption drawn under Section 139 of the Act against the accused has been successfully rebutted by the accused by examining D.W.2 and by proving Exs.D5 and D6, which have clearly established that the cheque was not issued on 29.09.2003 as against any legally enforceable debt. But the Courts below have not appreciated these facts in the proper perspective. Thus, I am inclined to set aside the conviction and sentence imposed on the petitioner.

13. In the result, the revision succeeds; the conviction and sentence imposed on the petitioner is set aside and he is acquitted. Fine amount, if any, paid by the petitioner shall be refunded to him. Bail bond shall stand terminated.

Sd/-
Assistant Registrar(Writs)

\\True copy\\

Sub Assistant Registrar

To
1.The District & Sessions Judge, Kanyakumari Division at Nagercoil
2.The Judicial Magistrate No.2,Nagercoil
3.-do-thro'The Chief Judicial Magistrate, Nagercoil
+1CC TO MR.K.Sreekumaran Nair Advocate SR.NO.24025
+1CC TO MR.C.K.M.Appaji Advocate SR.NO24507.

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RR
NA/AMF/10/06/2015/P3/6C