

Bail Slip

The Revision Petitioners/Accused 1 to 3
Viz.

- 1.Vinith Motors
rep.by its Partner Palanisamy
- 2.P.Palanisamy
- 3.Kalavathi

were released on bail by order of this court dated 15/12/2011
made in Crl.Mp.1 & 2 /2011 in Crl.RC.1772/2011 on the file of
this court.

RESERVED ON : 27.06.2017
DELIVERED ON: 10.07.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS
CORAM
THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR
Crl.R.C.No.1772 of 2011

1. Vinith Motors
rep.by its partner Palanisamy
2. P.Palanisamy
3. Kalavathi

.. Petitioners/accused 1 to 3

VS.

C.Manoharan

सत्यमेव जयते .. Respondent/Complainant

Revision Case filed under Section 397 and 401 of Cr.P.C to
set aside the conviction imposed in the judgment dated
10.11.2011 made in C.A.No.162 of 2010 on the file of the
Additional District and Sessions Court/Fast Track Court No.1,
Salem, confirming the conviction imposed in the judgment dated
12.10.2010 made in S.T.C.No.1536 of 2006 on the file of the
Judicial Magistrate, No.IV, Salem by allowing the Criminal
Revision petition.

For petitioners : Mr.N.Manokaran

For respondent : Mr.B.Gopalakrishnan

O R D E R

The revision petitioners herein are the accused. Aggrieved over the conviction and sentence by the Judicial Magistrate No.IV, Salem, which was confirmed by the 1st Additional District and Sessions Judge, Salem, awarding simple imprisonment of one year each and to pay a fine of Rs.5000/- each and in default to undergo simple imprisonment for two months each, under Section 138 of the Negotiable Instruments Act, the present revision came be filed by the accused/revisionists.

2. For the sake of convenience, the parties are referred to, as per their ranking before the trial Court.

3. Facts and circumstances giving rise to this revision are:

(i) The 2nd and 3rd accused are husband and wife and they were running Motorcycle company at Erode and Salem. In the month of December, 2005 both of them approached the complainant and borrowed a sum of Rs.10,00,000/- on 18.12.2005 (Ex.P1) as loan for their business purpose on behalf of the 1st accused Firm and in consideration thereof, a cheque was given to the complainant by the accused under the signature of 2nd accused. They also pleaded of financial crunch and ensured to pay back the amount to the complainant within a month and trusting their words, the said amount was given by way of loan. When the said cheque was presented before the ICICI Bank, Erode Branch, the same was returned with an endorsement "insufficient fund" Ex.P3. Ex.P4 is the banker's letter. When the complainant requested the accused, they impudently refused to pay back and, therefore, a statutory notice was issued demanding the amount and since no amount was paid pursuant thereto, the instant complaint was filed.

(ii). In the complaint filed by the present complainant/respondent, after recording of the evidence, further submission of accused was recorded where he denied the allegations and insisted that there was misuse of blank cheque

by the complainant. It is the case of the accused that they are stranger to the complainant and that there was no privity of contract between them and the complainant. According to them, they never borrowed amount from the complainant. It is stated that one mohan was working in the branch office of the accused company at Salem and that there was financial transaction between the accused and the said Mohan. On 02.10.2004, the accused sought financial help from Mohan for a sum of Rs.1,30,000/-. Accordingly, the said Mohan arranged finance on 04.10.2004. At that time, the accused issued a cheque Ex.P1 to the said Mohan. Apart from Ex.P1, the accused also handed over blank cheques to the said Mohan. Even after settlement of the amount advanced, the said Mohan did not return the amount. Thereafter, the accused Firm suffered huge loss in business and that the Principal i.e. New Royal Enfield Motor Cycles also sent a notice to cancel the dealership and at that time Mohan requested the accused to recommend his name. As the accused did not agree for that, the said Mohan, has misused the blank cheques. D.W.2 also stated that blank cheques were misused by the said Mohan.

(iii). The complaint preferred by the complainant/ respondent was taken cognizance in ST.C.No.1536 of 2006. After due trial, the learned Judicial Magistrate No.IV, Salem found the accused guilty under Section 138 of the Negotiable Instruments Act and imposed sentence to undergo one year Simple Imprisonment each and also to pay a fine of Rs.5,000/- each and in default, Simple Imprisonment for two months. Against which, the accused/ revisionists preferred an appeal in Crl.A.No.162 of 2010 and the Additional District and Sessions Court, Fast Track Court No.1, Salem, vide judgment dated 10.11.2011 confirmed the judgment of the Trial Court. Therefore, the accused/revisionists are before this Court.

4. Learned counsel appearing for the revision petitioners / accused submitted that there is no privity of contract between the accused and the complainant. The learned counsel further submitted that the oral and documentary evidence adduced on the side of the accused would clearly probabilise the case of the accused that they never issued cheque to P.W.1. It is submitted that the blank cheques given by the accused to one Mohan in the course of financial transaction has been misused by P.W.1, which is evident from Ex.D10, letter issued by Mohan. It is the vehement contention of the learned counsel for the revisionists/accused that the burden was cast upon the complainant to prove not only that there was an existing debt or liability but that debt or other liability was legally enforceable. According to the learned counsel, the execution of

the cheque has also not been proved. Therefore, it is the contention of the learned counsel that the Courts below have wrongly placed the burden on the accused and the offence under Section 138 has not been made out.

5. It is also the vehement contention of the learned counsel for the revisionists/accused that the 3rd accused has not at all been in charge of the day-to-day affairs of the Firm. When that being so, the conviction imposed as against the 3rd accused is not all sustainable. Hence, the learned counsel prayed for allowing the revision.

6. On the contrary, it is the contention of the learned counsel for the complainant/respondent that the defence set up by the accused i.e., the blank cheques given by the accused to one Mohan has been misused by the complainant is only after thought and that, there was no whisper or whatsoever in the reply notice about the said defence. According to the learned counsel, only during trial, the said defence was introduced and that the same has also been falsified by their own document, i.e. Ex.D10. Therefore, it is submitted by the learned counsel for the complainant/respondent that the Courts below have rightly found the accused guilty under Section 138 of the Negotiable Instrument Act and hence, the same does not warrant any interference of this Court.

7. In the light of the above submissions, now the points that arise for consideration in this revision are:

(i) Whether the order of the Courts below in convicting the revisionists suffers any illegality or impropriety?

(ii) Whether the revisionists have discharged the statutory presumption available under Section 138 of the Negotiable Instruments Act?

8. It is not in dispute that 2nd and 3rd accused, who are husband and wife, are partners of the 1st accused Firm. On a careful perusal of the entire records, it is seen that the 1st accused Firm is the dealer of Royal Enfield Motor cycles and that they had branch office at Salem and Erode. It is the case of the complainant that the accused had approached him and

borrowed a sum of Rs.10,00,000/- on 18.12.2005 for the purpose of their business, and issued Ex.P1 cheque, which has been signed by the 2nd accused. According to the complainant, the 2nd and 3rd accused, being husband and wife and partners of the 1st accused Firm, came together and borrowed the aforesaid amount. It is also the case of the complainant that on the advise given by the 2nd and 3rd accused, he presented the cheque in question on 03.4.2006 but the same was dishonored on account of "insufficient funds" and that the presentation of cheque for encashment and dishonour has also been clearly established by adducing oral and documentary evidence.

9. Admittedly, P.W.2, Assistant Manager, ICICI bank and P.W.3, Bank Manager, Syndicate Bank, were examined and they have spoken about the presentation as well as dishonour of cheque in question. The Return memo Ex.P3 has also been filed. There is no dispute with regard to the signature of 2nd accused in Ex.P1 cheque. Ex.P5 has been filed to show that the complainant has issued a notice within the statutory period. In reply notice, Ex.P7, except denying the transaction, there is no whisper, whatsoever made by the accused about the present defence taken by them that the cheque in question was given to one Mohan in the course of financial transaction and that the same has been misused.

10. As stated supra, the main defence taken by the accused during trial is that the cheque in question and another cheque were originally handed over in blank to one Mohan, who was working in one of the branch of the accused Firm at Salem on 04.10.2004; that despite repayment of the alleged amount to the said Mohan, he did not handover the cheque; that the accused had suffered huge loss in business and also received a letter from the Principal for cancellation of the dealership and at that time, the said Mohan, requested them to recommend his name for obtaining dealership, for which the accused refused and that the alleged cheque has been misused by the complainant. But the fact remains that the said Mohan has not been examined. Whereas D.W.2, who is said to be another employee of the accused at the relevant time, was examined to show that the accused used to leave the blank cheques with Mohan.

11. Be that as it may, it is well settled that once the cheque has been signed and drawn by the person on the account maintained by him and the said cheque was dishonoured and that notice was sent within the statutory period, then it is presumed that the offence under Section 138 has been made out.

12. It is true that the statutory presumption is rebuttable and the defence can be proved based on preponderance of probabilities. Admittedly, 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. In a case of this nature, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration. In the case on hand, as discussed supra, the entire oral and documentary evidence, would clearly prove the fact that Ex.P-1 cheque has been issued only for discharging the legally enforceable debt. The cursory glance at the cheque in question would leave no doubt that the same is undisputedly signed by the 2nd accused. At the risk of repetition, this Court once again points out that the signature, presentation as well as dishonour of cheque has been clearly established by the complainant. The statutory presumption also comes into operation in favour of the complainant.

13. It is worthy to mention that at the first instance i.e., in the reply notice issued by the accused, there was no whisper about the handing over of the alleged blank cheques to Mohan. Only during the trial, the said defence has been introduced by the accused for the first time. Though the accused have taken the defence that on 04.10.2004, one Mohan has arranged finance of Rs.1,30,000/- and at that time, two blank cheques have been handed over to him and that, the same has been misused, the accused have not taken steps to examine the said Mohan. However, the accused have filed letter dated 05.4.2004 said to have been issued by Mohan in this regard, which is marked as Ex.D10. D.W.2 was also examined to show that the accused used to leave blank cheques to the said Mohan. The said letter dated 05.4.2004, Ex.D10, would go to show that the accused borrowed a sum of Rs.1,30,000/- on 04.04.2004 and he received two cheques for the said amount.

14. It is to be noted that the aforesaid letter dated 05.4.2004, Ex.D10, itself has been falsified in view of the defence set up by the accused. It is the specific case of the accused that the cheque in question and another cheque were handed over to Mohan only on 4.10.2004. Whereas the aforementioned letter would go to show that the alleged blank cheques were handed over to Mohan on 04.4.2004. This evidence would clearly prove one fact that the defence of the accused is not true and in fact, the same has been taken only to non suit the complainant. Therefore, this Court is of the view that the

accused has not discharged any statutory presumption attached to the cheque. Therefore, the oral and documentary evidence adduced by the accused are in no way helpful to dislodge the legal presumption.

15. In this back ground, it has to be analysed as to whether the 3rd accused is also liable for the act committed on behalf of the Firm. Though P.W.1 would depose that both 2nd and 3rd accused came together and borrowed the amount, it is to be noted that the cheque in question was signed only by the 2nd accused, the husband of the 3rd accused. Further, there is no evidence to show that the 3rd accused, namely, the wife of the 2nd accused, had also actively participated in the day-to-day affairs of the 1st accused Firm. Merely on the basis of the evidence of P.W.1, the liability cannot be fastened on the 3rd accused. On a perusal of the records, it is seen that the 3rd is only a partner in the 1st accused Firm.

16. To be noted that in the absence of cogent, convincing and acceptable evidence that the 3rd accused was also actively participated in the day-to-day affairs of the 1st accused Firm, criminal liability cannot be fastened on her. Merely because she happened to be the wife of the 2nd accused and since she accompanied her husband at the time of borrowal, it cannot be presumed that she was also actively participated in the day-to-day affairs of the Firm. The Courts below failed to appreciate the evidence in that regard before imposing conviction against the 3rd accused. Accordingly, this Court hold that the conviction and sentence imposed against the 3rd accused for the offence under Section 138 of the Negotiable Instruments Act, are not proper and the same is not sustainable in law. Hence, the conviction and sentence imposed on the 3rd accused/ 3rd revision petitioner is liable to be set aside.

17. In the result, the Criminal Revision case is allowed in part. The conviction and sentence imposed against the 3rd accused/ 3rd revision petitioner alone are set aside. The fine amount, if any, paid by the 3rd accused/ 3rd revision petitioner is directed to be refunded to her. The bail bond, if any, executed by her, shall stand cancelled. However, the conviction and sentence imposed by the Courts below on the other accused are confirmed. Nature of the imprisonment would be the same as ordered by the Courts below in the impugned judgments. The period of sentence already undergone by the 2nd accused, if any, is ordered to be set off. The trial Court is directed to take

steps to secure the 2nd accused to undergo the remaining period of sentence, if any.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Sessions Judge,
Fast Track Court No.1, Salem
2. The Judicial Magistrate No.IV, Salem.
3. - do through- The Chief Judicial Magistrate, Salem.
4. The Section Officer/The Record Keeper,
Criminal Section, High Court, Madras

+1cc to M/s.N.Manokaran, Advocate, S.R.No.47960

order in
Crl.R.C.No.1772 of 2011

MSM(CO)
CU(07/08/2017)

सत्यमेव जयते

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