

Bail Slip:

The Accused namely viz., Pandurangan S/o.Pattabiraman was directed to be accused on bail, in MP.1/2011 in CrI.Rc.642/11, dt.27.4.2011.

Reserved on : 13.06.2017
Delivered on : 20.06.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

CrI.R.C. No.642 of 2011

Pandurangan

.. Revision Petitioner/
Appellant/Accused

vs.

Sivakami

.. Respondent/Respondent/
Complainant

Revision Case filed under Section 397 (1) r/w 401 of Cr.P.C against the Judgment dated 29.3.2011 made in C.A.No.18 of 2010, on the file of the Additional District & Sessions Judge (Fast Track Court), Namakkal, in partly allowing the Appeal against the Judgment dated 9.2.2010 made in C.C.No.109 of 2006 on the file of the Judicial Magistrate, Tiruchengode, convicting the petitioner for the offence under Section 138 of the Negotiable Instruments Act.

For petitioner : Mr.J. Franklin

For Respondent : Mr.N. Manoharan

O R D E R

Revision Case is filed to set aside the judgment dated 29.3.2011, made in C.A.No.18 of 2010, on the file of the Additional District and Sessions Judge (Fast Track Court), Namakkal, in partly allowing the Appeal against the judgment dated 9.2.2010 made in C.C.No.109 of 2006 on the file of the Judicial Magistrate, Tiruchengode.

2. The facts leading to the filing of the present revision is as follows:

The complainant is doing textile business at Tiruchengode. The accused and his family members running a Chit Fund. On 19.11.2004, the accused borrowed a sum of Rs.10,00,000/- from the complainant towards his chit fund business and agreed to repay the same within one month and issued cheque Ex.P.1 for Rs.10,00,000/- drawn on Karur Vysya Bank, Tirupur main branch on the same date. As the accused failed to pay the amount within the stipulated time, the complainant presented the cheque for encashment into his bank on 27.12.2004. The cheque was returned on the same day for the reason 'Exceed Arrangement' and the same was intimated to the complainant on 29.12.2004. The Bankder's Return Memo and Debit advice are Ex.P.2 and P.3 respectively. Thereafter, the complainant issued legal notice Ex.P.4 on 15.1.2005 to the accused and the same was received by the accused on 22.1.2005 as evident from Ex.P.6 Acknowledgment Card. After the receipt of notice, since the accused neither paid the amount nor sent any reply, the complainant filed the complaint against the accused under Section 138 of Negotiable Instruments Act.

3. On the complainant side, the complaint was examined as P.W.1 and 5 exhibits were marked. No witness was examined on the accused side and no exhibit marked. After analysing the oral and documentary evidence of P.W.1 and Ex.P.1 to P.6 and the arguments of both the learned counsel, the learned Judicial Magistrate, Tiruchengode, convicted the accused u/s 138 of Negotiable Instruments Act and sentenced him to undergo six months simple imprisonment and to pay a fine of Rs.3,000/- in default to undergo simple imprisonment for one month. Aggrieved against the order of the Judicial Magistrate, Tiruchengode, the accused preferred Appeal before the learned Additional District and Sessions Judge, Namakkal. After perusing the evidence and documents, the First Appellate Court modified the judgment by reducing the sentence from 6 months to 3 months and confirmed the fine amount. Challenging the lower Appellate Court judgment, the accused is before this court by way of this revision case.

4. The main contention of the revision petitioner is that there was a business transaction between him and the respondent/complainant and he has given a signed blank cheque to the respondent for the business transaction and the same has been misused by the complainant and filed a false case against him. The learned counsel for the Revision petitioner contended that absolutely there is no money transaction between the petitioner and the respondent. The cross examination of P.W.1 clearly shows that he has in no way connected with the alleged lending money. The complainant has accepted that the amount was given as hand loan and not for the chit fund business. The issuance of the cheque was by way of demand from P.W.1. The

petitioner has clearly discharged the statutory presumption that the cheque was not issued for any legal debt. The trial court has not taken into consideration of the legal position and simply convicted the accused. Appellate Court taken into consideration of the above aspects to some extent and reduced the sentence from 6 months to 3 months. Hence he preferred this revision praying for acquittal of the revision petitioner/accused by allowing the revision and set aside the order of the lower appellate Court.

5. It is the contention of the learned counsel for the respondent/complainant that issuance of the cheque, borrowal of the amount have clearly established the legal liability of the accused. The statutory presumption under Section 139 of the Negotiable Instruments Act is fairly applicable to the facts of this case. The accused having received the legal notice, failed to reply the same. This conduct itself clearly indicate that there is no defence whatsoever. Merely the said admission in the cross examination is not sufficient to rebut the presumption attached to the Negotiable Instruments Act. Hence it is the contention of the learned counsel for the respondent/complainant that the trial court has properly analysed the entire evidence and materials and rightly awarded the punishment. He further argued that the appellate court has also considered the same and confirmed the conviction.

6. In support of their respective arguments the learned counsel for the revision petitioner/complainant relied upon a citation reported in (1993) 3 SCC 35 [Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal] and the learned counsel for the respondent/accused cited a decision of the Honourable Supreme Court reported in 2010(4) CTC 1188 [Rangappa v. Sri Mohan].

7. In the light of the above submissions the points that arise for consideration in this revision petition is as to

1. whether the revision petitioner has committed any offence punishable under Section 138 of Negotiable Instruments Act? and
2. Whether the revision petitioner brought out any material to dislodge the legal position attached to the cheque?

8. It is the case of the complainant that the accused borrowed a sum of Rs.10 lakhs on 19.11.2004 for chit fund business and issued cheque Ex.P.1 and agreed to repay the amount within one month. Therefore as agreed to repay the amount, the cheque was presented into the complainant bank for encashment and the same was returned for the reason 'Exceeds Arrangement'. Presentation of the cheque to the bank and its dishonour have been clearly established from Exs.P.1 to P.3. It is also not in

dispute that the cheque was issued on the account maintained by the accused. Legal notice also properly sent by the complainant, which has been received by the accused. These aspects are clearly established legal procedures and limitation prescribed under the Section 138 of Negotiable Instruments Act. Now the crux of the issue is whether the execution of the cheque has been proved by the complainant.

9. Now it has to be seen whether the accused has rebutted the legal presumption under Section 118 (a) and 139 of the Negotiable Instruments Act. It is well settled that the initial burden of execution is always on the complainant. Once the execution is proved, then the burden automatically shifts on the accused to discharge the legal presumption attached to the cheque. To discharge the legal presumption, there need not be direct evidence; even mere preponderance of probabilities are sufficient to prove the case of the accused. Once the accused is able to bring out certain probabilities which are convincing to discharge the legal presumption, then the burden shifts on the complainant to prove the liability and other aspects. The accused need not get himself to be examined to bring out any evidence. He can rely upon the admissions of the complainant to show the probabilities.

10. In this case, the main contention of the accused is that there was no direct transaction with the complainant. He handed over the cheque only to the son of the complainant and the same has been misused. In the light of the specific defence, when the evidence of P.W.1 is carefully seen, it is admitted that the accused is neither his relative nor belongs to his village and there is no connection in respect of money transaction between them. Only her son and husband have connection with him. It is also admitted by P.W.1 that her son and herself were filed this case. Further, in her cross examination she has also admitted that the accused has borrowed the amount only as hand loan and not for his chit fund business. But in the complaint it is specifically stated that the accused borrowed the amount for his chit fund business. The specific pleadings in the complaint is completely different from the cross examination. When the entire evidence of P.W.1 is carefully perused, it is admitted that she has filed an application seeking permission to represent her son on her behalf as General Power of Attorney. It transpires from the evidence of P.W.1 that in the said application it is stated that the accused has issued cheque for the cotton thread business transaction with her husband and son. Further, she has also admitted in the cross examination she has not doing any business on her own. She has not paid income tax on her own.

11. It is also admitted in her cross examination that the amount of Rs.10 lakhs was given as hand loan without any interest. According to P.W.1 the accused is neither her relative nor she belongs to her village. Without any interest, giving hand loan of Rs.10 lakhs is highly unnatural and against the normal human conduct. It is further curious to note that the complainant has also filed Ex.P.6 Bank statement for the period from 01/01/1990 to 27/08/2007 which would show that she has deposited and mobilised funds. On a careful perusal of Ex.P.6 her bank statement, it has not exceeded more than Rs.5,00,000/- at any point of time. It is further to be noted that if she had such huge amount in her account, nothing prevented her to produce the bank statement for the period when the alleged cheque was issued and the amount was advanced. The particular period i.e., on 19.11.2004 in the account statement has been withheld by her without any reason whatsoever. That is also one of the aspects which clearly creates some doubt about the transaction between the complainant and accused. The material evidence withheld by her i.e., bank statement builds an adverse inference against her. It is further to be noted that the entire cross examination of P.W.1 clearly indicates that only her son and husband are aware of the transaction. She is only name lender.

12. The signature of the cheque was not in dispute. The letters written in words, figures and date of the cheque were written in bold letters, whereas the name of the complainant was written in different hand writing. This fact also creates serious doubt about the transaction. If really the accused has issued the cheque in the name of the complainant on the same day, the style of handwriting must be one and the same in all aspects. Whereas the accused has written the complainant name in different hand writing and filling up other columns in other hand writing also highly improbable and in fact, the same creates serious doubt about the issuance of the cheque by the accused to the complainant at the relevant time. When these materials more than probable from the admission of P.W.1 and materials, the burden is shifted on the complainant to establish that the cheque is supported by valid consideration. But the material documents and the cross examination of the complainant clearly indicates that she has not discharged her burden as prescribed in law.

13. In the judgment reported in *Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal* (cited supra) the Honourable Supreme Court has held as follows:

"12. ... Once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable.

The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

14. Similarly the judgment reported in 2010(4) CTC 1188 [Rangappa v. Sri Mohan] (cited supra) the Honourable Apex Court has held thus:

"15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment'

had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant."

15. Absolutely there is no dispute whatsoever in the above decision of the Honourable Supreme Court. In fact Section 139 of Negotiable Instruments Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. The Honourable Supreme Court held that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities' and if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The Honourable Supreme Court also held that the accused can rely on the materials submitted by the complainant in order to raise such a defence and in some cases the accused may not need to adduce evidence of his/her own.

16. The above observation of the Apex court is also clearly show that to prove the preponderance of probabilities the accused need not get himself examined. He can rely upon even the materials and evidence of the complainant. This Court after

scanning the entire evidence of P.W.1 as discussed above, have serious doubt about the legally enforceable debt. From the admissions of P.W.1 in the cross examination, the legal presumption attached to the cheque has been dislodged by the accused. The burden shifted on the complainant to establish the consideration has not been proved in the manner known to law. Therefore, the legally enforceable debt cannot be inferred merely on the cheque. Hence, this Court is of the view that the findings of the Court below has to be interfered with and the same is interfered. The order of the Courts below are set aside. The points are answered accordingly.

17. In view of the above, the revision case is allowed and the revision petitioner/accused is acquitted from the charges. Fine amount ordered to be returned to the accused.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

ggs

To:

1.The Judicial Magistrate,
Tiruchengode.

2.The Additional District &
Sessions Judge(Fast Track Court)
Namakkal.

3.The Chief Judicial Magistrate,
Namakkal.

+1cc to Mr.J.Franklin,Advocate sr.43831

+1cc to Mr.N.Manokaran,Advocate sr.43497

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ss(30/6/2017)