

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :23.10.2017

(Orders reserved on 13.07.2017)

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.R.C.No.960 of 2011

Thenappan ... Petitioner

.. Vs ..

K.Raguraman ...Respondent

PRAYER: Criminal Revision Case filed under Section 397 r/w. 401 of Cr.P.C., against the judgment dated 2.2.2011 made in C.A.No.193 of 2010 on the file of the Addl.District and Session Judge, Fast Track Court No.I, Coimbatore in confirming the judgment dated 9.8.2010 made in S.T.C.No.435 of 2008 on the file of the Court of the Judicial Magistrate No.I, Coimbatore.

For Petitioner : Mr.S.Vadivel Murugan

For Respondent : Mr.B.Vijayakumar

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ORDER

The accused has preferred this Criminal Revision Case under Sections 397 r/w. 401 of Cr.P.C., against the judgment dated 2.2.2011 made in C.A.No.193 of 2010 on the file of the Addl.District and Session Judge, Fast Track Court No.I, Coimbatore in confirming the judgment dated 9.8.2010 made in S.T.C.No.435 of 2008 on the file of the Court of the Judicial Magistrate No.I, Coimbatore.

2. The convicted accused is the appellant herein.

3. The accused has borrowed a sum of Rs.4,65,000/- on 30.07.2008 from the complainant and he promised him that he will repay the amount within one month. On the same day the accused had issued a cheque bearing No.904025, dated 21.08.2008 drawn on State Bank of Hyderabad, P.N.Pudur Branch, Coimbatore in favour of the complainant for the aforesaid amount Rs.4,65,000/- The complainant issued a lawyer's notice on 27.08.2008 to the accused by RPAD, demanding him to pay the amount covered under dishonoured cheque within 15 days time from the date of receipt of the notice and its receipt was duly acknowledged by the accused on 28.08.2008. But, he did not come forward to repay the amount nor send any reply to the complainant.

4. In the trial, the complainant is examined as P.W.1. He had deposed that he knows very well the accused herein. The accused met him in person on 30.07.2008 and asked a loan of Rs.4,65,000/- without any interest, for his urgent needs and promised him that he will repay the amount within a month's time. The accused had issued a cheque on the same day for Rs.4,65,000/- bearing no.904025, dated 21.08.2008 drawn on state Bank of Hyderabad, P.N.Pudur Branch, Coimbatore. As per the request of the accused, the cheque Ex.P1 was presented into the complainant's banker on 22.08.2008, but the same was unpaid and returned on 25.08.2008 through the accused banker, due to the reason of "Funds insufficient". The original return memo issued by the accused banker on 25.08.2008 is marked as Ex.P2. A lawyer's notice Ex.P3 and acknowledgment is marked as Ex.P4.

5. On analysis of the both oral and documentary evidence, the trial Court has discussed the factual position of the case and observed that as per the case of the complainant, the accused has borrowed a sum of Rs.4,65,000/- on 30.07.2008. He repaid it by a cheque Ex.P1 dated 21.08.2008. It was dishonoured due to "Insufficient Funds" in the accused account. The trial Court has held that the production of cheque Ex.P1 from the custody of P.W.1 and the admission of issuance and the signature by the accused would suffice to invoke the presumptions available to the complainant under Sections 108 and 139 of N.I.Act. The complainant has no financial capacity to deal with a huge sum of Rs.4,65,000/-. This mere defence put by the accused would not rebut the presumptions existing in favour of the complainant. Absolutely, there is no material placed by the accused to rebut the presumption or to substantiate the incapacity of the complainant and found that the accused is a guilty under Section 138 of Negotiable Instrument Act and convicted and sentence undergo for Simple Imprisonment for one year and a

fine of Rs.5,000/- in default to undergo Simple Imprisonment for one month.

6. Aggrieved against the said judgment, the convicted accused has preferred the appeal and on re-appreciation of evidence, the lower Appellate Court has also confirmed both conviction and sentence and hence, this Criminal Revision.

7. The learned counsel for the Revision Petitioner has submitted that the respondent does not have any solvency for making payment of Rs.4,65,000/- and both the Courts below failed to see that the respondent have given the said amount as a loan when he is not in income tax assess and he has no income and relied upon the decision reported in 2008 (1) CTC page 433 has held that:

"Ingredients of offence and nature of presumption arising under Section 139 and Section 138 has three ingredients viz., (a) that there is legally enforceable debt (b) that cheque was drawn for discharge in whole or in part of any debt or other liability which presupposes legally enforceable debt, and (c) that cheque so issued had been returned due to insufficiency of funds and Proviso appended to said Section provides for compliance of legal requirements before Complaint Petition can be acted upon by Court of law and Section 139 merely raised presumption that cheque was drawn in discharge of debt or other liability and presumption cannot be that there is legally enforceable debt".

and the decision reported in 2008 (5) CTC page 527 has held that:

"Presumption is that cheque was issued by Drawer and is supported by consideration and there can be no presumption on existence of legally recoverable debt and Drawer of cheque has burden to prove non-existence of consideration in such case and it can be either direct or by bringing on record preponderance of probabilities by reference to circumstances upon which he relies and Court may not insist upon direct evidence to prove non-existence of consideration as negative evidence is not possible and Drawer of cheque disproved existence of consideration by letting in circumstantial evidence and by examining

witnesses besides examining herself to prove that Payee of cheque did not have wherewithal to have lent any sum to drawer of cheque".

8. With the above decision in mine let us examine the evidence adduced before the trial Court. The complainant examined himself as P.W.1 and marked Exhibits P1 to P4. As rightly pointed out by the learned counsel for the respondent herein that for the Exhibit P3 legal notice, the petitioner herein has not choose to give any reply.

9. Even during the cross examination of P.W.1, though, an attempt has been made by the Revision petitioner/accused to touch upon the financial capacity of the P.W.1. However, such an attempt as become fertile in view of the positive evidence by the P.W.1 in the cross examination that from the saving of his earning he has made the amount. Both the courts below have concurrently and rightly held that the complainant has proved the necessary ingredients to raise the presumption in his favour and however, the respondent/accused has failed to probablise the suggestive case that the complainant is lend no financial capacancy and he is man of no means, as claimed by him. Either by direct evidence and to eliciate any circumstance to that effect by preponderance of probability.

10. In view of the positive answer given by the P.W.1 in the cross examination, this Court is of the considered view that the ratio laid down in the above two decisions are not being satisfied by the petitioner herein, it is held that the revision petitioner has miserably failed to probablise is suggestive case so as to satisfied the level as laid down in the above referred decision and hence, this Court is of the considered view that the Revision Petitioner has miserably failed to probablize the suggestive case and except this point, no other point urged were and both the courts below have a concurrently held that the complainant is entitled for the presumption under the Negotiable Instrument Act and the respondent/accused has failed to probablize the suggestive case is well merited and well considered and the same does not warrant any interference by this Court and this Criminal Revision Petition is devoid of merits and accordingly, this Criminal Revision Petition is dismissed.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

1. The Addl.District and Session Judge,
Fast Track Court No.I, Coimbatore
2. The Judicial Magistrate No.I, Coimbatore.
3. do-thro the Chief Judicial Magistrate,
Coimbatore (for information)
- 4 The Superintendent, Central Prison, Coimbatore.
5. The Public Prosecutor,
High Court of Madras.

+2cc to M/s.S.Vadivelmurugan, Advocate SR.No.75135 & 74666

+1cc to M/s. B.VijayaKumar, Advocate SR.No.74542

Order in
Crl.R.C.No.960 of 2011

SDR 21.11.2017



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