IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.04.2017
PRONOUNCED ON : 24.04.2017

CORAM

THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

CRL.R.C.No.1579 of 2016
and
Crl.M.P.Nos.12912 & 12914 of 2016

U.Nirmala Metha … Petitioner

Vs.

S.V.S.Ramaprakash @ Prakash … Respondent

Criminal Revision Case filed under Sections 397 and 401 of the Code of Criminal Procedure Code against the judgment of the learned XVII Additional Sessions Judge, Chennai in Crl.A.No.48 of 2016 dated 26.10.2016 confirming the conviction and sentence passed by the learned Metropolitan Magistrate, IV Fast Track Court, George Town, Chennai in C.C.No.1934 of 2006 by a judgment dated 15.02.2016.

For Petitioner : Mr.R.Johnsatyan
For respondent : Mr. D.J.Venkatesan

O R D E R

The sole accused in C.C.No.1934 of 2006 on the file of the IV Fast Track Metropolitan Magistrate, George Town, Chennai is the revision petitioner herein. The respondent/complainant, filed a private complaint against the petitioner for the offence under Section 138 of Negotiable Instrument Act. The trial Court, on appreciation of oral and documentary evidence, convicted the petitioner and sentenced her to undergo simple imprisonment for 2 years and also to pay a compensation of Rs.13,98,537/- under Section 357(3) Cr.P.C., in default, to undergo simple imprisonment for 6 months. Challenging the same, the petitioner filed an appeal in C.A.No.48 of 2016 on the file of the XVII Additional City Civil Court, Chennai. The lower appellate Court confirmed the conviction and sentence and dismissed the appeal by a judgment dated 26.10.2016. Challenging the same, the present revision has been filed.

2. The case of the complainant is that, the complainant was engaged in manufacturing of gold, diamond and silver ornaments as per the orders placed by the respective persons, and he also used to give the ornaments on credit basis. During the course of business transaction, the petitioner and her husband became known to him, as they were running a jewellery shop in the name of "Ujval Jewellers" at Egmore, Chennai. The accused had business transaction with the complainant from the year 1999. They were purchasing gold ornaments from the complainant on credit basis, and upto May 2003, they have also cleared all the outstanding credit. Thereafter, they failed to pay the amount and there was a default in payment. During the course of the transaction, the accused and her husband availed overdraft facilities with their bankers and the petitioner/accused issued cheques to the respondent/complainant, and he used to withdraw the amount from the bank. Later, the respondent/complainant came to understand that the accused and her husband have diverted the funds for various other activities and failed to pay the amount to the respondent/complainant. Hence, the respondent had approached the police for recovering the dues and lodged a complaint. Thereafter, a compromise was entered into between the parties, the petitioner/accused and her husband agreed to clear entire liability to the respondent, for which, they have issued a cheque for a sum of Rs.13,98,537/- drawn on ICICI Bank, Egmore Branch, Chennai on 27.11.2005 . When the respondent presented the above cheque in his account, the cheque was returned on the ground that the payments stopped by the drawer. Thereafter, the respondent had issued a legal notice on 06.12.2005 asking the petitioner to pay the amount and having received the legal notice, the petitioner failed to pay the cheque amount and also did not send any reply. Hence, the petitioner filed the complaint.

3. During the trial, the respondent examined himself as P.W.1 and exhibited 9 documents. The petitioner neither examined any witness nor marked any documents on her side.

4. On appreciation of oral and documentary evidence, the trial court convicted the petitioner/accused holding that since the petitioner/accused had admitted the cheque, there is a presumption of existence of legally enforceable debt or liability and that initial presumption was not rebutted by the petitioner/accused with any probable defence. Challenging the same, the petitioner had filed an appeal and the lower appellate court also confirmed the conviction and sentence of the petitioner/accused and dismissed the appeal. Chellenging the same, the present revision has been filed.

5. Mr.R.Johnsathyan, learned counsel appearing for the petitioner would contend that admittedly, there is a business transaction between the petitioner/accused and the respondent/complainant, it is also admitted by the respondent/complainant that up to May 2003, all the dues have been discharged by the petitioner, and it is also admitted that the petitioner used to give cheques and the respondent also was withdrawing the amount periodically from her account. In the above circumstances, the respondent ought to have produced his account book or ledger to establish that there is a legally enforceable debt. Apart from that, when the petitioner is doing business in large scale, he is expected to pay income tax, wherein, the liability of the petitioner/accused might have been mentioned, but the respondent failed to produce the income tax return containing the loan transaction between the petitioner/accused and the respondent/complainant. The non-production of the accounts as well as income tax assessment order will create a doubt in the respondent's case and only an adverse inference could be drawn against the respondent/complainant.

6. The learned counsel would further contend that even as per the complainant case, he has given a police complaint against the petitioner, thereafter, a compromise was entered into between the parties and during that compromise, the petitioner has agreed to pay the amount and thereafter, she issued the disputed cheque. But in order to prove the compromise, the respondent has not examined any witness nor marked any documents. Apart from that, even as per the evidence of the complainant, the cheque has been handed over to his lawyer at Egmore and even that lawyer was not examined. The cheque has been obtained from the petitioner forcibly by using the police and actually there is no legally enforceable debt or liability on the petitioner.

7. The learned counsel would further contend that even though there is a initial presumption on the petitioner, he rebutted the presumption by a probable defence that the cheque has been forcibly obtained from the petitioner by the respondent and thus, the burden shifts on the respondent/complainant and the respondent/complainant failed to discharge his burden that there is a legally enforcible debt and in order to discharge the same the cheque has been issued by the petitioner. Even the complaint is very bald and the quantum of liability was not stated in the complaint. He has also relied upon the judgment of the Hon'ble Supreme Court reported in 2010 (11) SCC 441 (Rangappa /vs/ Sri Mohan) and 2012 (2) MWN (Cr.) (DCC) 141 (Mad.) (T.R.Palanisamy /vs/ Hariharan).

8. Per contra, the learned counsel for the respondent would submit that once the petitioner/accused admitted the cheque, there is a presumption under Section 139 of Negotiable Instruments Act that the cheque has been issued for discharging the legally enforceable debt, and the petitioner did not rebut the presumption by raising any probable defence. First of all, for the legal notice issued by the respondent, the petitioner has not sent any reply, but subsequent to the filing of the complaint, she has issued a notice to the respondent, which was also marked as Ex.P.8. In the notice, she did not say anything about her liability, but she has made a claim of Rs.55,80,000/- from the respondent. Even in the said notice, she has not stated anything about issue of cheque under alleged threat or coercion by the respondent and the notice is silent regarding the cheque issued by the petitioner. Apart from that, the disputed cheque is not the only cheque issued by the petitioner, there are five more cheques issued by the petitioner to the respondent, which are all of the year 2004-2005, and all the cheques presented by the respondent were returned for various reasons, which were also marked as Ex.P.6 and Ex.P.7. Hence, the contention of the petitioner that only this respondent has the liability to her and there is no necessity for her to issue the cheques to the respondent/complainant cannot be accepted. In order to substantiate her defence, the petitioner neither examining herself as a witness nor marked any documents to show that there was a liability on the respondent/complainant, and both the courts below, after considering all the materials have come to a conclusion that the petitioner had failed to discharge the presumption under Section 139 of Negotiable Instrument Act, and convicted the petitioner, hence there is no reason to interfere with the judgments of the courts below. The learned counsel for the respondent also relied upon the judgment of the Hon'ble Supreme Court in a judgment reorted in 2015 (8) SCC 378 (T.Vasanthakumar /vs/ Vijayakumar) and another judgment of this Court in Crl.A.No.745 of 2005 dated 10.03.2015.

9. I have considered the rival submissions and perused the materials available on record carefully.

10. It is the specific case of the respondent/complainant that he was engaged in manufacturing of gold and other ornaments and the petitioner was also running a jewelery shop and purchased jewells and other ornaments on credit basis, and up to May 2003, she has cleared all the debts, thereafter there was a due in payment and she failed to discharge the liability. Hence, the respondent was forced to give a police complaint, thereafter, there was a compromise and in the said compromise, the petitioner agreed to clear the dues, for which, the disputed cheque was given to the respondent and when the cheque was presented, the same was returned on the

ground of "payment stopped by the drawer". Hence, after issuing legal notice and completing other necessary legal requirements, the complaint has been filed by the respondent. The petitioner/accused after receipt of the legal notice, did not send any reply. But after filing the complaint, a legal notice has been sent by the petitioner/accused to the respondent/complainant on 26.10.2006, which was marked as Ex.P.8, wherein, she has made a claim stating that the respondent/complainant had borrowed a sum of Rs.45,00,000/- and he promised to pay the amount with interest and executed a pronote and there was an accrued interest to an extent of Rs.10,80,000/- and in total, the respondent/complainant has to pay a sum of Rs.55,80,000/- to the petitioner and directing him to pay the amount. In the said notice, she referred the complaint filed by the respondent/accused under Section 138 of Negotiable Instruments Act , but she did not mention anything about the issuance of the disputed cheque to the respondent/complainant, or any threat or coercion by the respondent/complainant. Even in the cross examination of the complainant/P.W.1, the petitioner did not try to establish that the cheque has been forcibly obtained by the respondent/complainant and there is also a material alteration in the cheque, from the above, it could be seen that the petitioner/accused having admitted that cheque, failed to establish that the cheque has been forcibly obtained by the respondent/plaintiff, and there is no legally enforceable debt.

11. Section 138 of Negotiable Instruments Act has 3 ingredients, viz., (i) that there is a legally enforceable debt (ii) that the cheque was drawn from the account of the bank for discharge in whole or in part of any debt or other liability, which presupposes a legally enforceable debt; and (iii) that the cheque so issued has been returned due to insufficiency of funds. The proviso appended to the said Section provides for compliance of some legal requirements before a complaint can be acted upon by a court of law.

12. Even though the Section 138 of Negotiable Instruments Act not specifically include the return of cheque due to "stop payment " issued by the drawer of the cheque, the Hon'ble Supreme Court, in a judgment reported in 2002(1) SCC 234 (MMTC Ltd and another /vs/ V.Medchi Chemicals & Pharma (P) Ltd.,) , held that the 'stop payment' issued by the drawer will also come within the purview of Section 138 of Negotiable Instruments Act. And held as follows:

> " The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the

discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the 'stop payment' instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused..."

13. Though Section 139 of the Negotiable Instruments Act includes the presumption of legally enforceable debt or liability, it is in the nature of rebuttable presumption. It is open to the accused to raise the defence that there is no legally enforceable debt or liability, but there is an initial presumption which favours the complainant and the accused can prove the non-existence of consideration by raising a probable defence. A bare denial of passing of consideration cannot be considered as a defence. Something which is probable has to be brought on record for raising the presumption and shifting the onus of proving the existence of liability to the complainant.

14. The Hon'ble Supreme Court, in a judgment reported in 2008 (7) SCC 655 (Mallavarapu Kasivisweswara Rao /vs/ Thadikonda Ramulu Firm), held as follows:-

"17. Under Section 118(a)of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal."

In yet another judgment, the Hon'ble Supreme Court of India in 2010 (11) SCC 441 (Rangappa /vs/ Sri Mohan) held as follows:

> " In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position 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'. Therefore, 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. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

15. Keeping the above principle in mind, let me consider whether the petitioner/accused has raised the presumption under Section 139 of Negotiable Instruments Act by any probable defence.

16. It is the case of the petitioner/accused that as per the notice sent by her, which was marked as Ex.P.8, only the respondent/complainant has borrowed a sum of Rs.45,00,000/- from her and promised to repay with interest and he has also executed a pronote for the same and on the date of issuance of notice, there is a due of Rs.55,80,000/- from the respondent/complainant to the petitioner/accused. The notice was sent after filing of the present complaint, and she has also made a reference to the complaint filed by the respondent, but she deliberately failed to mention anything about the disputed cheque. If it is the case of the petitioner/accused that the cheque has been forcibly obtained by the respondent/defacto complainant, she could have mentioned the same in her notice, but the notice is very silent about the disputed cheque. Apart from that, it is the case of the petitioner that it is only the respondent/complainant has to pay a sum of Rs.55,80,000/-, in that event it was not explained why she has issued 5 cheques to the respondent/complainant, which were also returned on its presentation and the above cheques were marked as Ex.P.6 and the return memos were also marked as Ex.P.7 by the respondent/complainant.

17. A bare denial and a counter claim without any proof cannot be considered as a probable defence and something more must be there to show that the existence of liability was improbable or doubtful or the same was illegal, then only the onus shifts to the complainant and the complainant bound to

prove the same as a matter of fact, and upon his failure to prove would disentitle him to get the relief.

18. But, in the instant case, the petitioner/accused failed to prove by any probable defence that the existence of liability was either improbable or doubtful. So far as the judgments relied upon by the learned counsel appearing for the petitioner in Rangappa /vs/ Sri Mohan (Supra), the Hon'ble Supreme Court has held that the petitioner can raise the presumption by preponderance of probabilities and if the accused is able to raise a probable defence, which creates a doubt about the existence of liability or enforceable debt, then the prosecution can fail. But, in the instant case, the petitioner has failed to raise any probable defence to rebut the presumption. Hence, the above judgment is not applicable to the petitioner's case. The another judgment relied upon by the learned counsel for the petitioner in T.R.Palanisamy /vs/ Hariharan (supra), is also not factually applicable to the petitioner's case. In the above circumstances, I am of the considered view that the petitioner/accused had failed to rebut the initial presumption under Section 139 of Negotiable Instruments Act.

19. Considering all the above materials, both the court belows had convicted the petitioner and I find no illegality or irregularity in the judgment of the courts-below, hence, the revision fails and is liable to be dismissed.

20. Accordingly, the Criminal Revision Case is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

mrp

To

1. The XVII Additional Sessions Judge,
   City Civil Court,
   Chennai.

2. The Metropolitan Magistrate,
   Fast Track Court-IV,
   George Town,
   Chennai.

3. The Public Prosecutor,
   High Court, Madras.

+ 1 cc to Mr.D.J. Venkatesan, Advocate SR.24616

Crl.R.C.No.1579 of 2016

KJI(CO)
Eu 2.05.17