

BAIL SLIP

The Petitioner/Appellant viz., Devi Doss, aged 58 years, S/o.Raman Kutti Nayar, was directed to be released on bail as per order dated 28.01.2019 made in CrI.MP.No.1 of 2013 in CrI.R.C.No.97 of 2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.R.C.No.97 of 2013

and

M.P.No.1 of 2013

Devi doss

...Petitioner

Vs.

P.Theerthapathi

...Respondent

The Criminal Revision filed under Section 397 read with 401 of Code of Criminal Procedure to set aside the conviction imposed in the judgment dated 01.10.2012 made in C.A.No.116 of 2011 on the file of the learned III Additional District and Sessions Judge, Dharapuram, confirming the conviction imposed in judgment dated 21.09.2011 made in C.C.No.34 of 2010 on the file of the learned Judicial Magistrate, Kangeyam.

For Petitioners : Mr.M.Guruprasad

For Respondents : Mr.N.S.Sivakumar

O R D E R

This Criminal Revision has been filed to set aside the conviction imposed in the judgment dated 01.10.2012 in C.A.No.116 of 2011, on the file of the learned III Additional District and Sessions Judge, Dharapuram, confirming the conviction imposed in judgment dated 21.09.2011 in C.C.No.34 of 2010, on the file of the learned Judicial Magistrate, Kangeyam.

2. The case of the respondent/complainant is that on 16.08.2007, the petitioner/accused borrowed a sum of

Rs.6,88,000/- and issued a cheque on 15.09.2007 to discharge the said liability. When the respondent/complainant presented the said cheque for encashment, the same was returned as "insufficient funds". Subsequently, the respondent/complainant issued legal notice dated 28.09.2007, demanding money. Even though the petitioner/accused acknowledged the notice, he did not send any reply for the same. Hence, the respondent/complainant has filed a private complaint before the learned Judicial Magistrate, Kangeyam, Erode District and the same was taken on file in C.C.No.34 of 2010.

3. The learned Magistrate, after trial, found the petitioner/accused guilty under Section 138 of Negotiable Instruments Act, and sentenced him to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a period of three months. Challenge the same, the accused had filed an appeal in C.A.No.116 of 2011, the learned III Additional District and Sessions Judge, Dharapuram. being a fact finding Court, re-appreciated the entire evidence and after giving due opportunities to both the parties, dismissed the appeal by judgment dated 21.09.2011 and confirmed the conviction and sentence passed by the trial Court.

4. Aggrieved against the said judgment dated 21.09.2011 in C.A.No.116 of 2011, the accused has preferred this present criminal revision before this Court.

5. The learned counsel for the petitioner/accused would submit that the respondent/complainant has not lent the huge amount of Rs.7,00,000/- There is transaction between the son of the complainant I.e. respondent and revision petitioner. The petitioner issued a cheque for security purpose for the transaction between the son of the respondent/Complainant and the revision petitioner/accused. Subsequently, the agreement was cancelled. They have not returned the signed blank cheque. Then the said cheque was misused by the son of the respondent/complainant. The respondent/complainant has not explained the fact as to how the cheque has been gone into the hands of the respondent/complainant and in the presence of whom, he received the cheque. Further, the respondent/complainant has failed to produce any documents to prove the execution of cheque. Hence, both the Courts below have failed to consider the above facts and erroneously convicted the appellant, which warrants interference of this Court.

6. The learned counsel for the respondent/complainant would submit that when the cheque is in possession of the complainant, the legal presumption is that the cheque is issued for legally

enforcible debt under Section 118 & 139 of the Negotiable Instruments Act and the burden of proof shifted on the accused. In support of his contentions, the learned counsel has relied on the decisions rendered by the Hon'ble Supreme Court in Criminal Appeal No.1293 of 2006 in the case of Kalyani Baskar vs. M.S.Sampoornam and judgment rendered by the High Court of Kerala reported in ILR 2009 (3) Kerala 43. The Courts below, after considering all these aspects, had convicted the accused.

7. Heard the learned counsel appearing on either side and perused the materials available on record.

8. On a careful reading of the complaint, it reveals that the respondent/complainant has stated that there was a money transaction between the appellant/accused and respondent/complainant, whereas in the deposition he has clearly stated that he knows the accused from childhood and the accused used to come to his father's Cycle Shop and there is no money transaction between him and the appellant/accused. Both the Courts below have failed to consider the above contrary statement made by the respondent/complainant. Further the respondent/complainant did not produce any substantial document to prove his claim, except production of disputed cheque/Ex.P1.

9. It is settled proposition of law, in criminal case, that the burden of proof is on the side of the prosecution only. If it is a private complaint, it is for the complainant to prove his case. In the present case on hand, the accused has entered into the witness box and stoutly denied the execution of cheque and the signature found on the cheque. Such being the case, it is for the complainant to substantiate his claim beyond reasonable doubts in the manner known to law. The accused need not rebut the presumption by let in direct evidence even he can rebut the presumption by preponderance of probabilities or probable defence even otherwise through the cross examination. During the cross examination, the P.W.1 has stated that he has no money transaction with the petitioner which shows that the petitioner has rebutted the presumption by preponderance of probabilities.

10. In view of the above, this Court is inclined to set aside the conviction and sentence imposed by the trial Court and confirmed by the lower appellate Court by judgment dated 23.11.2012.

11. Accordingly, the revision is allowed and the judgment dated 23.11.2012 in C.A.No.138 of 2012, is hereby set aside. The bail bonds, if any, shall stand cancelled and the trial Court is directed to refund the amount to the appellant/accused, if any, deposited by him. Consequently, connected miscellaneous petition is closed.

FOR BEING MENTIONED

This petition having been posted under the caption for being mentioned on this day and in pursuant to the order of this Court dated 25.09.2018 made herein in Cr1.R.C.No.97 of 2013 and upon hearing the arguments of the aforesaid counsel the Court made the following order:-

Today the matter is listed under the caption "for being mentioned" at the instance of the learned counsel appearing for the respondent/complainant.

2 The learned counsel appearing for the respondent/complainant has submitted that in the above criminal revision case, an order was passed in the open Court on 25.09.2018 dismissing the revision, but, on seeing the order copy, it shows that the revision was allowed.

3 Heard both sides.

4 It is seen that as stated by the learned counsel appearing for the respondent/complainant that this case was dismissed by this Court on 25.09.2018, but, due to oversight, some mistake has occurred in the order and the same has to be rectified.

5 In my earlier order dated 25.09.2018, paragraph nos.8 to 11 shall stand deleted and the following paragraph nos.8 to 10 shall be incorporated:

" 8. The case of the respondent/complainant is that the revision petitioner has borrowed a sum of Rs.6,88,000/- on 15.08.2007. On the very same day, the petitioner issued a post dated cheque and when he presented the cheque for collection, the same was returned for want of sufficient fund. The petitioner/accused has not proved that he had sufficient funds on the date of presenting the cheque for collection by the respondent/complainant. The petitioner/accused has stated that he issued the subject cheque to the respondent's son towards the security and the respondent and his son had misused the cheque for filing this case. But, the fact

remains that the petitioner has not proved that there was transaction between the petitioner and the respondent's son and he given the subject cheque only the respondent's son. Though the learned counsel for the petitioner submitted that they have entered into an oral transaction and subsequently it was canceled, there is no proof for the same. Even neither the petitioner has filed any complaint nor proved that the oral agreement was canceled. If the respondent's has not returned the cheque, certainly the petitioner should have taken steps to get back those cheques. But, admittedly, he has not taken any steps to get back the cheque in the manner known to law. Even though he received summons from the Court in the complaint, he has not replied for the same. The petitioner has failed to prove that there was some transaction between him and the son of the respondent.

9. It is the settled proposition of law that once execution of the cheque is proved by the complainant and the signature found in the cheque is admitted by the accused, the Court can draw a statutory presumption that the cheque is issued towards discharging the legally enforceable debt or liability. Therefore, it is for the accused to rebut the presumption. No doubt, the said presumption is a rebuttable presumption. The accused need not rebut the presumption by direct evidence. He can very well rebut the presumption through preponderance of probabilities or probable defence or even otherwise, through cross examination of the witnesses. In the present case, the accused has not rebutted the presumption in the manner known to law. This Court does not find any illegality or perversity in the judgment passed by both the Courts below. There is no merit in the revision.

10. Accordingly, the revision is dismissed and the judgment dated 01.10.2012 in C.A.No.116 of 2011 on the file of the learned III Additional District and Sessions Judge, Dharapuram is confirmed. Consequently, connected miscellaneous petition is closed. The trial Court is directed to secure the custody of the petitioner to serve remaining period of imprisonment, if any."

6 All other observations made in the order dated 25.09.2018 in CrI.R.C.No.97 of 2013 shall remain intact.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The III Additional District and Sessions Judge,
Dharapuram.
2. The Judicial Magistrate, Kangayam.
3. Do Through The Chief Judicial Magistrate,
Erode District.

+1cc to Mr.M.Guruprasad, Advocate, S.R.No.94780

+1cc to Mr.N.S.Sivakumar, Advocate, S.R.No.95245

CrI.R.C.No.97 of 2013
and
M.P.No.1 of 2013

VGI(CO)
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