

Bail Slip

M. Ganesan, S/o Murugesan Accused in C.C.95/2003 on the file of District Munsif cum Judicial Magistrate, Neiveli has been released on bail by this High Court vide order dated 30.08.2011 in M.P.No.1 of 2011 in CrI.R.C.No.1203 of 2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2018

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

CrI.R.C.No.1203 of 2011

M.Ganesan

... Petitioner

Vs

1. C.Venu (Deceased)
2. Kasthuri
3. Santhi
4. Jagadeeswaran
5. Selvaraj
6. Rajalakshmi

(R2 to R6 Lrs of the deceased sole respondent are impleaded as per the Order of this Court in CrI.M.P.No.13503 of 2017 dated 09.11.2017)

... Respondents

Criminal Revision Case filed under Section 397 read with 401 Cr.P.C. against the judgment of the Appellate Court in CrI.A.No.72 of 2010 dated 19.08.2011 by the learned Additional District and Sessions Judge, Virudhachalam and the judgment of the District Munsif cum Judicial Magistrate at Neyveli in C.C.No.95 of 2003 dated 03.06.2010 wherein the petitioner was found guilty for an offence under section 138 of Negotiable Instruments Act, 1991 and was awarded a sentence to undergo simple imprisonment for a period of one year and to pay a sum of Rs.5000/- (Rupees five thousand only) towards fine, in default to undergo simple imprisonment for one month under section 138 r/w.142 of Negotiable Instruments Act 1881 in which Rs.2,500/- (Rupees two thousand five hundred only) shall be paid to the complainant being compensation under section 357(1) (b) of Cr.P.C.

For Petitioner : C.Arun Kumar
: R1 Died
For Respondents : Mr.N.Suresh - R2 to R6

O R D E R

This revision is against the order of the first appellate Court confirming the judgment of the trial Court in sentencing the revision petitioner to undergo imprisonment to one year and to pay fine of Rs.5000/- under section 138 read with 139 of the Negotiable Instruments Act.

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

The revision petitioner had borrowed a sum of Rs1,45,000/- and issued a cheque dated 07.12.2002 in favour of the respondent drawn on Indian Overseas bank. When the above cheque was presented for encashment by the respondent through his bank, the same was dishonoured for insufficient funds on 13.12.2002. Immediately, the respondent issued a legal notice. The revision petitioner received the same and sent a reply with false allegation.

3. On the side of the respondent, P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.5 were marked. On the side of the revision petitioner D.W.1 and D.W.2 were examined and Ex.D.1 was marked.

4. It is the contention of the revision petitioner that the cheque in question was issued in the year 1996, when the revision petitioner has borrowed some amount from the respondent and after settlement of the above amount, he did not collect the cheque from the respondent. The above cheque has been misused and presented for encashment and a complaint has been filed. Another defence taken by the revision petitioner is that source of money has not been established and the bank statement Ex.D.1 would clinchingly establish the fact that the respondent did not have any money in his account to advance the amount. The learned trial Court as well as the appellate Court found the accused guilty for the offence under section 138 of the Negotiable Instruments Act, as against which the present revision came to be filed.

5. The main contention of the learned counsel appearing for the revision petitioner is that the cheque in question was issued in the year 1996 and the same has been subsequently misused. It is the further contention of the learned counsel for the revision petitioner is that admittedly P.W.1 in his

evidence has stated that Rs.1,45,000/- was withdrawn from his bank account and given to the revision petitioner. The above evidence is found to be false in view of the evidence of P.W.2 as well as Ex.D.1 statement of accounts produced by the revision petitioner. The revision petitioner has brought the probabilities to dislodge the legal presumption attached to the cheque. Once the source of money to advance such a huge amount has not been established, the offence under section 138 of the Negotiable Instruments Act could not be get attracted. In support of his contentions he also relied upon the judgment of the Supreme Court in K.Subramani Vs. K.Damodara Naidu in Criminal Appeal No.2402 of 2014 and the judgment of this Court in Criminal Appeal (MD) No.109 of 20015.

6. Whereas, the learned counsel appearing for the respondent would contend that the revision petitioner has conveniently summoned only one account of the respondent and the evidence of D.W.1 clearly shows that apart from this account, the respondent is maintaining some other accounts and regularly transacting with the above accounts. Hence, submitted that the burden has discharged by the respondent and the trial Court as well as the appellate Court properly appreciated the evidence. Hence, prayed for dismissal.

7. Heard the learned counsel for the revision petitioner and the respondents and perused the entire materials available on record.

8. Ex.P.1 cheque dated 07.12 2002 was the issue in this case. It is the case of the respondent that the above cheque was issued by the respondent after parting a sum of Rs.1,45,000/-. Whereas, it is the contention of the revision petitioner that the above cheque in question was issued in the year 1999, when he had similar transaction with the respondent. However, even after settlement of the earlier transaction, he did not collect the blank cheque issued to the respondent. Such contention cannot be countenanced for the simple reason for it is a normal conduct of any human being to collect the unused cheque left with third parties in a transaction. Therefore, this Court is not able countenance the contention of the revision petitioner in this regard.

9. Another contention of the revision petitioner is that P.W.1 has admitted in his evidence that he has withdrawn the amount from the bank account and the learned counsel has placed much reliance on Ex.D.1 account statement produced by D.W.2 Branch Manager of the Bank. A perusal of the evidence of D.W.2 and Ex.D.1, it makes clear that it relate to the saving account No.3182 in the name of the respondent. The same also establish the fact that in the above account only a small amount of Rs.3,270/- is the balance at the relevant point of time.

10. Though the above document prima facie shows that P.W.1 has no source of income at the relevant point of time, the fact remains that P.W.1 never whispered anything about the account no. from which he has withdrawn the amount. He has simply stated that he had withdrawn the amount from his bank, Canara Bank. Whereas, the revision petitioner has chosen to summon the Canara Bank account namely, the savings account. Whereas, the evidence of D.W.2, Bank Manager show that apart from the savings account, other accounts are also maintained by the respondent and he is transacting through such accounts. D.W.2 is the Branch Manager summoned by the revision petitioner. In his cross examination, he has categorically stated that other accounts are also maintained by the respondent. Despite the above being the fact, no efforts whatsoever has been taken by the revision petitioner to summon other documents to establish the allegation that there were no funds available in other accounts also so as to advance huge amount of Rs.1,45,000/-. When the substantive evidence of witness disclose that the other accounts are maintained by the respondent, the accused on whom the burden lies to rebut the legal presumption, ought to have been taken steps to summon other documents.

11. It is well settled that the statutory presumption would normally apply to the holder of the negotiable instrument and only the borrower has to bring out the probabilities either by way of direct evidence or by way of substantive evidence in order to discharge the legal presumption. Therefore, when the substantive evidence shows that the respondent has maintained other accounts, the other account statements ought to have been summoned by the revision petitioner to discharge the legal presumption. Therefore, merely on the basis of one account summoned by the revision petitioner, we cannot presume that there is no legal liability attached. When the negotiable instrument is established and its issuance also established, the presumption attracts not only to the execution but also to the consideration and the onus lies on the accused to discharge the legal presumption. When the accused is able to bring some materials to discharge the legal presumption, the burden again shifts on to the complainant to prove the passing of consideration.

12. On a perusal of the entire materials, this Court is of the view that the accused has not discharged his burden to establish that there was no consideration at all. There is no dispute with regard to the judgments cited by the learned counsel for the revision petitioner. But the facts and circumstance of this case, this Court is of the view that merely on the basis of one of the document summoned by the Court, we cannot presume that there is no consideration. The burden is not fully discharged by the accused in bringing out the

materials while summoning the other accounts to show that there is no consideration at all. Hence, in view of the above discussion, this Court does not find any infirmity or illegality in the Judgment of the first appellate Court. However, taking into consideration, the nature of the amount advanced, the period of sentence awarded appear to be excessive.

13. In the result, the Criminal Revision is partly allowed and the conviction of the revision petitioner under Section 138 of the Negotiable Instruments Act is confirmed and the sentence is modified to simple imprisonment for 6 months. The period of sentence already undergone by the revision petitioner is directed to be set off under Section 428 Cr.P.C.

s/d-

Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

vrc

To

1. The Additional District and Sessions Judge,
Virudhachalam
2. The District Munsif cum Judicial Magistrate,
Neyveli.

+1 CC to Mr.C. Arunkumar, Advocate sr 10217.

+1 CC to M/s. N. Suresh, Advocate sr 10465

सत्यमेव जयते

Cr1.R.C.No.1203 of 2011

GMR (CO)
SP(12/03/2018)

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