

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2018

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Crl.R.C.No.1074 of 2016

and Crl.M.P.No.9157 of 2016

G.Nachimuthu
Prop.M/s.Ess Pee International
(Export Division)
No.1/401-A,A.Kuttai Thottam
Pooluvapatti Post
Neruperichal, Tiruppur

...Accused/Appellant/Petitioner

-VS-

M/s.Mehala Machineries India Limited
Rep. by its Manager / P.A. Holder
P.Shanmugham, S/o.Palanisamy
No.36 Harvey Road
Tiruppur 641 602

...Complainant/Respondent/Respondent

Prayer: Criminal Revision Petition filed under Section 397 and 401 of the Code of Criminal Procedure against the judgment of the II Additional District Sessions Judge, Tiruppur in C.A.No.34 of 2014 dated 16.12.2015 confirming the judgment of the Judicial Magistrate (Fast Track Court) Tiruppur, in C.C.No.41 of 2012 dated 05.07.2014.

For Petitioner : Mr.J.Franklin

For Respondent : Ms.Zeenath Begum

Judgment reserved on :11.07.2017

Judgment pronounced on : 13.04.2018

ORDER

This revision case has been filed against the judgment dated 16.12.2015 made in CA No.34/2014 on the file of the II Additional District and Sessions Judge, Tiruppur, confirming the judgment made in C.C.No.41/2012 on the file of the Judicial Magistrate, Tiruppur dated 05.07.2014.

2. The accused is the revision petitioner herein and the respondent is the complainant. For brevity, the parties are referred to as the complainant and accused respectively.

3. It is the case of the complainant that the complainant M/s.Mehala Machineries India limited is a limited company represented by its Manager and Power of Attorney Holder one Mr.P.Shanmugam. The complainant company supplied Sewing Machines to the accused one Mr.G.Nachimuthu, Proprietor of M/s. S. P. International (Export Division), Tiruppur. In the said

transaction, according to books of accounts of the complainant, there had been a due of Rs.5,72,800/-. In order to settle the part of the due, the accused had given three cheques drawn at Canara Bank, SME Branch, Tiruppur in Cheque Nos.699541, 699542 and 699540 dated 15.10.2011, 15.11.2011 and 15.12.2011 respectively, each for a sum of Rs.1,50,000/-.

3.1. It is the further case of the complainant that the said cheques were presented for collection at the complainant Bank on 20.12.2011, 20.12.2011 and 17.12.2011 respectively and those cheques were returned by the Bank for insufficient funds. Subsequently, the complainant had issued statutory notice on 07.01.2012, which was received by the accused on 09.01.2012 and issued a reply with different version on 21.01.2012. For the said reply, the complainant had also issued a rejoinder on 20.02.2012. Therefore, the accused, having known to the fact that there is no sufficient funds at his account, had issued the three cheques to the complainant, by thus, he has committed the offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). Accordingly, a private complaint was filed before the trial Court, ie., Judicial Magistrate, Fast Track Court, Tiruppur, where the said complaint was taken on file in C.C.No.41/2012.

3.2. After having tried the case, the trial Court has found the accused guilty and accordingly, convicted and sentenced him to undergo simple imprisonment for one year with fine of Rs.5,000/-, in default, to undergo simple imprisonment for two months. Aggrieved over the said conviction and sentence, the accused preferred appeal before the II Additional District and Sessions Judge, Tiruppur in Appeal No.34/2014. The first appellate Court also, after having considered the grounds raised by the accused and having taken into account the judgment of the trial Court, has ultimately come to the conclusion that the conviction and sentence imposed by the trial Court is to be confirmed and accordingly, the conviction and sentence imposed by the trial Court has been confirmed by the first appellate Court by judgment dated 16.12.2015. Aggrieved over the said judgment passed by the first appellate Court confirming the conviction and sentence made by the trial Court as referred to above, the accused preferred the present revision case.

4. Before the trial Court, the power of attorney holder one Mr.P.Shanmugam has been examined as P.W.1 and on behalf of the complainant, 19 documents, ie., Exs.P1 to P19 were marked. On behalf of the accused, the accused one Mr.Gowri Shankar was examined as D.W.1 and 6 documents were marked as Exs.D1 to D6.

5. It is the case of the complainant that, there had been business transaction between the complainant and the accused by way of supplying sewing machines to the accused by the complainant company and in this regard, there had been a due

as per books of accounts of the complainant for a sum of RS.5,72,800/- and in order to pay a part amount of the said due, three cheques each for a sum of Rs.1,50,000/- on the aforesaid dates, ie., on 15.10.2011, 15.11.2011 and 15.12.2011 were issued by the accused and when all the three cheques were presented for collection, the same were returned as "insufficient funds" and in spite of the statutory notice issued by the complainant under Section 138(b) of the Act, the accused had not come forward to pay back the cheque amount, instead, the accused had chosen to issue a reply with different version.

6. In order to rebut the said case, the definite case of the accused is that, the accused had given cheques in the year 2010 and the said cheques, without the consent of the accused, had been misused by the complainant by altering the dates and presented before the Bank. It is the further case of the accused that, since the money payable to the complainant was not paid and there was due, in order to settle the said due, the complainant company had taken back the machineries supplied by them and after taking back the machineries, ie, 12 in numbers, on behalf of the complainant company two of the representatives, who came and taken the machineries, had issued written letter to the accused on 17.12.2011 stating that as per Bill No.1349 dated 25.12.2009 and Bill No.1529 dated 05.02.2010, sewing machines were supplied to the accused and for the said supply, since the money has not been paid by the accused, 12 number of machines had been taken back by the complainant company and in future there is no business transaction between the complainant and the accused.

7. Relying this communication dated 17.12.2011, which is Ex.D2, heavily, the accused had projected the case before the trial Court stating that, after taking back the entire machineries from the accused, it was categorically given a written commitment and undertaking that the machineries had been taken back and there would be no business transaction henceforth between the complainant and the accused. When that being the position and the same had been done by the complainant company, there was no necessity for the accused to issue cheques on various dates, that too, in the month of October, November and December 2011.

8. With these factual matrix and the case respectively projected by both the complainant and the accused, the trial Court has come to the conclusion that the complainant has proved its case beyond reasonable doubt and thereby found the accused guilty and accordingly, convicted him.

9. While considering the appeal, the first appellate Court, having taken note of these factors, has come to the conclusion that the rebuttal projected by the accused side has not altered the statutory presumption made already in favour of the complainant under Sections 139 and 118 of the Act. When

Ex.D2 was heavily relied upon by the accused side, the said document was rejected/brushed aside both by the trial Court as well as by the appellate Court on the ground that in the said letter ie., Ex.D2, it has only been mentioned that the value of the machineries taken back by the complainant company would be made in the account and it did not say anything that the entire due payable by the accused had been paid by way of returning the machineries and therefore, the said letter or commitment given by the complainant by way of Ex.D2 cannot be taken as an acceptable defence to state that there was no legally enforceable debt between the complainant and the accused.

10. This Court has given its anxious consideration of both the trial Court judgment as well as the appellate Court judgment and the connected materials placed before this Court.

11. On perusal of the respective case projected both by the complainant and the accused, this Court finds that the accused has given defence that the cheques were not given on the date mentioned as it was given some time in the year 2010 ie., on 05.10.2010, 15.11.2010 and 15.12.2010. Thereafter, the machineries were taken back by the complainant. In spite of that, the said cheques were altered *suo motu* by the complainant by giving the date as 15.10.2011, 15.11.2011 and 15.12.2011 respectively. In support of this contention, the accused side has relied upon the copy of the cheque leaves, which were marked as Exs.P8 to P10 and a copy of the same has also been filed before this Court. On perusal, it discloses that, the cheques were originally given in the year 2010 and the same has been altered on the said dates mentioned above in the year 2011. In fact, this alteration has been accepted by the complainant stating that since there was a SARFAESI proceedings pending against the accused, the bank stopped issuing cheque leaves to the accused for usage. Therefore, since there was no fresh cheque leaves available with the accused, the old cheques given with the date sometime in the year 2010 had been altered by the accused himself and thereby these cheques had been altered into the dates as 15.10.2011, 15.11.2011 and 15.12.2011 respectively and the alterations have been accepted and signed by the accused by putting his signatures in each cheque. Moreover, this position has been accepted by the complainant at the rejoinder notice given by him dated 20.02.2012 ie., Ex.P18.

12. The relevant portion of the said rejoinder letter issued by the complainant is extracted hereunder:

"2.Your client had original issued the cheques on 15.10.2010, 15.11.2010 and 15.12.2010 respectively and subsequently, as you have narrated your client had under SARFAESI Act and they were not able to get fresh cheques as "15.10.2011", "15.11.2011" and "15.12.2011" respectively and made an endorsement signature below the alteration and validated the cheques as required under law. Your client's allegation that the material alteration was carried by our

clients, is not all true and correct.”

13. Moreover, when the said Mr. Shanmugam Power of attorney holder of the complainant (PW1) was cross examined before the trial Court, he has stated as follows:

“ஒருவர் எங்களிடம் மெசின் வாங்கிக் கொண்டு பணம் செலுத்த முடியாத காரணத்தினால் மெசினை நாங்கள் எடுத்த வந்த பின்பு மீண்டும் அதே நபர் கடனுக்காக மெசின் கேட்டால் தருவோமா என்றால் தரமாட்டோம். அதே போன்று அதே நபருக்கு உங்களுக்கும் எங்களுக்கும் எதிர்காலத்தில் வரவு செலவு கிடையாது என்று குறிப்பிட்டு கொடுக்க வேண்டிய அவசியமும் கிடையாது என்றால் சரிதான். வரவு செலவு என்பது எங்களிடம் மெசின் வாங்குவது குறித்த ஒன்று தான் என்றால் சரிதான்.”

14. The exact version of Ex.D2 is also extracted hereunder for easy reference:

“பெறுநர்:

உரிமையாளர்
எஸ்.பி.இண்டர் நேசனல்
திருப்பூர்.

எங்களுடைய நிறுவனத்திலிருந்து எஸ்.பி.இண்டர் நேசனல் நிறுவனத்திற்கு பில் நம்பர்:1349 தேதி:25.12.2009 மற்றும் பில் நம்பர்:1529 தேதி:05.02.2010 வாயிலாக தையல் மிஷின்கள் சப்ளை செய்யப்பட்டது. இதற்கு அந்நிறுவனம் உரிய பணத்தை திரும்ப செலுத்த முடியாத காரணத்தால் மற்றும் தொழிலில் ஏற்பட்ட பெருத்த நஷ்டம் காரணமாகவும் பணத்திற்கு பதிலாய் கீழ்க் கண்ட மெசின்களை திரும்ப பெற்றுக் கொண்டோம்.

மெஷின்கள் விபரம்:

1.ஓவர்லாக் (4 நூல்) - 8 Nos.

2.ஓவர்லாக் (4 நூல்) - 3 Nos.

3.பேட்லாக் (ஏர்) மெஷின்மட்டும்

புளோயர் இல்லாமல் - 1 No.

ஆம் மொத்தம் 12 Nos.

இந்த கணக்கில் இதன் மதிப்பை கணக்கில் வரவு வைத்து கொண்டோம். மேலும் எஸ்.பி.நிறுவனத்திற்கும் மேகலா நிறுவனத்திற்கும் எதிர்கால வர்த்தக தொடர்பு இல்லை.

இங்ஙணம்
கிளை மேலாளர் ”

15. By the deposition of P.W.1, he has accepted the letter of undertaking given on 17.12.2011 on behalf of the complainant Company by the 2 persons, namely, Mr.A.Parthiban and Mr.I.Shahabudeen, who had signed on behalf of the complainant Company. P.W.1 has further stated in his cross examination, as has been extracted above, that the sentence written in the said letter that there would not be any business transaction between the complainant and the accused in future and the said transaction is only in respect of purchasing machineries and making the payment for such purchase, which is in support of the accused case. Therefore, when P.W.1 deposed before the trial Court on behalf of the complainant, he has categorically stated in his cross

examination that the sentence written in Ex.D2 is only in respect of business transactions with regard to the supply of machines by the complainant to the accused. Therefore, in the context of the deposition of P.W.1, the averment contained in Ex.D2 can be fit in and can also be concluded that the said document ie., Ex.D2 can also be construed as a written commitment for final settlement between the parties, insofar as the supply of machineries are concerned.

16. Further, it is the definite case of the complainant that for the supply of machines to the accused under Bill No.1349 and Bill No.1529 dated 25.12.2009 and 05.02.2010 respectively, the due was there and for the same, the machineries were taken back. In this regard, it is pertinent to note that three cheques were given on 15.10.2010, 15.11.2010 and 15.12.2010 by the accused to the complainant towards the due payable by him. This factor is admitted by the complainant and only the said cheques, according to the complainant, had been subsequently altered with the date change by the accused himself. If at all the accused had given three cheques for a sum of Rs.4,50,000/- cumulatively, sometime in October, November and December 2010, the complainant, being the business concern, could have immediately presented the same and encashed it. Nowhere in the notice under Section 138(b) of the Act nor in the deposition of P.W.1, any explanation has been given by the complainant as to why the three cheques given in the year 2010 had not been presented for collection by the complainant, even though there was a due from the accused during that time. Also no reason had been given why the three cheques had been kept idle without presenting the same for one year ie., till October, November and December 2011. Unless a satisfactory explanation is given by the complainant for having not presented the three cheques in the year 2010 and had waited upto 2011, it is to be presumed that the theory projected by the accused by way of rebuttal to state that the said cheques, no doubt, were issued in the year 2010, however, since the machineries had been taken back by the complainant, the amount due had been set off as per Ex.D2 letter and therefore, there was no necessity to reissue the cheques by altering the dates in the year 2011. This aspect has not been noticed/considered/deliberated and concluded either by the trial Court or by the first appellate Court.

17. In the matter of issues raised under Section 138 of the Act, it is the settled proposition that the statutory presumption is always in favour of the complainant under Sections 118 and 139 of the Act. However, such statutory presumption is always rebuttable and once acceptable rebuttal has come from the accused side, the burden shifts towards the complainant to prove by definite evidence that the rebuttal is liable to be brushed aside.

18. In this regard, the Hon'ble Apex Court has held that the degree of proof of both the statutory presumption in favour of the complainant and the rebuttal from the accused side is only by way of preponderance of probabilities and the same can also be drawn not only from the materials on record but also by reference to the circumstances.

19. In this regard, the judgment reported in **(2006) 6 SCC 39** in **M.S.Narayana Menon @ Mani v. State of Kerala and another** can be usefully pressed into service. The following passages are extracted hereunder for easy reference:

"27. In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read as under:

"118. Presumptions as to negotiable instruments -

Until the contrary is proved, the following presumptions shall be made:

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

"139. Presumption in favour of holder It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.

.....

30. Applying the said definitions of 'proved' or 'disproved'

to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

....

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies."

20. Also, the Hon'ble Apex Court with regard to the degree of proof of both statutory presumption as well as rebuttal has held in **Rangappa v. Sri Mohan** reported in (2010) 11 SCC 441, in the following terms:

"26. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct.

However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments.

While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof.

28. 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."

21. If the said principle enunciated by the Hon'ble Apex Court in the afore cited cases is applied to the present case, the rebuttal, as has been brought in by the accused side against the statutory presumption formed in favour of the complainant under Section 139 and 118 of the Act, is an acceptable rebuttal by applying the degree of proof of preponderance of probabilities.

22. Assuming that the case of the complainant herein can be possible, at the same time, the case of the accused also can be possible in this case. When two views are possible in a given case, since Section 138 of the Act is punitive in nature, the doubt, if any arises, which shall go in favour of only the accused, as in criminal jurisprudence, it is the prosecution to prove the guilt of the accused beyond all reasonable doubts. Even the slight iota of doubt comes to the mind of the Court, naturally, the view to be taken by the Court would be in favour of the accused.

23. Here, in the case in hand, though it was claimed that the cheques were issued by the accused and the same has been admitted by him, the alteration made in the cheques was disputed and in this regard, if the signature is disputed by the accused with regard to the alteration of the date, it is for the complainant to prove the same by referring it to the complainant has failed in the said aspect. Moreover, as has been discussed above, since there is no plausible explanation from the side of the complainant to state as to why the complainant had kept the cheques idle for one year without presenting the same and since no explanation has been given either in the notice or in the deposition of P.W.1, the theory projected by the accused side can be accepted and in that case, the said defence theory definitely can be treated as rebuttal to shatter the initial statutory presumption formed in favour of the complainant. Therefore, this Court is of the considered view that both the trial Court as well as the first appellate Court have not considered these aspects of the issue, in proper perspective by applying the principle laid down by the Hon'ble Apex Court in the judgments cited supra. Therefore, this Court is of the view that both the trial Court as well as the first appellate Court have erred in coming to the conclusion that the accused is guilty beyond reasonable doubt of the offence punishable under Section 138 of the Act.

24. In the result, the criminal revision case is allowed and the impugned judgment made by the trial Court in

C.C.No.41/2012 dated 05.07.2014 confirmed by the first appellate Court in C.A.34/2014 dated 16.12.2015 are set aside and the accused is acquitted and is set at liberty. If the accused has executed any bail bond, the same shall be terminated. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

RR

To:

1.The II Additional District Sessions Judge,
Tiruppur

2.The Judicial Magistrate
(Fast Track Court) Tiruppur

Copy to:The Section Officer,
Criminal section,
High court, Madras

+1cc to Mr.Zeenath Begum, Advocate SR.No.27796

SSV(CO)
sm:7.6.2018

Judgment made in
Crl.R.C. No.1074 of 2016
and Crl.M.P.No.9157 of 2016

सत्यमेव जयते

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