

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.03.2018

PRONOUNCED ON : 02.04.2018

C O R A M

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

CRL.R.C.NO.848 OF 2016

AND

CRL.M.P.NO.6461 OF 2016

S.Veerappan

.. Petitioner

Vs.

K.Sundar

.. Respondent

PRAYER: Criminal Revision under Section 397 r/w 401 of Cr.P.C. against the order dated 03.06.2016 made in Criminal Appeal No.9 of 2015 on the file of the learned 1<sup>st</sup> Additional District Judge, Thiruvallur, confirming the order of conviction passed in S.T.C.No.128 of 2014 dated 29.01.2015, on the file of the learned Judicial Magistrate, Fast Track Court (Magistrate Level), Ambattur.

For Petitioner : Mr.M.L.Ramesh

For Respondent : Mr.A.Harivasagam

O R D E R

The instant Criminal Revision Case is preferred as against the judgment passed in Criminal Appeal No.9 of 2015 dated 03.06.2016 on the file of the learned I Additional District Judge, Thiruvallur in confirming the judgment of conviction passed in Summary Trial Case in STC.No.128 of 2014 dated 29.01.2015 on the file of the learned Magistrate (Fast Track Court), Ambathur. Further, the Revision Petitioner is an accused in a case initiated by the Respondent under section 138 N.I. Act. As the revision petitioner herein pleaded not guilty during the trial, he was ordered to face the summary trial.

2.The case of complaint is that on 10.04.2010, the revision Petitioner borrowed a sum of Rs.5,00,000/- by executing an unregistered deed of mortgage. However, when the amount was asked to repay, the Revision Petitioner did not repay the

amount, instead he entrusted a cheque bearing No.294541 dated 15.05.2011 (ICICI Bank) for a sum of Rs.5,00,000/- in favour of the respondent/complainant. Thereafter at the time stipulated by the accused, the cheque was presented on 06.06.2011, but the same was returned as "Funds Insufficient" on 07.07.2011. Subsequently, when the complainant informed about the return of the cheque and demanded payment, but the Revision Petitioner instructed the complainant to present the cheque once again for collection. Accordingly, cheque was presented for collection on 10.08.2011, but the same was returned as "Funds Insufficient" as per the memorandum of the bank dated 11.08.2011. Thereafter the complainant caused a legal notice and filed the complaint under section 142 of the Negotiable Instruments Act for the offence punishable under Section 138 of the same Act before the Judicial Magistrate Court (Fast Track Judicial Magistrate Level) Ambathur in S.T.C.No.128 of 2014.

3.In the conclusion of the trial, the Revision Petitioner/Complainant was found guilty for the offence under section 138 of Negotiable Instruments Act and was ordered to undergo six months simple imprisonment and was also directed to pay a sum of Rs.5,00,000/- compensation as per the judgment dated 29.01.2015. Against the said order of conviction, the Revision Petitioner/Accused filed an appeal before the learned 1<sup>st</sup> Additional District Judge, Tiruvallur in CrI.A.No.9 of 2015, but the same was dismissed on 03.06.2016 by confirming the Judgment of the learned trial court.

4.Aggrieved by the judgment of the learned appellate court and challenging the legality and propriety of the conviction and sentence against him, the present revision is preferred by the Revision Petitioner before this court.

5.The learned Counsel appearing for the Revision Petitioner has contended that the averments made in the complaint that the cheque had been presented on 06.06.2011 and the same had been returned, were not proved by the Respondent/Complaint by producing documentary evidence. Further, the learned counsel for the Revision Petitioner has also contended that the learned trial court and the learned appellate courts have convicted the petitioner only on the presumption under Sections 118 and 139 of Negotiable Instruments Act as if the cheque has been issued for legally enforceable debt. But, the courts below have failed to consider the legal proposition that mere failure to send reply notice will not take away the right of the party to contest the case. Hence, the case wherein it may be true that the accused admitted the issuance of cheque such a statutory presumption

under Sections 118 and 139 is involved to the effect that the cheque in question is issued in discharge of the liability either in whole or in part. Further, to strengthen his arguments, the learned counsel has relied on the judgment rendered by this Hon'ble Court in Crl.A.No.1263 of 2003 dated 19.01.2016 and the relevant legal proposition is extracted as follows:

It is well known principle of law that as per Section 138 of Negotiable Instruments Act, the cheques in question should be given in connection with legally enforceable debt. In the instant case, as mentioned earlier, no acceptable evidence is available on the side of the Appellant/Complainant to the effect that the cheques in question have been issued in connection with legally enforceable debt and further, the averments made in the complaint have not been proved by way of examining the concerned person. Under the said circumstances, the court cannot come to a conclusion that the Respondent/Accused has committed an offence punishable under section 138 of Negotiable Instruments Act, 1881. Further, mere failure on the part of the Respondent/Accused to give reply to the statutory notice does not amount to acceptance of the cheques to the effect that the same have been given in connection with legally enforceable debt.

6. Further, the courts below have erroneously considered the unregistered deed of mortgage marked as Ex.A-1 relied on by the complainant to prove the debt is not a valid document as per the Evidence Act. The learned Counsel for the revision petitioner, has further contended that though the document in Ex-A1 was executed for a sum of Rs.5,00,000/- and the cheque was issued by the revision Petitioner/Accused only for the same amount without any interest after the period of one year is really doubtful and there is no averment in the complaint in respect of interest.

7. On the other hand the learned counsel for the Respondent/Complainant has contended that the trial court as well as appellate court has rightly come to the conclusion that the Petitioner issued the cheque for the legally enforceable debt and the same was also proved by the complainant by giving proper evidence. Further, though the Petitioner also admitted that he borrowed a sum of Rs.3,00,000/- and the same was repaid, he has not given any evidence to prove his repayment. So, the conviction of the trial court as well as appellate court is sustainable. Apart from that he has also pointed out that the money transaction between the wife of the revision petitioner and the respondent/complainant cannot raise any presumption that

if at all the revision petitioner would not have repaid the money, no further transaction could have taken place between the wife of the revision petitioner and the respondent /complainant. Further, it is pointed out by the learned counsel that the respondent/complainant has proved that the cheque was issued in discharge of the liability of the revision petitioner and so judgment of the courts below need no interference.

8.I heard Mr.M.L.Ramesh, learned counsel for the appellant and Mr.A.Harivasagam, learned counsel for the respondent and perused the relevant materials available on record.

9.It is the case of the complainant that the receipt of money is proved by him. Moreover, on the instructions of the Revision Petitioner alone, he presented the cheque for collection, but it was unfortunately returned on two occasions. Further, by demanding the money payable to the Respondent/Complainant, he caused the statutory demand notice, having received the same, the Revision Petitioner has not come forward to settle the balance amount payable to the respondent/complainant. Apart from that the revision petitioner has not rebutted the presumption against him as contemplated under Sections 118 and 139 of the N.I. Act. So, the courts below have applied their mind into the facts, circumstances and all legal aspects categorically came to the conclusion that the offence against the revision petitioner has been proved and imposed the punishment along with compensation and the same does not require any interference by this Hon'ble Court.

10.At the same time, it is for this court to decide whether the complainant has proved his case first that the cheque was issued in lieu of a legally enforceable debt or not. In this regard, both the courts below have considered as the revision petitioner/accused had not sent any reply notice to the statutory demand notice issued by the respondent/complainant, it has to be presumed that the cheque was issued in lieu of the legally enforceable debt. However, the law laid down by this Hon'ble Court as well as the Hon'ble Supreme Court that the mere failure of the accused in responding the statutory demand notice, no liability can be fixed upon the accused.

11.To support his case the appellant has produced the following judgments:-

(i)R.B.Ramakrishnan vs. A.Meena in CrI.R.C.No.945 of 2007, dated 28.02.2011

"8. It may be true that the accused did not send any reply to the legal notice. The complainant has also cited the judgment of our High Court reported in 2003(2) DCR 145, M/s.Jayam Company & Another vs. T.Ravichandran for the legal proposition that the accused ought to have issued reply promptly stating the reason to deny the claim of the complainant and any valid defence raised at the time of trial cannot be considered. In my opinion the settled legal position is mere failure to send reply notice will not take away the right of the party to contest the case. Here is the case, wherein it may be true that the accused admitted the issuance of cheque as such the statutory presumption under Sections 118 and 139 is invoked to the effect that the cheque in question is issued for the discharge in whole or in part of any debt or liability....."

- (ii) Vijay vs. Laxman and another in CrI.A.No.261 of 2013, dated 07.02.2013

"4.In M.S.Narayana Menot v. State of Kerala (2006) 6 SCC 39. while dealing with that aspect in a case under Section 138 of the Negotiable Instruments Act, 1881, this Court held that the presumptions under Sections 118(a) and 139 of the Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt. The Court observed:

"29.In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)....

30.Applying the said definitions of "proved" or "disproved" to the 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. XX XX XX XX 31. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relied. Xx xx xx xx

41...Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

(iii)K.Subramani vs. K.Damodara Naidu in CrI.A.2402 of 2014, dated 13.11.2014

"Three Judge Bench of this Court in the decision in Rangappa case (supra) laid down that the presumption mandated by Section 139 of the N.I. Act includes a presumption that there exists a legally enforceable debt or liability and that is 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."

12.Unfortunately, both the courts below have failed to consider this important aspect and hold that the revision petitioner/accused is guilty of the offence. The findings of the courts below are unsustainable, because, it is for the complainant to prove that the cheque was issued in lieu of the legally enforceable debt. Once, the respondent/complainant has successfully proved the issuance of the cheque is meant for legally enforceable debts, then only the burden shift upon the revision petitioner/accused to rebut the presumption against him as contemplated under Sections 118 and 139 of the Negotiable Instruments Act. Here, in the considered opinion of this court that the respondent/Complainant has not proved the vital and prime aspect that the cheque was issued in discharge of a legally enforceable debt. Hence, this court has no hesitation to hold that the courts below have erred in convicting the revision petitioner/accused for the offence under section 138 of the Negotiable Instruments Act.

13.In the result,

(a)this Criminal Revision Petition is allowed by setting aside the Judgment in C.A.No.9 of 2015, dated 03.06.2016

on the file of the Learned I Additional District Judge, Thiruvallur, confirming the Judgment in S.T.C.No.128 of 2014, dated 29.01.2015 on the file of the Learned Judicial Magistrate, Fast Track Court (Magistrate Level), Ambattur,

(b)the appellant/accused is acquitted from the case. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

vs

To

1. The 1<sup>st</sup> Additional District Judge, Thiruvallur.
2. The Judicial Magistrate,  
Fast Track Court (Magistrate Level), Ambattur.

+lcc to Mr.A.Harivasagam, Advocate, S.R.No.24758

+lcc to Mr.M.L.Ramesh, Advocate, S.R.No.24521

Cr1.R.C.No.848 of 2016  
and  
Cr1.M.P.No.6461 of 2016

RJI (CO)  
CS/16/04/18

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