

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2018

DELIVERED ON : 09.10.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Crl. R.C.No.957 of 2017

V.Devendran ... Petitioner/Appellant/Accused

Vs

1. P.Nagaraj

2. The State
rep. by Public Prosecutor
Coimbatore.

... Respondents/Respondents/Complainants

PRAYER : Criminal Revision Case is filed under Sections 397 and 401 of Cr.P.C. against the judgment in C.A.No.53 of 2016, dated 26.10.2016 passed by the I Additional District and Sessions Judge, Coimbatore, confirming the order passed by the learned Judicial Magistrate, Fast Track Court, at Magisterial Level II, Coimbatore in C.C.No.135 of 2015, dated 22.3.2016, convicting the petitioner under Section 138 of the Negotiable Instruments Act and sentencing him to undergo one year simple imprisonment and to pay fine of Rs.5,000/-, failing which to undergo simple imprisonment for two months.

For Petitioner : Mr.R.Balakrishnan

For Respondents: Mr.A.Deivasigamani (for R1)

Mr.G.Ramar (for R2)

Government Advocate (Criminal Side)

ORDER

This criminal revision petition is filed under Sections 397 and 401 of Cr.P.C. against the judgment passed in C.A.No.53 of 2016, dated 26.10.2016 passed by the I Additional District and Sessions Judge, Coimbatore, confirming the order passed by the learned Judicial Magistrate, Fast Track Court, at Magisterial Level II, Coimbatore in C.C.No.135 of 2015, dated 22.3.2016, convicting the petitioner under Section 138 of the Negotiable

Instruments Act sentencing him to undergo one year simple imprisonment and to pay fine of Rs.5,000/-, failing which he shall undergo simple imprisonment for two months.

2. The facts in brief are as under: The petitioner is the accused. The first respondent is the complainant. It is the case of the complainant that the accused borrowed a sum of Rs.4 lakhs from him on 10.11.2013 agreeing to repay the same within three months. On demand made by the complainant, it is stated that the accused issued a cheque dated 19.2.2014 drawn at ICICI Bank, Perianaickenpalayam Branch, Coimbatore. It is stated that the said cheque was returned for the reason "funds insufficient" on 22.2.2014. Thereafter, the complainant sent a legal notice through his counsel on 14.3.2014. Even though the accused received the notice on 15.3.2014, he had neither chosen to repay the amount, nor sent any reply. Hence, the complainant filed the complaint.

3. It is the case of the accused that he had borrowed Rs.5 Lakhs from the complainant and had also repaid the same and while borrowing the said amount, the petitioner had given this cheque for Rs.4 lakhs as security and he had not borrowed the amount of Rs.4 lakhs as stated in the complaint.

4. The learned Judicial Magistrate, Fast Track Court at Magisterial Level II, Coimbatore, by judgment dated 22.3.2016, held the accused guilty for offence under Section 138 of the Negotiable Instruments Act and convicted and sentenced him to undergo one year simple imprisonment and directed him to pay a fine of Rs.5,000/-, in default to undergo two months simple imprisonment as per Section 255(2) of the Criminal Procedure Code.

5. Assailing the said judgment, the accused appealed before the learned 1st Additional District and Sessions Judge, Coimbatore. The Appellate Court, by judgment dated 26.10.2016 dismissed the appeal, being Criminal Appeal No.53 of 2016, by confirming the judgment of the trial Court and directed the trial Court to take necessary steps to commit the accused to undergo the sentence imposed on him.

6. Calling in question the said judgment, the present revision is filed by the accused.

7. It is the contention of the learned counsel for the petitioner that there existed an earlier loan transaction between the petitioner and the first respondent and in respect of the earlier loan transaction a cheque for Rs.4 lakhs was given as security by the petitioner and even though the petitioner had discharged the earlier loan amount, the

complainant tried to encash the cheque for Rs.4 lakhs given as security and the petitioner is no due and liable to pay any amount to the first respondent as claimed by him.

8. The learned counsel appearing on behalf of the first respondent reiterated the reasons that weighed with the Courts below in negating the plea of the petitioner and, hence, prayed for dismissal of this criminal revision case.

9. I heard Mr.R.Balakrishnan, learned counsel for the petitioner, Mr.A.Deivasigamani, learned counsel for the 1st respondent and Mr.G.Ramar, learned Government Advocate (Criminal Side) for the 2nd respondent and perused the documents available on record.

10. In the case on hand, the first respondent complainant had established that the cheque (Ex.P1) was presented for collection and the same was dishonoured. It is seen that thereafter the complainant had issued a legal notice to the petitioner accused and the same was duly acknowledged by the petitioner accused, though he had not chosen to send any reply to the same.

11. It is the say of the petitioner accused that a sum of Rs.5 lakhs was borrowed by the accused from the complainant and the same was repaid and at the time of taking the said loan, the petitioner had given a cheque towards security and the same had been misused by the first respondent complainant. The fact of taking loan of Rs.5 lakhs and discharging the same was admitted by the first respondent complainant, but he strongly refuted the allegation that he had obtained a signed cheque as security.

12. It is admitted that the cheque (Ex.P1) was signed by the petitioner accused and presumption under Section 118 of the Negotiable Instruments Act from the cross examination of P.W.1 (the complainant) was not rebutted by the petitioner accused. That apart, from the cross examination of the complainant as P.W.1., it is clear that the amount of Rs.5 lakhs was discharged by the petitioner through cheque dated 28.10.2013. It is only thereafter that the second sum of Rs.4 lakhs was borrowed by the accused on 10.11.2013. Once the petitioner had already issued a cheque for Rs.5 lakhs and discharged the loan, it is highly unbelievable as to why the petitioner had given another signed cheque as security to the first respondent complainant. To put it in other words, if the petitioner had already issued a signed cheque while taking loan from the first respondent complainant, then there is no necessity to issue a cheque for Rs.5 lakhs. The petitioner accused could have directed the first respondent to utilize the said cheque and present the same for discharge of the loan amount.

13. In *Spenser David v. Virjin Mary*, 2010 4 MLJ (Cri) 302, a learned Single Judge of this Court held that for establishing the requirements in Section 138 of the Act, there is no burden on the part of the complainant to prove before the Court the entire details of the transaction resulting in issuance of cheque. Further, it was held that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the accused.

14. In *Y.Sreelatha @ Roja v. Mukanchand Bothra*, 2002-1-L.W.-(Cr1.) 271, it was held that there is presumption under Sections 118 and 139 of the Act. In paragraphs 27 to 32 of the said decision, it was held as follows:

"27. Thus, Sections 118, 138 and 139 of the Negotiable Instruments Act would require that the Court "shall presume" the liability of the drawer of the cheques for the amount for which the cheques were drawn on accepting the consideration.

28. Therefore, it is obligatory on the Court to raise this presumption in every case where the factual presumption has been established. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs.

29. In other words, when the prosecution provided the facts required to form a basis for presumption, no discretion is left with the Court but to draw the statutory conclusion, in favour of the complainant. In the case of a discretionary presumption, the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused.

30. In the case of a mandatory presumption "the burden on the accused person" would not be light, as one cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable.

31. The words "unless the contrary is proved" contained in Sections 118 and 139 of the Negotiable Instruments Act would make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation, which is merely plausible.

Unless the explanation is supported by proof, the mandatory presumption created by the provision cannot be said to be rebutted.

32. It is contended by the learned counsel for the accused that the complainant received several cheques and several promissory notes from the accused and her brother and the same were misused, even though the entire amount of loan had been discharged."

15. Considering the above decisions, I am of the view, once the petitioner accused has admitted the signature in the cheque and issuance of cheque to the first respondent complainant, the first respondent complainant is entitled to invoke presumption under Sections 118 and 139 of the Act.

16. In the case on hand, the Courts below based on evidence held that there were two loan transactions between the petitioner and the first respondent and the complainant was able to show that the earlier transaction was different from the present transaction. As rightly held by the Appellate Court, the presumption that the cheque was drawn for legally enforceable debt was not rebutted by the petitioner accused.

For the foregoing reasons, finding no merits, this criminal revision case is dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vs
To

1. The I Additional District and Sessions Judge,
Coimbatore.
2. The Judicial Magistrate,
Fast Track Court II at Magisterial Level,
Coimbatore.

+1cc to Mr.A.Deivasigamani, Advocate Sr.69735
+1cc to Mr.R.Balakrishnan, Advocate Sr.69722

Cr1.R.C.No.957 of 2017

srg 24/10/2018