

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Order	Date of Pronouncing the Order
03.09.2018	14.09.2018

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THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.R.C(MD)No.233 of 2018
and
Crl.M.P.(MD) No.3033 of 2018

M.Nagaraja : Petitioner/Appellant/Sole
Accused

Vs.
V.Latcham :Respondent/ Respondent/
Complainant

PRAYER: Revision filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records relating to the judgement in C.A.No.8 of 2014 dated 04.10.2017 passed by the Principal District and Sessions Judge, Theni confirming the judgment and conviction dated 17.01.2014 passed in C.C.No.31 of 2012 by the Judicial Magistrate Court (Fast Track Court) (Magistrate Level), Uthamapalayam, set aside the conviction and sentence and set the petitioner at liberty.

For Petitioner : Mr.D.Malaichamy
For Respondent : No appearance

ORDER

This criminal revision case is directed against the concurrent findings of the Courts below, in the matter arising under Section 138 of Negotiable Instruments Act.

2.The brief facts of the case are as follows:

(i)The revision petitioner herein had borrowed Rs.2,00,000/- from the respondent herein and to discharge the debt, he has issued a cheque dated 07.07.2012 drawn on Indian Overseas Bank, Cumbum Branch. When the cheque was presented for collection, the same was returned with an endorsement 'no such account'. The statutory notice was issued to the respondent, but he had not replied for the same. Hence, the complaint has been filed before the Judicial Magistrate, Uthamapalayam, under Section 138 of Negotiable Instruments Act.

(ii)The learned Judicial Magistrate (Fast Track Court), Magistrate Level, Uthamapalayam has taken the complaint on file and after following the procedure, has examined the witnesses. The respondent herein has examined himself as P.W.1 and six exhibits were marked, on his side. On behalf of the revision petitioner, he and one Sunil were examined and five exhibits were marked.

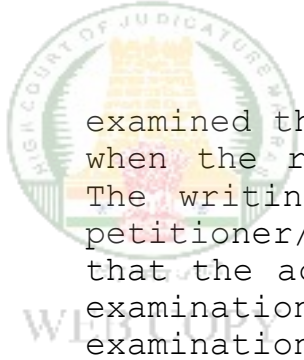
(iii)The trial Court has found the revision petitioner guilty, convicted and sentenced him to undergo 3 months simple

imprisonment and to pay a fine of Rs.3,000/-, in default, to undergo simple imprisonment for one month.

(iv) Aggrieved by the same, the revision petitioner/accused has preferred an appeal before the learned Principal District and Sessions Judge, Theni, on the ground that he did not borrow the money from the complainant. There is no evidence to show that he borrowed the money from the complainant and to discharge the said debt, the subject cheque was issued. In fact, the cheque was issued to one Peyathevar with whom the revision petitioner had transaction. His friend one Nallathambi availed loan from Peyathevar and to discharge the debt of Nallathambi, he gave the subject cheque to Peyathevar in the year 2004. Later, he closed the account in the year 2011. Peyathevar has filed a suit against him for recovery of money and at that time, he had misused the cheque by filling it and presenting the cheque in the name of Nagaraja. The trial Court has failed to take note of these facts. D.W.2 the Bank Manager had deposed about the closure account in 2011 itself. Ex.D.1 to Ex.D.3 fortify the said fact. The suit filed by Peyathevar against the revision petitioner/accused, is proved through Ex.D.4. While so, when the revision petitioner has discharged his burden to disprove the case of the complainant in respect of enforceable debt, the trial Court ought not to have convicted him.

(iv) The lower appellate Court however found that the plea of defence is only an after thought. The theory introduced by the appellant/accused that the cheque was given to Peyathevar as security of the loan availed by his friend Nallathambi is only an after thought, it was not disclosed at the earliest point of time. He has neither lodged any criminal complaint in this regard nor replied to the statutory notice, putting forth his explanation. The closure of account prior to the date of the cheque will not enhance the case of the accused. The pleading in the suit filed by Peyathevar against the accused will not prove the fact that the subject cheque was issued to Peyathevar, in the absence of examining the Peyathevar or Nallathambi in this regard. Having not discharged his burden and disproving the enforceable debt, but accepting the signature found in the cheque, the lower appellate Court has dismissed the appeal confirming the trial Court judgment. Aggrieved by that, the present Criminal Revision Case is filed.

3. The learned counsel appearing for the revision petitioner would submit that the very fact that the account was closed long before the date of cheque and the plea of issuing the post dated cheque for the loan availed on 03.06.2012, has not been taken into consideration by the Courts below. The Courts below have failed to consider the fact that there was private contract between the respondent/complainant and the revision petitioner/accused herein. The evidence of P.W.1 with regard to the circumstances under which the revision petitioner/accused borrowed money from him will clearly show that the respondent/complainant, had no acquaintance with the respondent/complainant. In the cross examination he has admitted the denomination of currencies. To prove the transaction, he has not



examined the person, whom, according to the complainant, was present when the revision petitioner/accused borrowed money on 03.06.2012. The writings in the subject cheque was not that of the revision petitioner/accused. In the chief examination, P.W.1 had deposed that the accused gave a written cheque to him, whereas in the cross examination he has contradicted his own version in the chief examination and admits that the wordings, figures and date in the cheque were returned by him later.

4. Having admitted that the date, figure and amount was written by him, the Courts below ought to have held that the blank cheque signed by the revision petitioner has been misused by the complainant. Later retraction of the witness regarding the writings in the cheque, only enhanced the falsity of the complaint, which has miserably fails to convince the Courts below.

5. The learned counsel for the revision petitioner would also submit that when issuance of cheque is disputed, the statutory presumption cannot be drawn against the accused. The burden is on the complainant to prove that the subject cheque was issued for a legally enforceable debt and for the said purpose, he should have produced the proof of existing transaction between him and the complainant.

6. To buttress his submission the learned counsel would rely upon the judgment of the Hon'ble supreme Court reported in (2014) 2 SCC 236 (*John K. Abraham Vs. Simon C. Abraham and another*) wherein it has been held as follows:

"10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent complainant, as rightly concluded by the learned trial Judge, the respondent was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW1 by stating once in the course of the cross-examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself by further reiterating that the amount in words was written by him."

7. The following judgment is relied to emphasis that once the account is closed prior to the date of alleged debt or cheque the onus of the complainant to prove the existence of legally enforceable debt, the learned counsel would rely upon the judgment of this Court reported in 2017(1) MWN (Cr.) DCC 147 (MAD.) (*Chinthamani Foods & Feeds (p) Ltd., Vs. D. Chandrasekar*). For the said reasons, the complaint has to be dismissed by reversing the judgments of the Courts below.



8. Heard the learned counsel for the revision petitioner. Though, notice was served to the respondent/complainant and received by him, there is no representation on his behalf.

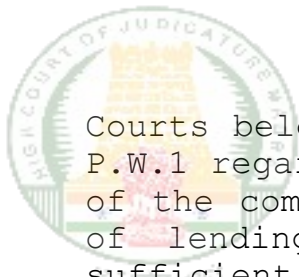
9. The signature found in the cheque not disputed by the revision petitioner/accused. His contention is that cheque was given to one Peyathevar long back that too in the year 2004, who has misused the cheque and presented it in the year 2012 through Nagaraja, the complainant herein. To prove the said contention, he has examined D.W.2 and the statement of account is marked as Ex.D.5.

10. This evidence would only go to show that the revision petitioner maintained the account in the Indian Overseas Bank and the same was closed in the month of February 2011. If really the cheque was issued to one Peyathevar as security of loan availed by his friend Nallathambi, the revision petitioner should have at least examined Nallathambi and produced the documents and under what circumstances the said cheque was given to Peyathevar. It is pertinent to note that the statutory notice issued to the revision petitioner/accused informing about the bouncing of cheque has not evoked any response by him. The statutory notice Ex.P.5 is received by the accused and same is proved through the acknowledgment card Ex.P.6.

11. The revision petitioner having failed to respond to the notice, only during the trial has pleaded about the new fact and about different transaction between him and one Peyathevar, wherein his friend Nallathambi was also involved. The deposition of Peyathevar recorded in the suit filed by Peyathevar against the revision petitioner/accused, will not have any bearing to decide the defence raised by the revision petitioner.

12. Ex.D.4 is the deposition copy of the accused in O.S.No.200 of 2012 filed by the one Peyathevar. This deposition copy has no evidential value for appreciation in the criminal proceedings. The deposition of the accused in that proceeding is a self serving statement of the accused in the civil proceedings between him and one Peyathevar, that cannot be a piece of evidence to be put against the complainant, who is not a party to that proceeding and who had no opportunity to cross examine the deponent. Therefore it has no evidential value for any consideration, in the absence of confronting the same with the maker of the statement.

13. The revision petitioner had not placed acceptable evidence before the trial Court in support of his contention. The evidence of the complainant prove the cheque is issued for a specific account and the factum of its dishonour necessarily draw the presumption under Section 118 and 139 of Negotiable Instruments Act. In the revision petition, while exercising the power under Section 397 and 401 Cr.P.C., the High Court can interfere with the order passed below, if any gross illegality or perversity in the findings of the



Courts below. In this case, minor discrepancies in the evidence of P.W.1 regarding the writings on the cheque or non-examining the wife of the complainant, who alleged to have been presented at the time of lending the loan to the revision petitioner, will not be sufficient to throw away the case of the complainant.

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14.The revision petitioner in the cross examination has admitted the signature in the cheque and the receipt of the statutory notice. He has also admitted that he has not lodged any complaint against the Peyathevar or Latcaham/complainant regarding this subject cheque.

15.In the said circumstances this Court finds no error or illegality in the judgments passed by the Courts below. Considering the above facts and circumstances, this Court is of the opinion that in respect of sentence, in lieu of imprisonment for three months and fine of Rs.3,000/- the revision petitioner/accused, shall pay compensation of Rs.2,00,000/- (Rupees Two lakhs only) being the cheque amount to the respondent/ complainant. The learned counsel for the appellant would submit that already a sum of Rs.1,00,000/- has been deposited in the Bank in compliance of this court order dated 09.04.2018. If so, the balance Rs.1,00,000/- to be deposited within sixty days from the date of order. The respondent is at liberty to withdraw the entire money deposited with accrued interest lying in the Bank and also the balance amount of Rs.1,00,000/- to be deposited in pursuance to this order.

16.Accordingly, this Criminal Revision Case is disposed of with the above modification. Consequently connected miscellaneous petition is closed.

Sd/
Assistant Registrar(CS-II)

/True copy/

Sub Assistant Registrar(CS-I)

To

- 1.The Principal District and Sessions Judge, Theni
- 2.The Judicial Magistrate Court, Fast Track Court,
(Magistrate Level), Uthamapalayam,
- 3.The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1cc to Mr.D.Malaichamy, Advocate, SR.No. 84398

CrI.R.C(MD)No.233 of 2018
and

CrI.M.P. (MD) No.3033 of 2018