IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED 30.01.2019
CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.R.C.No.1276 of 2011

P.Vijaya Ganesh .. Petitioner

Vs

L.Manivannan .. Respondent

Criminal revision preferred under Section 397 r/w 401 Cr.P.C. against the judgment dated 08.04.2011 passed by the Additional District and Sessions Judge (Fast Track Court), Vellore in Crl.A.No.184 of 2010 confirming the judgment dated 04.08.2010 passed by the Judicial Magistrate, Gudiyatham in C.C.No.9 of 2009.

For Petitioner : Mr.V.Karthikeyan
For Respondent : Mr.R.Karthikeyan

O R D E R

This Criminal Revision Petition has been preferred to set aside the judgment dated 08.04.2011 passed by the Additional District and Sessions Judge (Fast Track Court), Vellore in Crl.A.No.184 of 2010 confirming the judgment dated 04.08.2010 passed by the Judicial Magistrate, Gudiyatham in C.C.No.9 of 2009.

2.For the sake of convenience, the petitioner and the respondent will be referred to as the accused and the complainant respectively.

3.It is the case of the complainant that for the legal due that the accused owed to him, the accused issued a post-dated cheque dated 01.12.2008 drawn on Canara Bank, bearing No.802535 (Ex.P1) on 20.11.2008; the complainant presented the impugned cheque, in the account maintained by him with State Bank of India on 01.12.2008; the impugned cheque was dishonoured by State Bank of India vide (Ex.P4); the complainant issued the statutory demand notice dated 10.12.2008 (Ex.P5); in response to the statutory notice (Ex.P5), the accused issued a reply notice dated 18.12.2008 (Ex.P7); the complainant initiated a prosecution in C.C.No.9 of 2009 before the Judicial Magistrate, Gudiyatham under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") against the accused.

4.On the appearance of the accused, he was questioned under Section 251 Cr.P.C. and he denied the accusation. To prove the case, the complainant examined himself as P.W.1. and marked Exs.P1 to P7. When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. The accused examined himself as D.W.1. and also examined D.W.2 to D.W.4. and marked Exs.D1 to D12.

5.After considering the evidence on record and hearing either side, the trial Court, by judgment dated 04.08.2010 in C.C.No.9 of 2009, convicted the accused under Section 138 of the NI Act and sentenced him to undergo one year rigorous imprisonment and further directed the accused to pay Rs.6,00,000/- as compensation to the complainant.

6.Challenging the conviction and sentence, the accused filed Crl.A.No.184 of 2010 in the Court of Session, which was made over to the Additional District Court (Fast Track Court), Vellore, for hearing. The appellate Court, by judgment dated 08.04.2011, dismissed the appeal and confirmed the conviction and sentence imposed by the trial Court. Challenging the judgment passed by the trial Court and the appellate Court, the accused is before this Court under Section 397 r/w 401 Cr.P.C.

7.Heard Mr.V.Karthikeyan, learned counsel for the accused and Mr.R.Karthikeyan, learned counsel for the complainant.

8.Before adverting to the rival submissions, it may be necessary to state here that while dealing with a revision petition under Section 397 r/w 401 Cr.P.C., this Court should not reappreciate the evidence, as if it is a Court of second appeal. However, where it appears to this Court that there has been patent misappreciation or misreading of the evidence on record by the Courts below, it will be permissible for this Court to reappreciate the evidence.

9.For maintaining a prosecution under Section 138 of the NI Act, there should have been a legally enforceable debt and it is incumbent on the complainant to plead in the complaint about the debt. In this case, there is a complete absence of this plea in the statutory demand notice (Ex.P5) as well in the complaint and sworn statement. In paragraph No.1 of the statutory demand notice (Ex.P5), the complainant has merely stated as follows :

> "1.That my client states that for the legal due that you owe to my client on 20.11.2008 you have issued a post dated cheque

for a sum of Rs.6,00,000/- dated 01.12.2008 bearing cheque No.802535 drawn on your banker Canara Bank, Gudiyattam Branch."

In the complaint filed before the Court also, the complainant has stated as under :

"1.The complainant submits that for the legal due that the accused owe to the complainant, on 20.11.2008 the accused has issued a post dated cheque for a sum of Rs.6,00,000/- (Rupees Six Lakhs only) dated 01.12.2008 bearing cheque No.802535 drawn on his banker Canara Bank, Gudiyattam Branch."

10.Even in the sworn statement, the complainant has merely stated that for the debt due, the accused has issued the impugned cheque without anything more. However, in the proof affidavit, the complainant has stated that the accused borrowed Rs.4,00,000/- on 01.11.2006 and executed a promissory note, agreeing to repay the amount on demand with interest at 24% per annum; that the accused issued the impugned cheque dated 01.12.2008 on 20.11.2008 and collected back the promissory note. In other words, this theory of obtaining loan on 01.11.2006 and taking back the promissory note, after issuing a post-dated cheque has been proffered by the complainant for the first time in the proof affidavit and not at any time earlier.

11.The complainant has been subjected to cross-examination by the accused on all these aspects. The theory that the accused got back the promissory note, after giving a post-dated cheque appears incredible. No ordinary prudent man would have handed over a promissory note for Rs.4,00,000/-, on the strength of a post-dated cheque. Assuming for a moment that the complainant was gullible, he would have narrated this fact in the statutory demand notice (Ex.P5) or in the complaint to the Court or in his sworn statement.

12.Mr.R.Karthikeyan, learned counsel for the complainant submitted that once the accused admits his signature in the cheque, the presumption under Section 139 of the NI Act would cover the debt aspect also, as held by the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118]. One can have no quarrel with the above proposition of law. But, in the opinion of this Court, the complainant is not completely absolved of the necessity to plead about the fact of a legally enforceable debt, though he may not be required to prove it to the hilt, in view of Section 139 of the NI Act.

13.On the contrary, the accused was taking a consistent stand by contending that he had not borrowed any money from the complainant and the impugned cheque was issued by him to one Bison Sharma for the loan taken by the accused from him. Even at the earliest point of time viz., in the reply notice dated 18.12.2008 (Ex.P7), the accused has stated that he does not know the complainant at all; he had borrowed Rs.50,000/- on 08.12.2006 from a financier by name, Bison Sharma, who also is the owner of Sharma Sweets; the said Sharma, collected the blank, but, signed cheque from him; his (accused) father-in-law Shanmugam had also borrowed heavily from Bison Sharma and was not able to pay the usurious interest charged by him; when Bison Sharma and other creditors started harassing his father-in-law, a police complaint was given against them; only as a counter blast, Bison Sharma has set up the present complainant and has filled the blank columns in the cheque and has filed the present prosecution.

14.Further, in the reply notice, the accused has taken a specific stand that the cheque leaves bearing serial numbers anterior and posterior to 802535 (the impugned cheque-Ex.P1) have all been cleared by his bank between 05.01.2007 and 27.01.2007. But, strangely, the complainant has taken a stand that he had issued the impugned cheque on 20.11.2008. In order to establish these facts, the accused examined himself as D.W.1 and marked his bank statement as Ex.D7.

15.In the cross-examination of the accused, the complainant was not able to make any serious dent in his testimony. Surprisingly, both the Courts have believed the incredible theory put forth by the complainant, for the first time in the proof affidavit that the accused had executed a promissory note for Rs.4,00,000/- and had collected the same, after giving a post-dated cheque. Both the Courts failed to take note of the fact that this theory was not pleaded in the statutory demand notice (Ex.P.5), complaint and also in the sworn statement of the complainant.

16.In view of the foregoing discussion, this Court finds that the complainant has not satisfactorily proved that the impugned cheque was issued by the accused towards the legally enforceable debt for sustaining the conviction and sentence imposed upon the accused by the trial Court and the appellate Court.

In the result, this revision petition is allowed and the judgment of conviction and sentence dated 08.04.2011 passed by the Additional District and Sessions Judge (Fast Track Court), Vellore in Crl.A.No.184 of 2010 and also the judgment of conviction and sentence dated 04.08.2010 passed by the Judicial Magistrate, Gudiyatham in C.C.No.9 of 2009, are set aside and the accused is acquitted of the charge. The bail bond is discharged and the fine amount paid if any, shall be refunded.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

gya

To
1.The Additional District and Sessions Judge,
(Fast Track Court), Vellore.

2.The Judicial Magistrate,
Gudiyatham.

+1cc to Mr.R.Karthikeyan , Advocate SR.No. 8747
+1cc to Mr.V.Karthikeyan , Advocate SR.No. 7949

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A.SK(01/03/2019)