IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :08.03.2019

Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Revision Case No.339 of 2011
and M.P.No.1 of 2011

V.Jothiramalingam .. Petitioner

/versus/

Gunasekar .. Respondent

Prayer: Criminal Revision Case has been filed under Section 397 and 401 of Criminal Procedure Code praying to set aside the judgment in C.A.No.147 of 2009 dated 08.12.2010 on the file of the learned Additional District Sessions Judge (Fast Track Court No.IV) confirming the sentence of imprisonment for the period of one year simple imprisonment passed by the XV Metropolitan Magistrate Court. George Town, Chennai in C.C.No.6182 of 2002 dated 27.07.2009 and call for records and acquit the revision petitioner herein from all the charges.

For Petitioner : Mr.B.Ganesha Moorthy

For Respondent : Mr.R.Chakkaravarthy

O R D E R

Heard the learned counsel for the revision petitioner and the learned counsel for the respondent.

2. This case is arising out of the private complaint filed under Section 138 of Negotiable Instruments Act.

3. The facts of the case is that on 28.01.2002 the revision petitioner, his mother and his sister together borrowed Rs.3,00,000/-, and agreed to pay a sum with interest of 36% p.a and executed the mortgage deed in favour of the complainant. The mortgage deed was registered at S.R.O, Sembium. To discharge the said debt, the accused has issued a cheque dated 15.10.2002 for a sum of Rs.3,45,000/-, which is inclusive of principal and interest. When the said cheque was presented for collection, it was returned with endorsement "funds insufficient" and the same was informed to the accused by the

complainant. However, the notice was returned with an endorsement "Intimation Delivered - Not Claimed". Thereafter, the complaint under Section 138 of Negotiable Instruments Act was registered by the respondent against the revision petitioners herein.

4. Before the trial Court, complainant was examined and 4 documents were marked in support of the complaint. In defence the accused stated that the unfilled cheque was given to the complainant as a security for the mortgage loan of Rs.3,00,000/- and the same has been misused by the complainant and at the same time, he has also proceeded with auction of the mortgaged property. Therefore, the revision petitioner was forced to file a suit seeking injunction restraining the complainant by proceeding with the private auction under Section 69 of the Transfer of Property Act. In the said suit, the revision petitioner had already deposited Rs.1,00,000/-.

5. In such circumstances, the unfilled cheque which was given as security has lost the character of a cheque given to discharge a legally enforceable debt. Overruling the contention of the accused, the trial Court has held the accused guilty for an offence under Section 138 of Negotiable Instruments Act. Directed the accused to pay a sum of Rs.3,45,000/- within a period of one month, failing which to undergo Simple Imprisonment for a period of 2 weeks, in default.

6. Aggrieved by that the accused has preferred an appeal before the Additional District and Sessions Court (F.T.C.No.IV), Chennai.

7. The lower Appellate Court, on re-appreciation of evidence and the submissions made by the accused and the complainant, after taking note of the action taken by the complainant to enforce the mortgage deed by subjecting the property for sale, thought fit to modify the sentence while confirming the conviction. Accordingly, the lower appellate Court has modified the sentence to the effect that holding the appellant/accused is not liable to pay fine of Rs.3,45,000/-, since several remedies are available as per law to recover the cheque amount. Therefore, the sentence of imprisonment imposed by the trial Court alone was confirmed.

8. In the present revision, the petitioner urge the point that the blank cheque given as security at the time of mortgage,

cannot be filed up and restored to Section 20 of Negotiable Instruments Act, to draw presumption against the accused. Contending that the loan of Rs.3 Lakhs was availed after creating a mortgage and deposit of the original title deed of the property. The complainant has filed suit in the High Court for recovery of debt. Therefore, the provision of under Section 138 of Negotiable Instruments Act cannot be invoked against the revision petitioner, since the cheque was not issued to the complainant to discharge any legally enforceable debt, but only as a security for the mortgaged loan.

9. Relying upon the admission of the complaint, the cheque was filled by his son. The learned counsel for the revision petitioner would submit that presumption under Section 139 of Negotiable Instruments Act, has been discharged by the accused, by the admission of the complainant as well as the subsequent conduct of the complainant. Therefore, the Courts below ought not to have relied upon Section 139 of Negotiable Instruments Act, to draw adverse presumption against him.

10. The learned counsel for the respondent would submit that the accused/petitioner had issued a cheque to discharge the mortgage loan, admittedly he has created a mortgage and he also admits receipt of the loan of Rs.3 Lakhs. While so, by issuing a blank cheque, for the discharge of mortgage loan, under Section 20 of the Negotiable Instruments Act, the holder of the cheque is entitled to fill it up and the presumption is that the drawer of the cheque has permitted to holder of the cheque to fill it.

11. The Civil suits referred are subsequent to cause of action in the criminal cases. Filing of suit will not take away the criminal liability of the revision petitioner for issuing cheque without sufficient fund. The evidence before the Court is the testimony of the complainant, the returned cheque, Bank memo, statutory notice and the returned cover. The factum of injunction suit filed by the accused and the suit for enforcement of mortgage are all oral submissions made by the respective parties across the bar, without the material facts being placed before the Trial Court. It is admitted by the complainant that the accused and his family created the mortgage deed and availed loan of Rs.3 Lakhs. On 28.01.2002, the mortgage has been created by the accused along with his mother and his sister. It is the case of the complainant that the subject cheque was given by the accused to discharge the mortgage debt. Whereas, the defence of the accused is that, the cheque was given only as a security, it was not given on the

date on which it bears. In the given circumstances to attract under Section 138 of the Negotiable Instruments Act, the complainant should have established that the cheque was issued by a person from his account to discharge in whole or in part of any debt or other liability and if it is returned and paid the factum of cheque returned unrealised ought to be informed to the drawer of the cheque by giving a notice in writing within a period of 30 days. In this case, admittedly a statutory notice though sent on 18.10.2002, it was not served on the accused, but returned unclaimed. This has been presumed to be sufficient service, thereafter, the private complaint has been filed and the learned Magistrate has taken the matter on file for further proceedings. The learned Magistrate has relied upon under Section 20 of the Negotiable Instruments Act to get over the admission of the complainant that the blank cheque was filled by his son.

Section 20 of the Negotiable Instruments Act reads as below:

> Section 20. Inchoate stamped instruments:- Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 1[India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder. (Emphasis added)

12. The spirit of Section 20 is to valid the inchoate instruments, if it was given by the drawer and used by the drawee for recovery of any sum which the drawer need to pay such inchoate instrument cannot be used for recovery of any excess sum what the drawer intended. In this case, if the facts are analysed, admittedly when Ex.P1 was given to the complainant it was unfilled inchoate instrument. The complainant had admitted in the cross-examination that it was filled by his son and thereafter presented.

13. The contention of the accused is that unfilled cheque was given to the complainant as a security for the mortgage debt. The title document was also given to the complainant while creating the registered mortgage. In such circumstances, whether the Ex.P.1 was given by the accused with an intention to recover a sum of Rs.3,45,000/- is a question, which has not been answered by the complainant. The alleged mortgage loan was availed by the accused on 28.01.2002, the subject cheque is dated 15.10.2002. The rate of interest as per the mortgage is 36% p.a. Mortgage was created not only by the accused, but his mother and his sister are also party to the mortgage deed. They have created registered mortgage and deposited title deed to the complainant. The blank cheque signed by one of the mortgagee cannot be construed to be issued to the complainant permitting to be filled up and make it a valid document under Section 20 of the Negotiable Instruments Act.

14. Further more, when the enforceable debt itself is questioned by the accused and probablised his defence, presumption under Section 139 of the Negotiable Instruments Act gets reversed. Therefore, fixing the criminal liability because he has signed the cheque in possession of the complainant cannot be safe.

15. The Courts below, while invoking Section 138 Negotiable Instruments Act, ought to have considered the ingredients of Section 20 of the Negotiable Instruments Act in full. In the absence of any intend to allow the holder of the cheque to fill the amount of Rs.3,45,000/- in the cheque, Ex.P1 Section 20 of the Negotiable Instruments Act cannot be applied. More particularly, when the facts of the case indicates that the accused had already created mortgage of his property for the loan, he has availed. So, there is a possibility of his defense that Ex.P1 was given to the complainant only as a security and not toward discharge of the debts. Accordingly, I find that the Courts below had erred in law by applying Section 20 and 139 of Negotiable Instruments Act in this case.

16. Accordingly, the Criminal Revision Case is allowed. The Conviction and sentence passed by the trial Court is hereby set aside. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To,

1.The XV Metropolitan Magistrate,
George Town, Chennai

2.The Additional District Sessions Judge,
Fast Track Court No.IV, Chennai.

3.The Section Officer, Criminal Section,
High Court, Madras.

+1 cc to M/s.B.Ganesha Moorthy, Advocate, S.R.No.22012

+1 cc to Mr.R.Chakkaravarthy, Advocate, S.R.No.22381

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NRL(CO)
SSM(09/04/2019).