IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.07.2019
PRONOUNCED ON : 14 .08.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.R.C.No.547 of 2017

M.P.M.Jayadass .. Petitioner

Vs

J.Saroja .. Respondent

Criminal Revision preferred under Sections 397 and 401 Cr.P.C. to set aside the judgment dated 07.02.2017 of the IV Additional Sessions Judge, Chennai in C.A.No.140 of 2014 against the judgment dated 28.04.2014 of the VIII Metropolitan Magistrate, George Town, Chennai in C.C.No.363 of 2011.

For Petitioner : Mr.A.Nagarajan

For Respondent : Mr.D.Dayalan

O R D E R

This Criminal Revision has been preferred challenging the judgment and order dated 07.02.2017 passed by the IV Additional Sessions Judge, Chennai in C.A.No.140 of 2014 confirming the conviction and substantive sentence of imprisonment and setting aside the fine element imposed by judgment and order dated 28.04.2014 in C.C.No.363 of 2011 on the file of the VIII Metropolitan Magistrate Court, George Town, Chennai.

2.This indubitably is not a run-of-the-mill case under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act"). The facts are indeed surreal and weird. For the sake of convenience, the parties will be referred to by their name.

3.Saroja, the complainant has stated that, she got married to Jayadass sometime in the year 1991 and has a daughter J.Menaka through the wedlock; while they were both living happily, Jayadass incurred loss in his business and wanted Saroja to arrange a loan of Rs.25 lakhs to settle the loans that he had taken from some persons; understanding his plight, Saroja arranged the money by selling her jewels and also getting loan from various persons during the first week of November 2008 and gave it to him; Jayadass neither paid the interest to the persons from whom she had borrowed nor did he come forward to pay the principal; when she started putting pressure on Jayadass, he gave a cheque for Rs.25 lakhs (Ex.P1) dated 29.07.2010 drawn on Bank of India, Koyambedu Branch; she deposited the cheque in Indian Bank where she holds an account on 04.10.2010, but, the same was dishonoured on the ground "insufficiency of funds" on 05.10.2010 vide return memo (Ex.P3); she issued a statutory demand notice (Ex.P4) dated 27.10.2010 to Jayadass, for which, Jayadass sent a reply notice (Ex.P5) dated 18.11.2010, denying the marital relationship itself and contending that the cheque was obtained under coercion on 25.07.2010; therefore, she initiated a prosecution in C.C.No. 363 of 2011 before the VIII Metropolitan Magistrate, George Town, Chennai under Section 138 of the NI Act against Jayadass.

4.On appearance, Jayadass was questioned under Section 251 Cr.P.C. and he denied the accusation.

5.To prove the case, Saroja examined herself as PW1 and marked Ex.P1 to Ex.P5 including the reply notice (Ex.P5) dated 18.11.2010 issued by Jayadass. Neither any witness was examined on behalf of Jayadass nor any document marked.

6.When Jayadass was questioned under Section 313 Cr.P.C., he denied the incriminating circumstances appearing against him but, did not come forward with any explanation, as to how the cheque issued by him came into the hands of Saroja.

7.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 28.04.2014 in C.C.No.363 of 2011, convicted Jayadass of the offence under Section 138 of the NI Act and sentenced him to undergo 2 years rigorous imprisonment and pay a fine of Rs.5,000/-, in default to undergo 1 month simple imprisonment and also pay Rs.25 lakhs as compensation to Saroja. The appeal in C.A.No.140 of 2014 filed by Jayadass has been partly allowed by the IV Additional Sessions Judge, Chennai on 07.02.2017, inasmuch as, the fine amount of Rs.5,000/- imposed by the trial Court alone has been set aside. Challenging the conviction and substantive sentence of imprisonment, Jayadass is before this Court.

8.Heard Mr.A.Nagarajan, learned counsel for Jayadass and Mr.D.Dayalan, learned counsel for Saroja.

9.Before adverting to the rival submissions, it may be necessary to state here that, while exercising revisional powers under Section 397 r/w 401 Cr.P.C., this Court is required to find out, if there is any illegality or impropriety in the findings of the trial Court and the appellate Court warranting interference and it is not open to this Court to exercise the revisional power as a second appellate forum. In this context, it is profitable to allude to the following paragraphs in the judgment of the Supreme Court in State of Maharashtra Vs Jagmohan Singh Kuldip Singh Anand and Others, etc. [(2004) 7 SCC 659.]

> "22.The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,
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> > "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court".
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> It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.
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> (emphasis supplied)
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> 23.On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn.[(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5)
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> "The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for

> the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."

10.This legal principle has been reiterated very recently by the Supreme Court in Bir Singh Vs Mukesh Kumar [(2019) 4 SCC 197], wherein, the Supreme Court formulated the following question of law :

> "(i) whether a Revisional Court can, in exercise of its discretionary jurisdiction, interfere with an order of conviction in the absence of any jurisdictional error or error of law"

The answer of the Supreme Court to the aforesaid question is as under :

> "19.It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record.
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> 20.As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [(2008) 14 SCC 457], it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error. The answer to the first question is therefore, in the negative."

11.Mr.Nagarajan, learned counsel for Jayadass submitted that when Jayadass had issued a reply notice (Ex.P5), denying the very marital relationship and the debt, the burden shifts on Saroja to plead and prove that she had sold her jewels and taken loan from others to give Jayadass and her failure to prove those facts, would lead to the inference that there was no legal debt. Learned counsel took this Court through the cross-examination of Saroja.

12.From the records, it is seen that Saroja has been subjected to a grilling cross-examination on 24.01.2013 and 15.03.2013. In the cross-examination, Saroja has admitted that, she was married to one Dharmalingam and through him, she begot two children and she got separated from him in a panchayat that was held in the police station; she had taken a shop in the fruit and flower market at Bunder street and was selling flowers; though she does not have a name for her shop, she is famous in the flower market; she will transact business for around Rs.1.5 to 2.5 lakhs per day in flower business, out of which, she may get a commission in the range of Rs.5,000/- to Rs.10,000/- per day. In the cross-examination, she has stated that she is an income tax assessee and also has a PAN card. She has further stated that she was paying income tax of Rs.30,000/- p.a. and her accounting is being done by an Auditor. She is an illiterate.

13.In the light of this evidence, it may be necessary to refer to the incriminating admission that has been made by Jayadass in his reply notice (Ex.P5), "That your client was doing fruit business with my client for quiet some time and in due course your client started borrowing money and fruits from my client for her business rotations for which my client stretched his hands and lifted your client at many instances, thereby since your client started having continuous business transactions with my client both of them started doing fruit business jointly as an out come of which the fruit business started growing steadily. While so, in due course your client persuaded my client to expand the business by jointly purchasing a property and operating a small concern from the said property. Accordingly with a view to expand the business my client jointly purchased a property with your client at Vadapalani." This admission is relevant under Section 21 of the Indian Evidence Act, 1872 and can be used against Jayadass.

14.From this admission, it is clear that Jayadass and Saroja were not strangers to each other, but were having some relationship. According to Saroja, theirs was a marital relationship. But, according to Jayadass, theirs was a business relationship. But, the fact remains that both of them were into fruit and flower business in the Bunder Street market. Saroja candidly admitted that she was married to Dharmalingam and had two children through him, got separated from him and got married to Jayadass and begot a daughter by name J.Menaka. Though Jayadass has disputed the paternity of J.Menaka in the reply notice (Ex.P5) given by him, yet, in the cross-examination of Saroja, he has not suggested that Menaka was not born through him. On the contrary, in the cross-examination, Saroja has clearly stated that she has also initiated proceedings in the Family Court to establish that Jayadass fathered Menaka.

15.Learned counsel for Jayadass contended that the case of Saroja that she is the wife of Jayadass has been falsified by her admission that she got married to one Dharmalingam and that her marriage with Dharmalingam was terminated in the police station and not in a Court of law. Therefore, he submitted that the entire case of Saroja should be rejected. Had Saroja suppressed her earlier marriage with Dharmalingam, then, this Court could look at her testimony with suspicion. She has frankly stated that she got estranged from Dharmalingam and thereafter, Jayadass married her and fathered Menaka. From her point of view, Jayadass is her husband when he, having fathered her daughter Menaka.

16.In this case, it may not be necessary to give a finding about their marital relationship at all because, that is not the fact in issue. However, Jayadass has admitted that he has purchased a property in Vadapalani in his name and in the name of Saroja. It is Jayadass' contention that they fell apart and Saroja brought some goondas to his house on 25.07.2010 and forcibly obtained the cheque for Rs.25 lakhs.

17.Learned counsel for Jayadass contended that Saroja had admitted in the cross-examination that police have called her for enquiry. It is true that Saroja has stated that she was called for enquiry by the Madhuravoyal police, but, she has stated that when she started demanding money, Jayadass gave a false complaint to the police and the police enquired her. It is not Jayadass' case that an FIR was registered against Saroja for criminal intimidation. According to Jayadass, the cheque was obtained from him on 25.07.2010. However, Saroja did not deposit the cheque on 25.07.2010, but, deposited it only on 04.10.2010. The cheque was not returned for the reason "payment stopped", but, was returned for the reason "funds insufficient". Had Saroja obtained the cheque from Jayadass forcibly, Jayadass would have given a request for stop payment. Saroja was in no hurry to deposit the cheque on the date it bore.

18. Learned counsel for Jayadass contended that once the debt has been disputed, the burden shifts on Saroja to prove the debt by showing that she had the necessary means to give the loan. This Court is unable to concur with this submission because, this argument militates against the legal presumption envisaged by Section 139 of the NI Act. The law laid down by the Supreme Court in Krishna Janardhan Bhat Vs. Dattatraya G.Hegde [(2008) 4 SCC 54] has been specifically overruled subsequently in Rangappa Vs Sri Mohan [(2010) 11 SCC 441], wherein, in paragraph No.26, the Supreme Court has held as follows :

> "26.In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not

> be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of 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. However, there can be no doubt that there is an initial presumption which favours the complainant."

As held by the Supreme Court in Rangappa (supra), the presumption under Section 139 of the NI Act is a rebuttable one and the accused can rebut it by preponderance of probability and not by proof beyond reasonable doubt.

19.In this case, Saroja has stated that, she is a popular flower vendor in the flower market; she is an income tax assessee; she has a PAN card and she has an Auditor and pays income tax of Rs.30,000/- to 50,000/- p.a. Even according to Jayadass, both of them were doing business together and he had purchased a house jointly with her in Vadapalani.

20.Learned counsel for Jayadass relied upon the judgment of the Supreme Court in Basalingappa Vs. Mudibasappa [(2019) 5 SCC 418] and submitted that the failure of Saroja to prove and establish the means for giving a huge loan of Rs.25 lakhs, would, by itself be sufficient to hold that she had not proved the debt. In Basalingappa (supra), the accused therein was acquitted by the trial Court and the High Court reversed the acquittal and convicted the accused. In the facts and circumstances of that case, the Supreme Court held that the accused had failed to establish the source of income, especially in the light of the fact that the accused had marked Ex.D1 to Ex.D3. The Supreme Court has not held as a thumb rule that in every case, the complainant should prove the source for giving the loan to the accused.

21.Further, Jayadass has not given any plausible explanation as to the circumstances under which, he had given the impugned cheque to Saroja, when he was examined under Section 313 Cr.P.C. Even the reply notice dated 18.11.2010 (Ex.P5) was marked by Saroja herself fairly. When Jayadass has accepted the issuance of the cheque, the burden under Section 139 of the NI Act falls on him, which he did not dislodge even by preponderance of probability. In such view of the matter, this Court does not find any infirmity in the finding of facts arrived at by the two Courts below warranting interference.

In the result, this Criminal Revision is dismissed as being devoid of merits. The trial Court is directed to secure Jayadass and commit him to prison for undergoing the sentence.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The IV Additional Sessions Judge,
Chennai.

2.The VIII Metropolitan Magistrate,
George Town,
Chennai.

+1cc to Mr.K.R.Rameshkumar, Advocate Sr.69144
+1cc to Mr.S.Sivakumar, Advocate Sr.69206

CRL.R.C.No.547 of 2017

srg 16/09/2019