IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2018
DELIVERED ON : 22.01.2019
CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.R.C.No.631 of 2017

V.Sundaram ... Petitioner

Vs

Sandhiyarani ... Respondent

Prayer: Criminal Revision filed under Section 397 r/w 401 of Cr.P.C., to call for the entire records in so far relates to order passed in C.A.No.189 of 2016, dated 05.04.2017 on the file of III Additional District and Sessions Judge, Gobichettipalayam, Erode District and Sessions Judge, Gobichettipalayam, Erode District whereby confirming the conviction and sentence dated 13.10.2016 passed in C.C.No.293 of 2007 on the file of the Judicial Magistrate No.I, Gobichettipalayam, Erode District and set aside the same.

For Petitioner : Mr.C.Prakasam
For Respondent : Mr.K.Govi Ganesan

JUDGMENT

This Criminal Revision is filed by the appellant/accused against the confirmation of conviction and sentence passed by the learned III Additional District and Sessions Judge, Gobichettipalayam, Erode District in C.A.No.189 of 2016 dated 05.04.2017, whereby the learned Additional Sessions Judge dismissed the criminal appeal and upheld the conviction and sentence made in C.C.No.293 of 2007 on the file of the learned Judicial Magistrate-I, Gobichettipalayam, Erode dated 13.10.2016.

2.Brief case of the appellant:

The appellant/accused and the respondent/complainant were family friends and on 05.05.2006, the respondent/accused borrowed a sum of Rs.7,50,000/- from the appellant and assured payment of 15% interest for the abovesaid loan amount and executed a pro-note (Exhibit P7) for the loan amount. The respondent/accused never paid any interest towards the loan amount and on repeated request, issued a post-dated cheque bearing No.0037023 drawn at theThanalakshmi Bank, Erode Branch for Rs.8,71,900/- loan amount with interest on 27.6.2007 to the appellant. The appellant deposited the said cheque for collection in his bank The Union Bank of India, Gobichettipalayam on 27.6.2007, but the same was dishonoured and returned with return memo dated 28.6.2007 noted with "Account closed". The appellant issued statutory legal notice to the respondent/accused dated 13.7.2007. The respondent/accused received the notice and send a false reply. Hence the appellant preferred complaint before the learned Judicial Magistrate No.I, Gobichettipalayam in C.C.No.293 of 2007. During trial the appellant herself examined as DW1 and Exhibits P1 to P9 were marked on her side. The respondent/accused examined himself as DW1 and marked Exhibits D1 to D18. On completion of the trial the learned trial judge convicted the respondent/accused and sentenced him to undergo one year rigorous imprisonment and imposed fine of Rs.5,000/- and in default to undergo simple imprisonment for four weeks.

3.Aggrieved against the conviction, the respondent/accused preferred appeal before the Learned III Additional Sessions Judge, Gobichettipalayam in Criminal Appeal Number 189 of 2016, wherein the Learned Additional Sessions Judge dismissed the appeal and confirmed the conviction and sentence imposed against the respondent/accused. Hence this criminal revision.

4.The learned counsel for the appellant submits that the Lower Appellate Court failed to consider that when the trial Court imposed punishment of one year imprisonment and imposed fine amount to the tune of Rs.5,000/- but on appeal the lower appellate Court not only confirming the imprisonment of one year and fine amount of Rs.5,000/- but without giving any notice to the petitioner for awarded compensation to the tune of Rs.8,71,900/- is illegal and arbitrary.

5.The learned counsel for the appellant submits that the Court below failed to consider that the cheque was not issued for legally enforceable debt, when the petitioner had money transaction with respondent/s father Shanmugam, when the petitioner made request to return the documents, pro-note and signed blank cheque leaves, but the respondent's father drag on the matter and not returned the said documents, pro-note and signed blank cheque leaves and filed this complaint.

6.The learned counsel for the appellant submits that the Court below failed to consider that after demise of the said Shanmugam the petitioner approached the respondent and made request to return back his documents, pro-note and signed blank cheque leaves, since the respondent also having knowledge about the said documents , cheque leaves, pro-note and settled the said loan amount, but inspite of it she refused to return the said cheque leaves, pro-note and property documents, hence the petitioner issued legal notice on 1.6.2007 to the legal heirs of said Shanmugam including the respondent herein for asking them to return back the said cheque leaves, pro-note and property documents and lodged police complaint against the respondent and others on 23.6.2007 before the Superintendent of Police, Salem District, when the police enquired the same immediately the respondent herein filled up the said cheque leaves and presented her account.

7.The learned counsel for the appellant submits that the Court below failed to consider that even after that the petitioner made public notice by way of giving advertisement in the newspaper on 26.07.2007 by warning other that the respondent may utilize the said cheque, documents and pro-note.

8.The learned counsel for the appellant submits that the Court below failed to consider that when the respondent herein utilized the said pro-note by filled up the pro-note and filed suit in O.S.No.76 of 2009 against the petitioner for recovery of the money. The said decree is binding in the above said under section 138 of Negotiable Instrument Act case.

9.The learned counsel for the appellant submits that the Court below failed to consider that when the petitioner alleged said to have been borrowed amount to the tune of Rs.7.50 Lakhs from the respondent then it certainly the respondent would have mentioned in her income tax returns, but no such document has been filed by the respondent herein.

10.The learned counsel for the appellant submits that the Court below come to conclusion that the petitioner admitted his signature in the said cheque then the entire complaint has been proved, but the Court below failed to note that whether the said cheque issued by the petitioner to discharge for legally enforceable debt with the respondent or not. Since it is admitted that the said blank signed cheque leaves handed over to the respondent's father for security purpose, but the said loan amount has been duly repaid by the petitioner.

11.The learned counsel for the appellant submits that the Court below failed to consider that the respondent not proved with the documents that the petitioner is liable to pay the loan amount for discharge of legally enforceable debt.

12.The learned counsel for the appellant cited the decision for supporting his submissions in the Hon'ble Supreme Court Judgment dated 27.08.1997.

13.The learned legal aid counsel for the respondent cited the decision reported in (2005) 4 SCC 370 in support of his submission sought for dismissal of the revision.

14.I heard Mr.C.Prakasam, learned counsel for the petitioner and Mr.K.Govi Ganesan, learned counsel for the respondent and perused the entire materials available on record.

15.On careful perusal of the records, it is seen that the revision petitioner/accused had serious money transaction with the father of the respondent and borrowed a sum of Rs.5,00,000/- by depositing the title deeds, executed the pro-note and also handed over the blank signed cheque leaves as demanded by the respondent/complainant.

16.The entire incident of availing loan of Rs.5,00,000/- and depositing of title deeds were happened on 21.03.2005 and in the very same year the loan amount of Rs.5,00,000/- was repaid by the revision petitioner to the respondent’s father namely Shanmugam. Inspite of repeated demands, the respondent’s father dragged the petitioner/accused for returning the documents, pro-note and signed blank cheque leaves, for which, now the false case has been filed.

17.It is also a admitted fact that the respondent’s father namely Shanmugam expired in the year 2006 and the revision petitioner issued a legal notice dated 1.6.2007 to the respondent/complainant, being the legal heir of her father Shanmugam requesting them to return back the impugned cheque leaves, pro-note and property documents. The respondent/complainant have not sent any reply to the legal notice and evaded herself in returning the documents. Hence the revision petitioner preferred police complaint against the respondent and others before the Superintendent of Police, Salem District on 23.06.2007. Immediately, to overcome this issue, the respondent/complainant presented the cheque leaves and filed the complaint under Section 138 of the Negotiable Instruments Act.

18.It is also available in evidence that the revision petitioner made a public notice by way of giving advertisement in the newspaper on 26.07.2007 stating that the entire loan amount was repaid to the respondent’s father Shanmugam and not to encumbrance the documents, pro-note and cheques issued by him. Immediately the respondent/complainant filed a suit in O.S.No.76 of 2009 against the petitioner for recovery of money through the said pro-note for the very same amount of Rs.7,50,000/- before the learned III Additional District Court, Salem and after full contest, the suit was dismissed on 31.8.2015 holding that the respondent/complainant failed to prove the loan amount given to the petitioner/accused.

19.It is settled law that the drawee of the cheque has to prove the existence of debt or liability. In the present case also, the complainant not averred in his complaint that on what date, the accused sought financial assistance in order to improve his business. The complainant further deposed that he demanded the return of money when the accused was informed him to repay the said amount. It is clear that no consideration has been passed under Ex.P1 cheque on the said date of issue.

Therefore, presumption under class (a) of Section 118 of the Act stood rebutted.

20.The impugned cheque Ex.P1 itself was not proved that as on the date of issuance of cheque there was recoverable debt and can it be believed that unless source is proved to the Court as to the capacity of complainant to lend a sum of Rs.7,50,000/- to the accused, then the case of the complainant cannot be accepted. Normally, their, arises the presumption when the cheque and signature are admitted. But, when once the probable defence is raised that the amount was paid to the father of the complainant and the evidences relating to the earlier transactions cast doubt. Then non-prove of source of income is also come to the rescue of the accused to raise a probable defence and rebut the presumption available under Section 139 of N.I. Act. When once such evidence is placed by way of cross-examination of PW-1, then, complainant must be in a position to show source of income as on the date of lending. Therefore, I am of the view that the complainant has utterly failed to prove that Ex.P.1cheque have been issued towards legally recoverable debt. On the other hand the accused has been in successful in raising probable defence in the mind of Court, Exs.P1 cheque was not given towards legally recoverable debt or liability.

21.In the present case also the accused rebutted the presumption under Section 139 of N.I. Act by cross examining the PW1 that Ex.P1-cheque were not given towards legally recoverable debt or liability and hence, the evidence of accused not necessary. As per the aforesaid rulings, the presumption mandated by Section 138 of Negotiable Instruments Act includes that there exists legally enforceable debt or liability, which is rebuttable presumption and it is open to the accused to raise defence wherein the existence of legally enforceable debt or liability can be contested. The complainant has not rebutted the burden which cast upon him and he has not produced any corroborative evidence to establish his case. Therefore, on the basis of aforesaid decisions coupled with the defense taken by the accused, those decisions are squarely applicable to the present case on hand. The accused has given rebuttal evidence to the case of the complainant. The complainant failed to give corroborative evidence.

22.The complainant has failed to prove that the cheque was issued towards legally recoverable debt and screened the earlier transactions made with her father. There is no question of convicting the accused or order for compensation in favour of complainant. In any cheque bounce cases, existence of legally recoverable debt has to be proved and in the present case, though, initial burden is discharged, when strong defence is raised by the accused, then complainant has failed to prove the legally recoverable debt due from the accused. Then, certainly presumption cannot be raised under Section 139 of the Act. The accused cannot be convicted for the said offence. In all, the revision petitioner/accused is successful in raising the probable defence which creates doubt in the mind of Court regarding existence of legally recoverable debt. Therefore, the accused is entitled to benefit of doubt and he is acquitted against the offences under Section 138 of the Negotiable Instruments Act.

23.Hence, this criminal revision is allowed and the order passed in C.A.No.189 of 2016, dated 05.04.2017 on the file of III Additional District and Sessions Judge, Gobichettipalayam, Erode District and Sessions Judge, Gobichettipalayam, Erode District whereby confirming the conviction and sentence dated 13.10.2016 passed in C.C.No.293 of 2007 on the file of the Judicial Magistrate No.I, Gobichettipalayam, Erode District, are set aside.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

vs
To

1.The III Additional District and Sessions Judge,
Gobichettipalayam, Erode District.

2.The Judicial Magistrate No.1,
Gobichettipalayam, Erode District.

+1 CC to Mr.K.Govi Ganesan, Advocate sr 4805.
+1 CC to Mr.C.Prakasam,Advocate sr 5211.

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SP(07/02/2019)