



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.07.2019

CORAM

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THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

Cr1.R.C(MD)No.259 of 2018

Ganesan : Revision petitioner/
Appellant/Accused

Vs.

Balamurugan : Respondent/Respondent/
Complainant

Prayer: Criminal Revision has been filed under Section 397 r/w 401 of Criminal Procedure Code, against the judgment, dated 14.02.2018 passed in C.A.No.97 of 2017 by the II Additional District and Sessions Judge, Thoothukudi, confirming the judgment, dated 23.12.2016 passed in C.C.No.193 of 2015 by the Fast Track Court (Magistrate Level), Thoothukudi.

For Revision petitioner : Mr.R.Alagumani

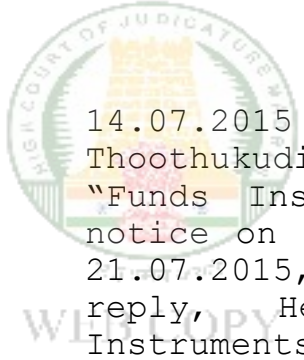
For Respondent : Mr.S.C.Herold Singh

J U D G M E N T

This criminal revision is directed against the judgment, dated 14.02.2018 passed in C.A.No.97 of 2017 by the II Additional District and Sessions Judge, Thoothukudi, confirming the judgment, dated 23.12.2016 passed in C.C.No.193 of 2015 by the Fast Track Court (Magistrate Level), Thoothukudi.

2.The factual matrix of the case leading to filing of the present revision petition are as under:-

The complainant and the accused were well known to each other for more than five years and the accused borrowed a sum of Rs.9,50,000/- on 18.06.2014 for his urgent family expenses and for construction of his house and agreed to pay the same with 12% interest per annum and for that, he executed a promissory note on the day of his borrowing and for the debt, the accused on demand issued a cheque drawn on State Bank of India, Thoothukudi bearing No.278838, dated 11.07.2015 in favour of the complainant for Rs.9,50,000/-. When the cheque was presented for collection on



14.07.2015 through Indian Overseas Bank, Koramballam Branch, Thoothukudi, the same was returned on 16.07.2015 with an endorsement "Funds Insufficient" and hence, the complainant issued a legal notice on 20.07.2015 and in-spite of receiving the legal notice on 21.07.2015, the accused neither paid the cheque amount nor send any reply, Hence, a complaint under Section 138 of the Negotiable Instruments Act (in short "The Act") was filed.

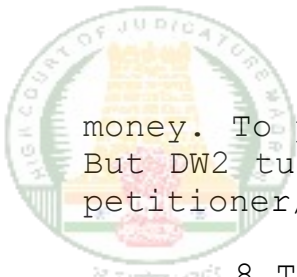
3.The accused was summoned. Notice under Section 251 Cr.P.C was served upon the accused to which he pleaded not guilty and claimed trial. After completing trial, vide order, dated 23.12.2016, learned Fast Track Court (Magisterial Level), Thoothukudi, convicted the accused and sentenced him to undergo one year simple imprisonment and directed to pay Rs.9,50,000/-, the cheque amount as compensation to the complainant within one month time, in default to undergo further period of one simple imprisonment. Feeling aggrieved by the order, appeal was preferred before the II Additional District and Sessions Judge, Thoothukudi and the first appellate court had also confirmed the findings of the trial court. Aggrieved over the same, the present criminal revision has been filed.

4.The learned counsel appearing for the revision petitioner submitted that the respondent/complainant has not proved the case against the revision petitioner/accused for the offence under Section 138 of the Negotiable Instruments Act and the respondent/complainant did not prove the source of income to part with a huge amount of Rs.9,50,000/- to the revision petitioner and the respondent/complainant did not produce any valid document to prove his capacity of income and there is no material alteration in the alleged cheque the signature and one ink and other particulars ink different clearly proved that there is a material alteration and the evidence of PW1 and his complaint are contradictory to each other and in this case, the complainant produced the pro-note as a supporting document for the offence under Section 138 of the Negotiable Instruments Act, but really the complainant has not produced the pro-note at the time of filing the petition. In view of the above circumstances, the judgments of the courts below are liable to be set aside.

5.On the other hand, the learned counsel appearing for the respondent submitted that both the courts below have concurrently given a correct findings, which does not require interference by this court and prays for dismissal of the revision.

6.Heard both sided and perused the materials available on record.

7.The first contention raised on the side of the revision petitioner/accused is that he has not borrowed any amount from the complainant and only his friend Alaguvel borrowed amount from the complainant and for that, he gave the dishonoured cheque only as security for the above amount borrowed and he was not in need of



money. To prove it, the accused examined the above Alaguvel as DW2. But DW2 turned hostile and did not support the case of the revision petitioner/accused.

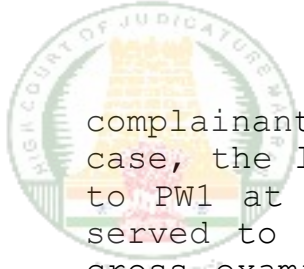
8. The case of the revision petitioner/accused is that he gave the disputed cheque as security for the amount borrowed by DW2 from the complainant. During the examination of DW2, the learned counsel appearing for the revision petitioner/accused put a suggestion that the accused gave his signed cheques, but unfilled cheque to the said Alaguvel for his debt to Murugesan as security, but it was denied by DW2 and first at the time of cross examination of PW1, and chief examination of DW1, the stand taken by the accused is that the accused gave the disputed cheque as security for the loan taken from the complainant by the DW2, but at the time of chief examination of DW2, they took different stand that the accused gave assurance for the loan taken from one Murugan. Hence, there was inconsistency in the defence theory and the stand taken on the accused side is baseless. Hence, argument put forth on the side of the revision petitioner/accused stating that only for the amount borrowed by Alaguvel from the complainant, he gave the disputed cheque as security is not at all acceptable.

9. The next contention raised on the side of the revision petitioner/accused is that the complainant has no capacity to lend the disputed amount and further, there is no need for him to borrow money. To prove that the complainant has capacity to lend money, on the side of the complaint, it is stated that he sold his property to his sister and with the sale proceeds, he gave the amount to the accused. To prove it, the sister of the complainant gave Ex.P8 receipt to show that she purchased the property from the complainant. Further, while cross examining DW1, he admitted that the complainant had capacity to lend money. Hence, admitted facts need not be proved.

10. From the perusal of Ex.A8, it reveals that the complainant had capacity to lend money to the accused. On the side of the complainant, it is argued that only for the construction of a house, the accused borrowed money, hence, the accused borrowed money from the complainant. To prove the construction of a house, Ex.P6 Encumbrance Certificate in the name of the wife of the accused was filed by the complainant.

11. DW1 during his cross examination admitted that the house was constructed by his father-in-law. To prove it, his father-in-law had the financial capacity to construct a house, no document was filed on the side of the revision petitioner/accused. Hence, it reveals that at the time of the alleged borrowal, the revision petitioner/accused was in need of money for the construction of a house.

12. The next contention raised on the side of the revision petitioner/accused is that he has not received any notice from the



complainant and hence, the complaint is not maintainable. In this case, the learned counsel appearing for the defense put a suggestion to PW1 at the time of cross examination that the legal notice was served to one Lakshmi and not to the accused. But DW1 during his cross examination admitted that the said Lakshmi is the mother-in-law and further, DW1 himself admitted that on receiving the legal notice from the complainant, he approached Alaguvel. Hence, the argument put forth on the side of the revision petitioner/accused stating that the legal notice sent by the complainant is not served on the revision petitioner/accused and hence, the complaint is not maintainable is not at all acceptable.

13. At this juncture, it is significant to refer Section 118 of Negotiable Instruments Act, which would run thus:-

"Presumptions as to Negotiable Instruments of consideration until the contrary is proved, the following presumptions shall be made."

a) of consideration:- that every negotiable instrument was made or drawn for consideration and that every such instrument when it has been accepted, endorsed, negotiated or transferred for consideration.

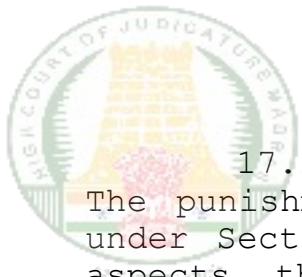
b) as to date:- that every negotiable instrument bearing a date was made or drawn on such date.

14. Section 139 of Negotiable Instrument Act reads as follows:-

"Presumption is favour of hold:- It shall be presumed unless the contrary is proved that the holder of a cheque received the cheque or the nature referred to in Section 138 for the discharge in whole or or part of any debt of other liability".

15. So the presumption is no doubt, it is a rebuttable presumption, but the accused has not rebutted the presumption as known to law. Therefore, in the absence of contrary proof, the cheque was issued for consideration. In this case, the accused admitted his signature in the disputed cheque. Unless contrary is proved, it is presumed that the accused issued the disputed cheque.

16. For all the reasons stated above, this court is of the considered view that both the courts below after proper appreciation of entire materials available on records had given wrong finding, which is required interference by this court. However, considering the fact that the revision petitioner is the only bread winner of the family, the punishment imposed on the revision petitioner requires modification.



17. In the result, this Criminal Revision is partly allowed. The punishment imposed on the revision petitioner for the offence under Section 138 of NI Act is reduced to 8 months SI. In other aspects, the findings of the courts below are confirmed. The period of sentence, if any already undergone by the revision petitioner shall be given set off under Section 428 of Cr.P.C. The revision petitioner, after adjusting the period of imprisonment already undergone, shall undergo imprisonment for the remaining period.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar (CS)

To

1. The II Additional District and Sessions Judge,
Tuticorin

2. The Judge, Fast Track Court (Magistrate Level),
Tuticorin

+1 CC to M/s.S.C.HEROLD SINGH, Advocate (SR-76845 dated 23/07/2019)

+1 CC to M/s.R.ALAGUMANI, Advocate (SR-77068[F] dated 23/07/2019)

Judgment made in
Cr1.R.C (MD) No.259 of 2018
23.07.2019

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JMN(30.08.2019) 5P : 5C