IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.02.2020

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL. R.C. NO.1309 OF 2010

Poonkothai ... Petitioner

- Vs -

M. Mahilingam ... Respondent

Criminal Revision Petition filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records of the learned Judicial Magistrate, Avinashi in C.C. No.89 of 2005 and set-aside the judgment dated 08.05.2009 as confirmed by the learned Additional District & Sessions Court, FTC No.IV, Coimbatore at Tirupur in C.A. No. 61 of 2009 by judgment dated 19.07.2010.

For Petitioner : Mr.R.Sivakumar for
M/s. K.M.Vijayan Associates

For Respondent : Mr.D.J.Venkatesan

ORDER

The present revision has been filed against the order of the Addl. District & Sessions Judge No.IV, Coimbatore @ Tirupur, confirming the order passed by the learned Judicial Magistrate, Avinashi, in a case relating to an offence u/s 138 of the Negotiable Instruments Act.

2. It is the case of the respondent/complainant that for the purpose of diversifying and expanding the business run by the petitioner, the petitioner borrowed a sum of Rs.3,00,000/- on 2.10.03 and towards the discharge of the said debt, the petitioner issued a cheque bearing No.507032 dated 10.08.04 drawn on Corporation Bank, Erode. When the cheque was presented to the bankers for clearance on 1.9.04, the same was returned citing that the account was already closed. Therefore, the respondent/complainant caused a notice on 13.9.04 to the petitioner for return of the amount, for which reply notice was issued by the petitioner. Since the said amount was not paid inspite of notice, proceedings u/s 138 of the Negotiable Instruments Act was instituted in C.C. No.89 of 2005 before the Judicial Magistrate, Avinashi.

3. The trial court, caused summons to the accused/petitioner and after trial, the trial court convicted the accused and sentenced her to simple imprisonment for a period of one year together with a fine of Rs.5,000/-. Against the said conviction, the petitioner herein preferred appeal before the Addl. District & Sessions Court, Coimbatore @ Tirupur in C.A. No.61/09, which confirmed the conviction and sentence passed by the trial court. Assailing the said judgment of conviction and the consequent sentence, the present revision has been preferred by the petitioner/accused.

4. Learned counsel appearing for the petitioner stressed that though the lower appellate court has accepted that there are many discrepancies not only in the evidence, but has also held that certain crucial facts have not been proved in a manner known to law by the complainant, yet, thrusting the burden on the shoulder of the petitioner/accused, the lower appellate court has went on to confirm the conviction on the petitioner. It is the stand of the petitioner that the account, from which the cheque is said to have been issued, stood closed even in the year 2001, which fact has even admitted by the lower appellate court. It is the further submission of the learned counsel for the petitioner that though this fact has been accepted by the lower appellate court and the further fact that the monetary capacity of the respondent to part with the amount of Rs.3,00,000/- has been raised by the petitioner/accused, however, the lower appellate court has brushed aside the said vital points and convicted the petitioner/accused merely on the ground that the petitioner/accused has not rebutted and proved as to how the cheque found its way into the hands of the complainant. It is the submission of the learned counsel for the petitioner that the business, in which the petitioner's husband was a partner, was, in toto, sold to one Umapathy, whose friend Kalisamy, was the friend of the complainant and who had given the cheque to the complainant. This fact has not been appreciated in proper perspective by the courts below, but has merely shifted the burden on the accused to prove his case. It is the further submission of the learned counsel that over and over again, the lower appellate court has held that it is for the accused/petitioner to have disproved the case of the complainant by placing documentary evidence and examining witnesses, including himself, forgetting the fact that it is for the complainant to prove beyond reasonable doubt his case at the first instance and it is not necessary for the accused/petitioner to let in evidence and only in the event of the evidence of the complainant being beyond the pale of doubt, it becomes imperative for the accused/petitioner to place materials/examine witnesses. It is the further submission of the learned counsel for the petitioner that there is no legally enforceable dept on the part of the petitioner to settle the

claim, more so, when the complainant has failed to prove the loan given to the petitioner. In fine, it is the submission of the learned counsel for the petitioner that the courts below have not appreciated the evidence in proper perspective and erroneously convicted and sentenced the petitioner, which deserves to be interfered with.

5. Per contra, learned counsel appearing for the respondent/complainant strenuously submitted that the findings arrived at by the court below, being concurrent in nature, unless, a strong case, both on facts and law is made out by the petitioner, this Court should be circumspect in interfering with the concurrent findings rendered by the courts below. It is the further submission of the learned counsel for the respondent that the signature of the petitioner in the cheque has not been disputed and inspite of causing of statutory notice, except for replying to the notice stating that no legally enforceable right exists, the petitioner has not placed any materials to repudiate the said plea of the respondent. It is the further submission of the learned counsel for the petitioner that had the petitioner been really truthful, the petitioner ought to have entered the box and given evidence disputing the claim of the respondent and in the absence of the same, the findings arrived at by the courts below do not call for any interference, as the findings are well considered on the basis of the materials available on record.

6. This Court paid its careful consideration to the rival contentions advanced on behalf of the petitioner and the respondent and also perused the materials available on record as also the findings rendered by the courts below.

7. The main and pivotal contention of the petitioner is that the account stood closed even in the year 2001 and, therefore, the cheque, alleged to have been issued by the petitioner, itself is highly questionable. In this regard, a reference to the impugned judgment of the lower appellate court reveals that an attempt was made by the petitioner praying to send the cheque for expert opinion as to the signature found on the cheque. Inspite of the same, the cheque has not been sent for expert opinion as to the genuineness of the signature. When such a request has been made by the petitioner, prudence warrants that the said prayer ought to have been acceded to conclusively prove as to the signature found on the cheque. However, the said procedure has not been followed, which could not be held to be detrimental in all cases.

8. In the case on hand, non-following of the procedure has crucially impacted the case of the respondent for the reason that a defence has been raised by the petitioner stating that the whole business had been sold to one Umapathy, whose friend,

Kalisamy, is the friend of the respondent and who had paved the way for the cheque reaching the hands of the respondent. When such a defence has been taken by the petitioner, it is incumbent on the court below to have subjected the cheque to expert opinion, which would have conclusively proved the case either way. Neither the respondent nor the courts below thought it fit to subject the cheque to expert opinion.

9. In Laxmi Dyechem - Vs- State of Gujarat (2012 (13) SCC 375), the Supreme Court has discussed the effect of Sections 138 and 139 of the Negotiable Instruments Act under various scenarios and in that context, held as under :-

> "24. Further, a three-Judge Bench of this Court inRangappav.Sri Mohan [(2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] held that :
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> > "27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of [the] cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation."
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> The Court, however, further observed that :
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> > "27.… it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."
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> The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of preponderance of probabilities.
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> 25. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the

accused may not need to adduce the evidence of his/her own.If however, the accused/drawer of a cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

26. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial Judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy.

27. As already noted, the legislature intends to punish only those who are well aware that they have no amount in the bank and yet issue a cheque in discharge of debt or liability which amounts to cheating and not to punish those who bona fide issue the cheque and in return get cheated, giving rise to disputes emerging from breach of agreement and hence contractual violation:

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28. What is wished to be emphasised is that matters arising out of "stop-payment" instruction to the bank although would constitute an offence under Section 138 of the NI Act since this is no longer res integra, the same is an offence subject to the provision of Section 139 of the

> Act and hence, where the accused fails to discharge his burden of rebuttal by proving that the cheque could be held to be a cheque only for discharge of a lawful debt, the offence would be made out. Therefore, the cases arising out of stop-payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on a par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account, since Section 138 cannot be applied in isolation ignoring Section 139 which envisages a right of rebuttal before an offence could be made out under Section 138 of the Act as the legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in Section 138 of the NI Act, for the discharge of a debt or other liability. Hence, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course."
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> (Emphasis Supplied)

10. From the above proposition of law adumbrated by the Hon'ble Supreme Court what unequivocally follows that Section 138 and 139 of the Negotiable Instruments Act are intricately interconnected and for the offence u/s 138, the necessary ingredients u/s 139 also has to be fulfilled.

11. In the case on hand, it cannot be brushed aside that no defence has been taken by the petitioner with regard to the cheque in question. A defence has been taken, which has not been shown to be a illusory defence by the complainant. Therefore, applying the test of preponderance of probabilities, as envisaged by the Hon'ble Supreme Court with regard to the standard of proof that is required to be adduced by the accused in a case u/s 138 of the Negotiable Instruments Act, this Court is of the considered opinion that definitely there exists a rebuttal by the petitioner with regard to the materials placed by the complainant and in such a scenario, as stated above, prudence should have been exercised by subjecting the cheque to expert opinion so as to authenticate the signature on the cheque.

12. The other piece of glaring material inconsistency in the complainant's version is that the cheque was issued by the petitioner on 2.10.03, with regard to the loan of Rs.3,00,000/-

availed from the complainant. However, it is the case of the defence that the account was closed even in the year 2001. If that be the case, necessarily, the cheques that accompanied the said account were to be surrendered to the bank for the closure of the account. In case of non-surrender of the cheque leaves issued, necessary affidavit would have been taken by the bank. In this scenario, it was incumbent on the part of the respondent/complainant to have called for particulars from the bank relating to the surrender of the cheque leaves by the petitioner, which the complainant had failed to do. The connecting link between the cheque and the petitioner on the date of issuance of the cheque is the evidence from the banker as to the surrender or otherwise of the cheque leaves issued to the petitioner. However, the said step has not been taken by the complainant. The absence to place the materials from the banker about the cheques coupled with the defence taken by the petitioner as to the sale of the business to another person, as noted above, definitely clogs the complainant's case from moving any further.

13. In addition to the above, one other material fact that is highlighted by the learned counsel for the petitioner is that a similar case in and around the same period of time was initiated by the complainant against the husband of the petitioner with regard to receipt of a loan amount of Rs.1,95,000/-, which has ended in dismissal. In the said judgment, the lower appellate court has adverted to the amounts involved and has held that the amount covered in the present case has been accounted for in the case as against the petitioner's husband as well. In the above circumstances, it is the submission of the learned counsel for the petitioner that once the amount has been taken into consideration in the case relating to the petitioner's husband, who has, after trial been acquitted of the offence, necessarily, the case against the petitioner also deserves to be dismissed for the simple reason that the amount, alleged to have been borrowed by the petitioner has been accounted for in the parallel case initiated against the petitioner's husband.

14. There is no dispute that a case u/s 138 of the Negotiable Instruments Act was pursued against the petitioner's husband, which ultimately ended in acquittal and the same has attained finality as no appeal/revision has been filed against the said order. That being the case, the amount, which is the subject matter of the present case, having been accounted for in the parallel proceedings against the petitioner's husband, and the further fact that the same judicial officer has conducted the appellate proceedings and rendered a finding in the said case, this Court is at a loss to understand as to what stood in the way of the lower appellate court to record a different finding on the same set of facts. However, this Court is not

amplifying any further on the said issue, except to hold that the findings recorded in the parallel proceedings ought to have been taken into consideration while deciding the issue in the present case.

15. True it is that the petitioner has not placed any oral or documentary evidence to substantiate his defence. The lower appellate court has held that the absence of the petitioner to prove his case is detrimental and, therefore, it has rendered a finding in favour of the complainant. As held by the Hon'ble Supreme Court in Laxmi Dyechem's case (supra), that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution has to fail and that the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. In the case on hand, the accused has raised a defence by rebutting the evidence placed by the complainant and has further pleaded for sending the disputed cheque for expert opinion, which has been rejected. In such circumstances, it is not necessary for the defence/petitioner to either place documentary or oral evidence before the court to establish his case, but suffice if a doubt is created in the complainant's case about the existence of a legally enforceable debt or liability, which the petitioner, in the present case, has successfully established. In such a backdrop of the factual materials available on record, this Court is of the considered view that the findings recorded by the trial court, as found favour with by the lower appellate court, are not based on correct interpretation of the proposition of law and, therefore, this Court has no hesitation to differ with the conclusion arrived at by the courts below.

16. For the reasons aforesaid, the criminal revision petition is allowed setting aside the impugned judgment, passed by the learned Additional District & Sessions Court, FTC No.IV, Coimbatore at Tirupur in C.A. No. 61 of 2009 by judgment dated 19.07.2010, confirming the judgment of the learned Judicial Magistrate, Avinashi in C.C. No.89 of 2005 dated 08.05.2009.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

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To

1. The Additional District & Sessions Court
   Fast Track Court No.IV
   Coimbatore at Thirupur.

2. The Judicial Magistrate,
   Avinashi.

CRL. R.C. NO.1309 OF 2010

VSN II(CO)
CB(09/10/2020)