IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2020

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.R.C.No.1400 of 2011

1. Maheshbala Films,
Represented by its partner-cum
-Authorized signatory,
D.Balu,
S/o.Dharmalingam,
408, Trichy Main Road,
Gugai, Salem Town and District.

2. D.Balu ..Petitioners/Appellants/Accused

Vs.

P.S.K.Ganapathi ..Respondent/Respondent/Complainant

Criminal Revision filed under Sections 397 and 401 Cr.P.C., to set aside the judgment and order dated 29.04.2008 passed in C.C.No.317 of 2005 on the file of the Judicial Magistrate Court No.II, Namakkal, confirmed by the judgment and order dated 30.08.2011 passed in C.A.No.19 of 2008 on the file of the Principal District and Sessions Court, Namakkal.

For Petitioners : Mr.M.Karthik for Mr.R.Nalliyappan

For Respondent : Mr.K.Gunasekaran

O R D E R

This criminal revision has been filed seeking to set aside the judgment and order dated 29.04.2008 passed in C.C.No.317 of 2005 on the file of the Judicial Magistrate Court No.II, Namakkal, confirmed by the judgment and order dated 30.08.2011 passed in C.A.No.19 of 2008 on the file of the Principal District and Sessions Court, Namakkal.

2. For the sake of convenience, the petitioners and the respondent will be referred to as accused and complainant, respectively.

3. It is the case of the complainant that on 21.10.2004, the accused borrowed a sum of Rs.10,00,000/- for his business purpose and also executed a promissory note agreeing to repay the amount with interest, on demand; when the complainant demanded repayment of the amount, the accused issued a cheque (Ex-P1) dated 16.06.2005 for a sum of Rs.10,00,000/- drawn on Central Bank of India, Salem Branch, from the account of Maheshbala Films (A1) and the impugned cheque (Ex-P1) has been signed by Balu (A2) in the capacity as a partner of Maheshbala Films; the complainant presented the cheque (Ex-P1) on 16.06.2005 in Indian Overseas Bank, where, he was having his account, but the same was returned unpaid with the endorsement "Funds Insufficient" vide bank's return memo (Ex-P2) dated 22.06.2005; therefore, the complainant issued a statutory demand notice (Ex-P4) dated 12.07.2005, which was received by both the accused on 13.07.2005 vide postal acknowledgement card (Ex-P5 series); since the accused did not comply with the demand, the complainant initiated a prosecution in C.C.No.317 of 2005 before the Judicial Magistrate No.II, Namakkal, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act"), against the Maheshbala Films (A1) and Balu (A2).

4. Before the trial Court, the complainant examined himself as PW1 and Mohankumar, Senior Manager, Indian Overseas Bank, as PW2, to speak about the presentation and dishonour of the impugned cheque (Ex-P1) and marked six exhibits. The accused examined himself as DW1 and his brother Maheswaran as DW2.

5. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 29.04.2008 in C.C.No.317 of 2012, convicted the accused (A1 and A2) of the offence under Section 138 of the NI Act and sentenced them as follows:

Accused	Sentence
Maheshbala Films (A1)	Fine of Rs.5,000/-
D.Balu (A2)	One year simple imprisonment and to pay a sum of Rs.10,00,000/- as compensation to the complainant, in default to undergo three months simple imprisonment.

6. The appeal in C.A.No.19 of 2008 filed by the accused was dismissed by the Principal District and Sessions Court, Namakkal, on 30.08.2011.

7. Aggrieved by the concurrent findings of fact arrived at by the Courts below, the accused have preferred the present criminal revision invoking Section 397 r/w 401 Cr.P.C.

8. Heard Mr.M.Karthik, learned counsel representing Mr.R.Nalliyappan, learned counsel on record for the accused and Mr.K.Gunasekaran, learned counsel for the complainant, who submitted that the complainant has taken away the case bundle and he has no instructions.

9. Before adverting to the submissions made by the learned counsel for the accused, it is necessary to state here that while exercising revisional jurisdiction in a case involving concurrent findings of fact arrived at by two Courts below, the High Court cannot act as a second appellate Court [See State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand and Others, etc.[1]]. In Bir Singh vs. Mukesh Kumar[2], the Supreme Court has held as under:

> "17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [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. .... " (emphasis supplied)

10. In the case at hand, the complainant, who examined himself as PW1, in his evidence, has stated about the loan of Rs.10,00,000/- that was given to the accused, the execution of the promissory note, the issuance of the impugned cheque (Ex-P1) by the accused, its presentation and dishonour, the issuance of the statutory demand notice (Ex-P4), the receipt of the same by the accused and the failure of the accused to comply with the demand.

11. From the evidence of the accused (A2) and his brother Maheswaran, who were examined as DW1 and DW2, respectively, it can be gleaned that they had taken a defence that they did not know the complainant at all and had handed over the impugned cheque (Ex-P1) to one Ravikumar, with whom, they had a litigation, which was settled, but, the said Ravikumar had handed over the impugned cheque (Ex-P1) to the complainant for filing the present prosecution. Both the Courts below have rejected this defence.

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1 (2004) 7 SCC 659

2 (2019) 4 SCC 197

12. In the cross-examination, the accused (A2) admitted that he has signed the impugned cheque (Ex-P1); he was the partner of Maheshbala Films (A1) and the cheque (Ex-P1) was issued from the account of Maheshbala Films (A1) with Central Bank of India. He further admitted that the impugned cheque (Ex-P1) was given to one Ravikumar, for which, except his ipse dixit, there is no other material to substantiate this defence.

13. It is the case of the accused that there was litigation between them and Ravikumar and after it was amicably settled, the cheque that was with Ravikumar, came into the hands of the complainant herein. The accused did not produce any material to show the nature of litigation between them and Ravikumar. There is also no material on record to infer that Ravikumar and the complainant knew each other as well.

14. The accused (A2), in the cross-examination, has not denied his signature in the postal acknowledgement card (Ex-P5 series) and has accepted that he received the statutory demand notice (Ex-P4), but, did not give any reply.

15. Of course, the failure of the accused to send reply to the statutory demand notice cannot be the only ground to hold against the accused. In this case, when it is the defence of the accused that he had had no transactions with the complainant and that he did not even know the complainant and that he came to know about the complainant only after he came to the Court, the failure of the accused to reply to the statutory demand notice assumes significance.

16. This Court perused the impugned cheque (Ex-P1) and did not find any suspicious feature therein.

17. The learned counsel for the accused placed strong reliance on the judgment of this Court in Sarathy Enterprises, by its Manager, Ranjendran Vs. Selvaraj[3] and submitted that the cheque should have been given contemporaneously with the promissory note and since the cheque was not given at the time when the promissory note was executed, there was no debt.

18. This Court carefully read the said ruling. In that case, the complainant had not stated anything about the debt in the complaint. The complainant admitted that one Sheela had borrowed Rs.60,000/- from him. He also admitted that the accused had not borrowed any amount from him. In the absence of evidence to show that the impugned cheque was given by the accused for a legally enforceable debt of Sheela, the trial Court acquitted

3 2004 (2) MWN (Cr.) DCC 14 (Mad.)

the accused and the same was confirmed by this Court. While dealing with the evidence on record, this Court had observed that the cheque in that case was not issued at the time when the amount was borrowed by Sheela. This statement in the said ruling, cannot be interpreted to mean, that if a cheque is not given at the time of execution of the promissory note, the prosecution under Section 138 of the NI Act cannot be maintained.

19. Coming to the instant case, the complainant has marked the statement of accounts submitted to the Income Tax Department as Ex-P6 in order to show that he had the means to give a loan of Rs.10,00,000/- to the accused.

20. As alluded in paragraph no.3, Maheshbala Films was arrayed as A1 and D.Balu, the partner of Maheshbala Films, who had signed the impugned cheque (Ex-P1), was arrayed as A2. Thus, there are sufficient materials on record to fasten criminal liability on Balu (A2) for the offence under Section 138 of the NI Act with the aid of Section 141, ibid.

21. Though the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability as held by the Supreme Court in Rangappa Vs. Sri Mohan[4], even that has not been done in this case.

22. In Uttam Ram Vs. Devinder Singh Hudan & Another[5], the Supreme Court has held as follows:

> "20. The trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil Court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that he cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.
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> 21. There is the mandate of presumption of consideration in terms of the provisions of the

4 (2010) 11 SCC 441
5 (2019) 10 SCC 287

Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act.”

23. In view of the foregoing discussion, this Court does not find any infirmity in the judgments and orders passed by the Courts below, warranting interference.

Resultantly, this criminal revision is dismissed as being devoid of merits. The trial Court is directed to secure the accused (A2) and commit him to prison to serve out the remaining period of sentence. Liberty is given to the parties to approach the trial Court under Section 147, ibid., even after the accused (A2) is taken into custody. In the event of the matter being compounded under Section 147, ibid., the Magistrate shall send a report to the Assistant Registrar (Crl. Section) of this Court, who shall make it form part of the records in Crl.R.C.No.1400 of 2011. If any amount has been deposited by the accused either in the appellate Court or in the trial Court in connection with this case, the same shall be disbursed with accrued interest to the complainant or to his legal heirs, as the case may be.

Sd/-
Assistant Registrar(C.S.III)

/True Copy/

Sub Assistant Registrar

To

1. The Judicial Magistrate No.II, Namakkal.
2. The Principal District and Sessions Judge, Namakkal.

3. The AssistantRegistrar, (Crl.Side) Madras High Court, Chennai - 104. — with a direction to return the original records to the Courts below concerned

+1 cc to M/s.R.Nalliyappan,Advocate Sr.No. 16128
+1 cc to M/s.K.Gunasekaran,Advocate Sr.No. 16320

AKM/04.03.2020/6P- 6C /

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