BAIL SLIP

The petitioner/Accused viz., Abdul Gafoor @ Babu, aged about 53 years S/o.Abdul Razak, in C.C.No.168 of 2011, dated 01.06.2012 on the file of the Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, was released on bail as per order of this Court dated 08.11.2013 made in Crl. MP.1 of 2013 in Crl.RC.No.1389 of 2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.01.2020

Delivered on : 30.01.2020

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl. R.C. No.1389 of 2013

Abdul Gafoor @ Babu ... Revision Petitioner

Vs.

A.P.Sasikumar ... Respondent

Criminal Revision Case filed under Section 397 r/w. 401 Cr.P.C., against the judgment dated 26.07.2013, passed by the IV Additional District and Sessions Judge, Coimbatore, in C.A.No.171 of 2012, confirming the judgment of conviction and sentence dated 01.06.2012, passed by the Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, in C.C.No.168 of 2011.

For Petitioner : Mr.N.Manokaran

For Respondent : Mr.A.M.Krishnamoorthy

O R D E R

This Criminal Revision Case has been filed against the judgment dated 26.07.2013, passed by the IV Additional District and Sessions Judge, Coimbatore, in C.A.No.171 of 2012, confirming the judgment of conviction and sentence, dated 01.06.2012, passed by the Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, in C.C.No.168 of 2011.

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

3.It is the case of the complainant that the accused was his childhood friend and both families knew each other well; the accused had fixed the marriage of his daughter and needed money for it; he (accused) requested the complainant in January, 2010, to help him financially, and so, the complainant arranged the money; on 23.01.2010, the accused came to the house of the complainant and when the complainant intended to give him a cheque for Rs.3,00,000/-, the accused requested him to give in cash; therefore, the complainant withdrew Rs.3,00,000/- on 23.01.2010 and gave it to the accused; the accused executed three promissory notes for Rs.1,00,000/- each, agreeing to repay the amount with interest @ 24% p.a.; after the marriage was over, the complainant demanded the accused for repayment and so, the accused gave three cheques, viz., cheque No.842313 dated 09.04.2010 for Rs.1,00,000/- (Ex.P2), cheque No.842315 dated 10.05.2010 for Rs.1,00,000/- (Ex.P6), and cheque No.842316 dated 09.06.2010 for Rs.1,00,000/- (Ex.P4); the accused requested the complainant to present the first cheque on 04.08.2010 and the other two cheques on 12.08.2010; accordingly, the complainant presented the first cheque on 04.08.2010 and the other two cheques on 12.08.2010, for clearance, in Bank of Baroda, Coimbatore Main Branch, where, he was maintaining his account; however, all the three cheques were returned unpaid with the endorsement "today's opening balance in-sufficient" vide return memos (Exs.P3, P5 and P7); the complainant issued a statutory demand notice dated 24.08.2010 (Ex.P9), which was received by the accused on 27.08.2010, vide acknowledgment card (Ex.P10); since the accused did not comply with the demand, the complainant initiated a prosecution in S.T.C.No.753 of 2010, before the Court of Judicial Magistrate No.7, Coimbatore, for the offence under Section 138 of the Negotiable Instruments Act, against the accused, which, on transfer to the Court of Judicial Magistrate (Fast Track Court at Magisterial Level No.II), Coimbatore, was renumbered as C.C.No.168 of 2011.

4.The complainant examined himself as P.W.1 and marked Exs.P1 to P17. He also examined one Anand as P.W.2. No witness was examined from the side of the accused, but one letter, dated 01.09.2010, sent by the accused to Anand (P.W.2), was marked as Ex.C1.

5.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 01.06.2012, convicted the accused of the offence under Section 138 of the Negotiable Instruments Act and sentenced him to simple imprisonment for six months and pay a fine of Rs.4,000/-, in default to undergo simple imprisonment for two months.

6.The appeal in C.A.No.171 of 2012 that was filed by the accused was dismissed by the IV Additional District and Sessions Judge, Coimbatore, on 26.07.2013.

7.Aggrieved by the concurrent findings of the two Courts below, the accused has preferred the present Criminal Revision Case before this Court under Section 397 r/w. 401 Cr.P.C.

8.Heard Mr.N.Manokaran, learned counsel for the accused and Mr.A.M.Krishnamoorthy, learned counsel appearing for the complainant.

9.It is trite 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. (2004) 7 SCC 659]. Very recently, in Bir Singh vs. Mukesh Kumar [(2019) 4 SCC 197], 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. .... "
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> (emphasis supplied)

10.The complainant (P.W.1), in his evidence, has stated about the circumstances under which the accused borrowed Rs.3,00,000/-, the promissory notes executed by the accused, the three cheques issued by the accused, their presentation and dishonour, issuance of statutory demand notice, and non compliance with the demand.

11.It may be necessary to recapitulate few dates to appreciate the rival submissions. The three cheques, viz., Exs.P2, P4 and P6 are dated 09.04.2010, 09.06.2010 and 10.05.2010, respectively. The first cheque (Ex.P2) was presented on 04.08.2010 and the other two cheques (Exs.P4 and P6) were presented on 12.08.2010 and all of them were dishonoured. The legal notice (Ex.P9) was issued on 24.08.2010, which was received by the accused on 27.08.2010, vide postal acknowledgment card (Ex.P10).

12.The accused has sent a letter dated 01.09.2010 (Ex.C1) by registered post to Anand (P.W.2), stating that, he (accused) had taken a hand loan of Rs.2,91,000/- from him (Anand) and had given three blank cheques bearing Nos.842313, 842315 and 842316; he had repaid the hand loan through their common friend A.P.Sasikumar (complainant herein) and therefore, the three cheques should be returned to him. Thus, the defence of the accused is that he had not borrowed any money from A.P.Sasikumar, the complainant herein, but from Anand (P.W.2), a financier, and Anand (P.W.2) had obtained three promissory notes and three cheques (the impugned cheques herein) and had misused the same by giving them to A.P.Sasikumar, the complainant herein, for filing the present complaint, after the loan was discharged.

13.The accused did not stop with the letter dated 01.09.2010. He also issued an Advocate's notice dated 04.12.2010 (Ex.P12) to Anand (P.W.2) and A.P.Sasikumar, the complainant herein, projecting the same story. Strangely, the accused did not send any reply to the statutory demand notice dated 24.08.2010 (Ex.P9) that was sent to him by the complainant, instead, he sent a letter dated 01.09.2010 (Ex.C1) and an Advocate's notice dated 04.12.2010 (Ex.P12). It is pertinent to state here that, by the time the lawyer's notice dated 04.12.2010 (Ex.P12) was issued, the complainant had already filed the prosecution in S.T.C.No.753 of 2010 before the Court of Judicial Magistrate No.7, Coimbatore.

14.The short point is, whom to believe, whether the complainant or the accused.

15.Since the accused had taken a stand that he had availed a loan of Rs.2,91,000/- from Anand (P.W.2), the complainant examined Anand as P.W.2. The complainant, who examined himself as P.W.1, and Anand (P.W.2) have stated that the accused approached the complainant for a loan of Rs.3,00,000/- and since the complainant did not know what sort of documents one should obtain while giving a loan, he brought the accused to Anand's (P.W.2's) office, where, Anand (P.W.2) advised him to get three promissory notes for Rs.1,00,000/- each.

16.Mr.N.Manokaran submitted that, for a loan of Rs.3,00,000/-, it is strange as to how the complainant and Anand (P.W.2) obtained three promissory notes. At the first blush, this argument did sound appealing. However, in the cross-examination of Anand (P.W.2), he has clearly stated that he advised the complainant to obtain three promissory notes for Rs.1,00,000/- each, so that, as and when the accused repays the amount, the promissory notes can be discharged and the debt amount can be reduced.

17.This Court perused all the three promissory notes which have been marked as Ex.P1 series. In all the three promissory notes, the amount is Rs.1,00,000/- and the accused has signed in them. The three promissory notes do not bear any date. Had the complainant and Anand (P.W.2) wanted to exploit the accused, they could have obtained blank promissory notes without filling the amount, whereas, they have obtained three promissory notes without date and have truthfully filed those documents as Ex.P1 series, without making any interpolation in them. The accused has not denied that he does not know the complainant or Anand (P.W.2). It is the stand of the accused that, the loan of Rs.2,91,000/- was given by Anand (P.W.2) and not by the complainant and that, he had discharged the said loan through the complainant. There is no shred of material to show when and how the accused had discharged the loan be it to Anand (P.W.2). Even in the questioning under Section 313 Cr.P.C., the accused has not stated the circumstances under which the three cheques were issued. Merely marking the notice issued by him to the complainant and Anand (P.W.2), without anything more, would not amount to proof of all the averments therein.

18.Mr.N.Manokaran placed strong reliance on the judgment of the Supreme Court in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35] and submitted that the presumption under Section 118(a) of the Negotiable Instruments Act is a rebuttable one and that the defendant can prove the non-existence of consideration by raising a probable defence.

19.The case of Bharat Barrel & Drum Manufacturing Company (supra) is not a case under Section 138 of the Negotiable Instruments Act, where, there are two presumptions, one under Section 118 and the other under Section 139 ibid. That apart, the expression "raising a probable defence" means adducing evidence to probabilise the defence. Mere marking of letters denying the debt to the complainant, but accepting the debt to Anand (P.W.2), and pleading discharge of that debt also, will not amount to proof of discharge. Even in Bharat Barrel & Drum Manufacturing Company (supra), the Supreme Court has very clearly stated as under :

> "... The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. ..."

20.Mr.N.Manokaran placed reliance on the observations of the Supreme Court in Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808], wherein, the Supreme Court has stated as under :

> "There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution

> to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

21.Kali Ram (supra) is a case that arose under Section 302 IPC, where, the accused raised a probable defence, which found acceptance with the Court. In this case, except suggestions and marking of letters, there is no other material, even in the answers given by the accused under Section 313 Cr.P.C., in support of the defence taken by him.

22.In Uttam Ram Vs. Devinder Singh Hudan & Another (C.A.No.1545 of 2019 decided on 17.10.2019), 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 the 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.
>
> 21. There is the mandate of presumption of consideration in terms of the provisions of the 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.Though the accused can discharge the burden under Section 139 of the Negotiable Instruments Act by preponderance of probability, as held by the Supreme Court in Rangappa Vs. Sri Mohan [2010 (4) CTC 118], even that has not been done in this case.

24.In fine, this Criminal Revision Case is devoid of merits and hence, stands dismissed. The judgments of the two Courts below are confirmed. The trial Court is directed to secure the accused and commit him to prison to undergo the remaining sentence.

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. It is always open to the parties to file an application before the trial Court under Section 147 of the Negotiable Instruments Act for compounding the offence, even after the accused is taken into custody. In the event of the matter being compounded under Section 147, ibid. before the trial Court, the Magistrate shall send a report to the Assistant Registrar (Crl. Side), who shall make it form part of the records in Crl.R.C.No.1389 of 2013.

Sd/-
Assistant Registrar(CS-VI)

// True Copy//

Sub Assistant Registrar

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To

1.The IV Additional District and Sessions Judge,
Coimbatore.

2.The Judicial Magistrate,
Fast Track Court at Magisterial Level No.II,
Coimbatore.

3.The Deputy Registrar (Criminal Section), High Court, Madras. | with a direction to send back the original records, forthwith, to the respective Courts below

+1cc to Mr.N.Manokaran, Advocate, SR.No.7889.
+2cc to Mr.A.M.Krishnamoorthy, Advocate, SR.No.7564.

Order in
Crl. R.C. No.1389 of 2013

GP(CO)
CSR: 10.03.2020