

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.02.2020

Delivered on : 19.02.2020

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl. R.C. No.1612 of 2013

and

M.P.No.1 of 2013

B.Venkatesan ... Revision Petitioner

Vs.

V.Udayabanu ... Respondent

Criminal Revision Case filed under Section 397 r/w. 401 Cr.P.C., against the judgment dated 13.09.2013, passed by the XVIII Additional Sessions Judge, Chennai, in C.A.No.137 of 2009, modifying the judgment, dated 22.06.2009, passed by the XV Metropolitan Magistrate, George Town, Chennai, in C.C.No.7176 of 2002.

For Petitioner : Mr.CT.Udayappan

For Respondent : Mr.P.Thiyagaraj

O R D E R

This Criminal Revision Case has been filed against the judgment dated 13.09.2013, passed by the XVIII Additional Sessions Judge, Chennai, in C.A.No.137 of 2009, modifying the judgment, dated 22.06.2009, passed by the XV Metropolitan Magistrate, George Town, Chennai, in C.C.No.7176 of 2002.

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 borrowed Rs.2,00,000/- as hand loan from her and gave five cheques for Rs.40,000/- each, all dated 25.02.2002, drawn on State Bank of India, Royapuram Branch, in favour of the complainant, out of which, in this case, we are concerned only with two cheques, viz., cheques bearing Nos.911854 (Ex.P1) and 911855 (Ex.P2); the complainant presented the two cheques for clearance on 13.04.2002 and they were return unpaid with the endorsement "funds insufficient" vide Bank return memo dated 13.04.2002 (Ex.P3); the complainant issued a statutory demand notice dated 22.04.2002 (Ex.P5), which was received by the

accused vide postal Acknowledgment Card (Ex.P6); since the accused did not comply with the demand, the complainant initiated a prosecution in C.C.No.7176 of 2002 before the XV Metropolitan Magistrate, George Town, Chennai, for the offence under Section 138 of the Negotiable Instruments Act, against the accused.

4.The complainant examined herself as P.W.1 and marked Ex.P1 to P7. Ex.P7 is a letter of undertaking dated 18.05.2002 that was executed by the accused.

5.When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same, but did not offer any explanation as to the circumstances, under which, the impugned cheques signed by him came into the hands of the complainant. No witness was examined nor any document marked from the side of the accused.

6.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 22.06.2009, convicted the accused of the offence under Section 138 of the Negotiable Instruments Act and sentenced him to simple imprisonment for two years and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for one month.

7.The appeal in C.A.No.137 of 2009 that was filed by the accused was heard by the XVIII Additional Sessions Judge, Chennai. The Appellate Court confirmed the conviction of the accused, but reduced the sentence of two years simple imprisonment to one year simple imprisonment.

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

9.Mr.CT.Udayappan, learned counsel for the petitioner/accused submitted that the respondent/complainant had died. However, he did not produce any death certificate. In the absence of valid death certificate, this Court cannot act on the representation of the counsel that the party is dead. Hence, this Court heard the learned counsel for both sides on the merits of the case.

10.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. "

(emphasis supplied)

11.Mr.CT.Udayappan, learned counsel for the accused submitted that the trial Judge had failed to sign the trial Court's judgment. This Court perused the records and found that the trial Judge, Mr.A.Paramaraj, M.A., M.L., has clearly signed in the trial Court's judgment. When this was brought to the notice of the learned counsel, he withdrew the submission.

12.Thereafter, Mr.CT.Udayappan submitted that, Mr.R.Karunagaran, Advocate for the complainant, has, in his letter pad, shown himself as Special Public Prosecutor, Enforcement Directorate, and therefore, the statutory demand notice dated 22.04.2002 (Ex.P5) issued by him is invalid. In the opinion of this Court, this cannot be a good reason to invalidate the statutory demand notice. Beyond these, this Court does not want to say anything more on the specious arguments advanced by Mr.CT.Udayappan.

13.Mr.CT.Udayappan contended that, in the complaint, the complainant had stated that the notice was returned unserved, whereas, he (complainant) has marked the Acknowledgment Card (Ex.P6) and therefore, the prosecution is vitiated. This Court perused the proof affidavit of the complainant, wherein, the complainant has very clearly stated that the statutory demand notice dated 22.04.2002 (Ex.P5) was issued and it was received by the accused on 29.04.2002, vide Ex.P6.

14.Mr.CT.Udayappan's further submission that there is no cause of action paragraph in the complaint only deserves to be rejected. The complaint contains the necessary pleadings, for the Court to take cognizance of the offence and issue process.

15.Mr.CT.Udayappan contended that the letter of undertaking dated 18.05.2002 ought not to have been marked as Ex.P7 without notice to the accused, especially when there is no reference to it in the complaint. The complainant, in his proof affidavit, has stated as follows :

"5.I issued legal notice on 22.4.2002 (Ex.A3) advising dishonour of cheques and the same was received and acknowledged by the said accused on 29.4.2002 (Ex.A4) .

6.Criminal case was filed before this Court on 29.5.2002.

7.In the midst on 18.5.2002, the said accused gave me an undertaking letter (Ex.A5) to settle the loan amount before 30.06.2002 but in vain."

The complainant has been extensively cross-examined by the accused on these aspects, but to no avail. Even if we keep aside the letter of undertaking (Ex.P7), the cheques carry with them, the presumptions under Sections 118 and 139 of the Negotiable Instruments Act.

16.It is the defence of the accused that the impugned cheques were not given to the complainant, but were given to one Vembu, who, in turn, had handed over the cheques to one Viswanathan, the brother of the complainant and that the complainant had misused the cheques to lodge the present complaint. This suggestion has been denied by the complainant. Thus, the accused has not denied his signature in the impugned cheques and has only stated that he had given them to Vembu, who, in turn, had handed over them to Viswanathan, from whom, the complainant got them and lodged the present prosecution. However, the accused has not placed any credible material to probabalise this defence.

17.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
"

18. 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.

19. In fine, this Criminal Revision Case is devoid of merits and hence, stands dismissed. Consequently, connected miscellaneous petition is closed. 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 her 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.1612 of 2013.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

mkn

Copy to :

1. The XVIII Additional Sessions Judge,
Chennai.

2. The XV Metropolitan Magistrate,
George Town,
Chennai.

Copy To :

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

2. The Assistant Registrar,
Criminal Section,
High Court, Madras-104.

Crl. R.C. No.1612 of 2013

BP (CO)

<https://hcservices.courts.gov.in/hcservices/>
GMI (27/07/2020)