



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.12.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl.R.C(MD)Nos.633 to 636 of 2017

WEB COPY

Anoor K.Prakasam

... Petitioner in all Crl.R.Cs.

Vs

Sellamuthu

... Respondent in all Crl.R.Cs.

Prayer in Crl.R.C.(MD)No.633 of 2017: Petition filed under Section 397 r/w 401 of Criminal Procedure Code, to call for the records pertaining to the Judgment dated 22.02.2016 made in C.A.No.44 of 2014 on the file of the Sessions Judge / Mahila Fast Track Court, Karur, against the Judgment dated 30.09.2014 made in S.T.C.No.292 of 2011 on the file of the Judicial Magistrate Fast Track Court at Magisterial Level, Karur and set aside the same.

Prayer in Crl.R.C.(MD)No.634 of 2017: Petition filed under Section 397 r/w 401 of Criminal Procedure Code, to call for the records pertaining to the Judgment dated 22.02.2016 made in C.A.No.45 of 2014 on the file of the Sessions Judge / Mahila Fast Track Court, Karur, against the Judgment dated 30.09.2014 made in S.T.C.No.392 of 2011 on the file of the Judicial Magistrate Fast Track Court at Magisterial Level, Karur and set aside the same.

Prayer in Crl.R.C.(MD)No.635 of 2017: Petition filed under Section 397 r/w 401 of Criminal Procedure Code, to call for the records pertaining to the Judgment dated 22.02.2016 made in C.A.No.46 of 2014 on the file of the Sessions Judge / Mahila Fast Track Court, Karur, against the Judgment dated 30.09.2014 made in S.T.C.No.1224 of 2011 on the file of the Judicial Magistrate Fast Track Court at Magisterial Level, Karur and set aside the same.

Prayer in Crl.R.C.(MD)No.636 of 2017: Petition filed under Section 397 r/w 401 of Criminal Procedure Code, to call for the records pertaining to the Judgment dated 22.02.2016 made in C.A.No.47 of 2014 on the file of the Sessions Judge / Mahila Fast Track Court, Karur, against the Judgment dated 30.09.2014 made in S.T.C.No.46 of 2012 on the file of the Judicial Magistrate Fast Track Court at Magisterial Level, Karur and set aside the same.

For Petitioner : Mr.R.Devaraj

For Respondent : Mr.Suresh
(in all Crl.R.Cs.) for Mr.E.K.Kumaresan



COMMON ORDER

The revision petitioner in all these four cases is one and the same namely Anoor K.Prakasam. Likewise, the respondent is also one and the same.

WEB COPY

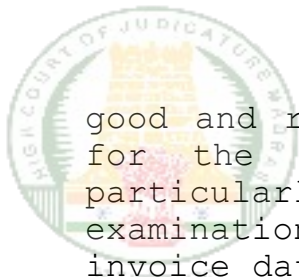
2.The respondent herein filed S.T.C.Nos.292, 392 and 1224 of 2011 and 46 of 2012, before the learned Judicial Magistrate Fast Track Court at Magisterial Level, Karur. These four cases were filed, since the four cheques issued by the revision petitioner herein were dishonored. The respondent, after complying with the statutory formalities, filed the complaints. Cognizance of the offence under Section 438 of the Negotiable Instruments Act was taken in each of the cases. The accused denied the charges and claimed to be tried. The learned trial Magistrate, on 30.09.2014, pronounced individual Judgments holding the revision petitioner guilty of the offence and sentenced him to undergo simple imprisonment for three months and also levied fine on him. Aggrieved by the same, the revision petitioner filed C.A.Nos.44, 45, 46 and 47 of 2014 before the learned Sessions Judge, Mahila Fast Track Court, Karur. By Judgment dated 22.02.2016, all the four appeals were dismissed and the Judgments of the trial Magistrate were confirmed. Questioning the same, these four revision cases have been filed.

3.Heard the learned counsel for the revision petitioner and the learned counsel for the respondent.

4.The primary contentions of the learned counsel for the accused/revision petitioner is that the revision petitioner had transaction only with M/s.Selva Kumar-A-Fabrics. The petitioner claims that the cheques in question were entrusted as security. As per the arrangement, the petitioner would have 45 days credit period after the receipt of the goods. On settling their issues by paying the cash, the cheques would be returned.

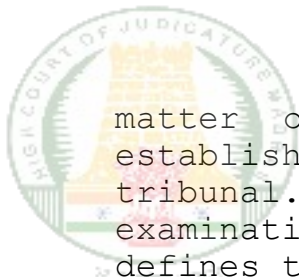
5.It is the specific defence of the accused that the goods were never supplied. According to the petitioner's counsel, there was, thus, no enforceable liability on the part of the accused. He would also point out that the complainant had marked invoices that stood in the name of M/s.Selvakumar Fabrics. While the purchase orders marked by the accused indicate the name of M/s.Selvakumar-A-Fabrics, the documents marked by the complainant are in the name of M/s.Selvakumar Fabrics.

6.The petitioner's counsel's pointed contention is that the complainant has to stand or fall on his evidence. The accused cannot be called upon to prove the negative. The accused can only say that the goods were never supplied to him. It is only the complainant who has to show the documents evidencing the supply of



good and receipt of the same by the accused. The learned counsel for the petitioner took me through the evidence on record, particularly, cross examination of P.W.1. P.W.1 in this cross examination had stated that he did not supply the goods on the invoice dates and that, he has not marked any delivery receipt. The specific suggestions put to the complainant in the cross examination is that by way of advance, the cheques in question had been taken and that by misusing the same, even without supplying the goods, the impugned prosecution had been instituted. The learned counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court reported in **(2009) 2 SCC 513 (Kumar Exports Vs. Sharma Carpets)**. He placed reliance on the ratio laid down in the following paragraphs:-

"9. In order to determine the question whether offence punishable under Section 138 of the Act is made out against the appellant, it will be necessary to examine the scope and ambit of presumptions to be raised as envisaged by the provisions of Sections 118 and 139 of the Act. In a suit to enforce a simple contract, the plaintiff has to aver in his pleading that it was made for good consideration and must substantiate it by evidence. But to this rule, the negotiable instruments are an exception. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term 'presumption' is used to designate an inference, affirmative or disaffirmative of the existence a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some



matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof". Section 4 of the Evidence Act inter-alia defines the words 'may presume' and 'shall presume' as follows: -

"(a) 'may presume' - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

(b) 'shall presume' - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

In the former case the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.

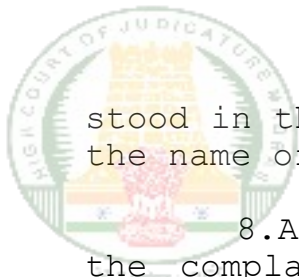
10. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out



that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

7.I am not persuaded by the contentions of the learned counsel appearing for the revision petitioner. I do not see much force in the petitioner's contention that while the purchase orders

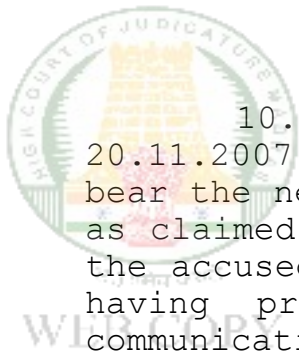


stood in the name of M/s.Selvakumar-A-Fabrics, the invoices stood in the name of M/s.Selvakumar Fabrics.

8.As rightly pointed out by the learned counsel appearing for the complainant, there is no distinction between the proprietary concern and the proprietor. Thus, Sellamuthu is the proprietor of the two proprietary concerns. One stood in the name of M/s.Selvakumar-A-Fabrics and other stood in the name of M/s.Selvakumar Fabrics. The documents had been issued only in the name of M/s.Selvakumar-A- Fabrics. Therefore, the discrepancy between the purchase orders and the invoices does not make any differences. The learned counsel for the complainant would draw my attention to the decision of the Madras High Court reported in **1992 (1) MWN (Cr.) 227 (M/s.Sri Sivasakthi Industries, Madras-21 Vs. M/s.Arikant Metal Corporation, Madras)**.

9.Since there is no distinction between the proprietary concern and the proprietor, even though the cheques had been issued in the name of M/s.Selvakumar-A-Fabrics, I hold that the proprietor Sellamuthu can very well institute the complaints. The learned counsel appearing for the complainant would point out that the transaction between the complainant and the accused was in the year 2007. All the invoices, however, are dated 23.05.2007. As many as five cheques had been received from the accused. The details are as follows:-

Dates	Details	Total	
03/01/2007	Purchase order to Selvakumar-A-Fabrics by Karnica Rs.2,77,776		
13/01/2007	Purchase order to Selvakumar-A-Fabrics by Karnica Rs.12,38,740		
02/02/2007	Purchase order to Selvakumar-A-Fabrics by Karnica Rs.4,25,940	19,42,456.00	
23/05/2007	Invoice No.12 of Selvakumar Fabrics- Rs.6,73,157.20		
23/05/2007	Invoice No.13 of Selvakumar Fabrics- Rs.5,05,132.60		According to P.W1 cross Total Value is Rs.21,00,000.00
23.05.2007	Invoice No.14 of Selvakumar Fabrics- Rs.6,96,093.60	18,74,383.40	



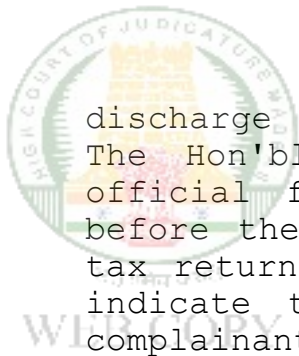
10. It is not in dispute that the cheque No.955601 dated 20.11.2007 was honored on 20.11.2007 itself. The other four cheques bear the next four succeeding numbers. It is quite possible that if as claimed by the accused, there was no supply of goods, certainly, the accused would have taken up the matter with the complainant for having presented the cheque without his consent. No such communication from the accused has been marked. That apart, the cheques were presented on different dates. That is evident from the following table:-

Case No.	Cheque No.	Amount	Alleged Given Date	Cheque Date
	955601	2,00,000	20.11.2007	20.11.2007
STC.392/11	955602	2,95,000	31.01.2008	23.04.2008
STC.292/11	955603	2,95,000	31.01.2008	21.05.2008
STC.1224/11	955604	2,95,000	31.01.2008	10.06.2008
STC.46/12	955605	2,95,000	31.01.2008	25.06.2008
	Total	13,80,000		

Collection/Dishonour	Demand Notice	Date of Receipt	Expiry of 15 days	Complaint
20.11.2007	-	-	-	-
23.04.2008	10.05.2008	13.05.2008	28.05.2008	10.06.2008
21.05.2008	6.6.2008	10.06.2008	25.06.2008	15.07.2008
10.06.2008	3.7.2008	5.7.2008	20.07.2008	13.08.2008
25.06.2008	11.07.2008	15.07.2008	11.07.2008	13.08.2008

11. The clinching circumstance against the accused is the fact that the complainant had issued statutory notices on different dates. The accused had received all the notices. That is evident by marking of the acknowledgment cards. In three of the cases, notice had been received as is evident by marking of the acknowledgment cards. One notice was returned. The accused had not responded even to a single notice.

12. On account of these distinguishing features, I have to hold that the case law relied on by the learned counsel for the petitioner is distinguishable. In **Kumar Exports Vs. Sharma Carpets** case, the stand of the complainant was that he had sold woollen carpets to the accused on 06.08.1994 and that, the accused, towards



discharge of the said liability, issued the cheques in question. The Hon'ble Supreme Court noted that the accused examined one official from the Sales Tax Department, who positively asserted before the Court that even though the complainant had filed sales tax return for the assessment year 1994-1995, there was nothing to indicate that in the return, the transaction relied on by the complainant was reflected. The complainant also did not cross examine the said official, even though sufficient opportunity was given to him. The Hon'ble Supreme Court further observed that once the testimony of the official of the Sales Tax Department is accepted, it becomes evident that no transaction of sale of woolen carpets had taken place between the two as alleged by the complainant. When the sale of woolen carpets did not take place, there was no existing debt in discharge of which, the accused was expected to issue the cheques. Thus, the accused in the said case had positively disproved the case of the complainant.

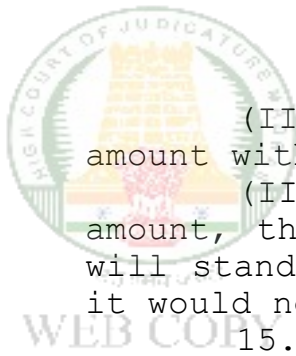
13.In the present case, no such evidence has been forthcoming. The Courts below rightly drew the presumption under Section 139 of the Negotiable Instruments Act against the accused and rightly held that the same was not rebutted by the accused. The learned counsel for the revision petitioner is absolutely right in his contention that the standard of proof cast on the accused is only that of preponderance of probability. But the Courts below have held that even by applying the said standard, the burden cast on the accused has not been rebutted. I must also note that I am only exercising revisional jurisdiction. The Courts below have concurrently found the accused guilty. The contentions advanced by the learned counsel appearing for the petitioner do not persuade me to come to the conclusion that the said findings are vitiated by irregularity or perversity. Therefore, I have to necessarily confirm the conviction imposed on the revision petitioner herein.

14.However, taking note of the other aspects, I am of the view that some modification in the matter of sentence is warranted. Therefore, the sentence imposed on the petitioner is modified as follows:-

(I)The petitioner is directed to deposit the following amount

Case No.	Cheque No.	Amount
STC No.392/11	955602	Rs.2,95,000/-
STC No.292/11	955603	Rs.2,95,000/-
STC No.1224/11	955604	Rs.2,95,000/-
STC No.46/12	955605	Rs.2,95,000/-

towards the respective S.T.C Nos.392 of 2011, 292 of 2011, 1224 of 2011 and S.T.C.No.46 of 2012, on the file of the Judicial Magistrate/Fast Track Court, Magisterial Level, Karur, within a period of five months from the date of receipt of a copy of this



(II)It is open to the complainant to withdraw the cheque amount without notice to the petitioner.

(III)If the petitioner fails to deposit the said cheque amount, the sentence imposed on the petitioner by the Courts below will stand automatically restored. If he deposits the said amount, it would not be enforced.

15.With this modification in the matter of sentence, these Criminal Revision Cases are partly allowed.

Sd/-

Assistant Registrar

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

rmi

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Judicial Magistrate / Fast Track Court,
Magisterial Level,
Karur.

2.The Mahila Fast Track Court,
Karur.

+1cc to Mr.R.Devaraj, Advocate Sr.No.26565

+4cc to Mr.K.Suresh, Advocate Sr.No.27148

Crl.R.C(MD)Nos.633 to 636 of 2017

21.12.2020

SJ(CO)

NR (01/02/2021) 9P : 8C