



BAIL SLIP

The Petitioner/3rd Accused viz., Ramasamy be and hereby was directed to be released on bail as per order of this Court, dated.14.05.2015 and made in CrI.RC.No.465 of 2015 and M.P.Nos.1 & 2 of 2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Reserved on : 27.07.2021)

(Pronounced on : 20.09.2021)

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CrI.R.C.No.465 of 2015

Ramasamy

....Petitioner

.. Vs ..

1. S.Jafer Ali

2. Public Prosecutor, Erode

3. M/s.Yaham Process
Rep.by Managing Partner
Avinashilingam
18/F, Kallangadu thottam,
Palladam Road,
Tiruppur - 641 604.

... Respondents

PRAYER: Criminal Revision Case filed under Section 397 r/w. 401 of Cr.P.C., to set aside the judgment passed by the 1st Additional Sessions Judge of Erode in C.A.No.37 of 2014 dated 23.03.2015, confirming the judgment passed by the Judicial Magistrate No.III of Erode, in S.T.C.No.414 of 2008, dated 25.04.2014.

For petitioner : Mr.V.S.Kesavan
For R1 : Mr.M.Guruprasad
For R2 : Mr.R.Vinoth Raja,
Government Advocate (CrI.Side)
For R3 : No appearance



O R D E R

This revision petition filed against the judgment passed by the learned 1st Additional Sessions Judge of Erode in C.A.No.37 of 2014 dated 23.03.2015 confirming the judgment passed by the Judicial Magistrate No.III of Erode, in S.T.C.No.414 of 2008 dated 25.04.2014.

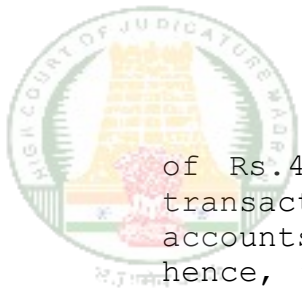
2. The respondent/complainant filed S.T.CNo.414 of 2008 before the learned Judicial Magistrate No.III, Erode for offence under Section 138 of the Negotiable Instruments Act. After trial, the trial Magistrate has laid the conviction and sentence as stated supra. On appeal in Crl.A.No.37/2014 first additional sessions Judge dismissed the appeal and hence the revision.

3. Heard the learned counsel for the petitioner and the respondents.

4. The learned counsel for the revision petitioner would contend that A3 is the revision petitioner herein. The sum and substance of the contention of the revision petitioner is that the cheque was not issued to the private complainant herein and it was issued to one M/s.Yaham Process, partnership firm represented by its Managing Partner, Avinashilingam and hence, after the receipt of the legal notice, he had issued reply notice, specifically requested to furnish a copy of the impugned cheque but the impugned cheque has not been furnished to the accused and on the date of issuance of the alleged amount, the private complainant do not own sufficient funds to lead a sum of Rs.4 lakhs and the MICR cheque was in use from 2005 while Ex.P1 cheque is issued for prior to 2005 and also stated that he is only a sleeping partner.

5. Per contra, the learned counsel for the respondent/private complainant would submit that as per Ex.P8 re-joinder dated 29.07.2008, the copy of the impugned cheque was duly served on the accused herein and the signature in the cheque was not disputed and hence, he is entitled for the presumption under Section 139 of the Negotiable Instruments Act. Furthermore, he also drawn my attention to the finding rendered by both the Courts below that the defence has not probablised the suggestive case to rebut the statutory presumption.

6. The learned counsel for the revision petitioner relied upon a decisions of the Hon'ble Supreme Court reported in 2014 (1) MLW Crl.DCC 24 (SC) and 2014 (2) MLW Crl. DCC 129 (SC) and further, contended that the dishonoured cheque was marked as Ex.P1 through D.W.1 Manager of the Karur Vysa Bank Limited. At no point of time, the private complainant owned such an extent



of Rs.4 lakhs. Even for the entire financial year, the total transaction comes about only Rs.8 lakh. Further most of the accounts is under minus account namely, Over Draft facility and hence, the private complainant has no means to pay such amount. Hence, between the private complainant and the accused, there is no legally enforceable debt.

7. The case of the private complainant in brief is that the accused has received loan transaction of Rs.4 lakhs given to A2 and A3 on behalf of A1 firm. In turn A3 signed and issued Ex.P1 cheque to the complainant in the presence of A2 and on behalf of A1 firm. So is the evidence as P.W.1. From records revealed that Ex.P1 cheque was dishonoured. Ex.P2 Memo with an endorsement 'accounts closed'. Legal notice was issued. The complainant issued Ex.P8 notice with enclosing xerox copy Ex.P1 cheque, no reply was issued by the revision petitioner/accused.

8. The accused come forward with the defense that the complaint never had any source of income to lend R.4,00,000/- to the accused as alleged. Further, contended that accused never borrowed any money as loan from the complainant as alleged and never issued any cheque to the complainant as collateral security for the said loan transaction. Further contended that the complainant is an unknown person and stranger to them and prays to dismiss the complaint.

9. The learned counsel for the revision petitioner further contended that Ex.D1 Bank Account (opening form), which shows that the respondent/complainant is residing at the rental building and his wife is house wife, who is not having any source of income and apart from movable properties, like, T.V., Fridge, Washing Machine, etc., he has not having any immovable properties. Thus it is clear that absolutely the respondent/complainant is not sufficient financial sources to lending such alleged amount, even, he could not to have meet out his day to day affairs of his family through the sources mentioned above.

10. From the records reveals that the issuance of the cheque from the account of A3 and signature in Ex.P1 cheque was not disputed in fact admitted during the cross-examination of A3 when he was examined himself as D.W.3 and hence both the Courts below has rightly come to the conclusion that since the issuance of cheque and signature in the cheque are admitted by A3, they are entitled for presumption under Section 139 of the Negotiable Instruments Act.

11. Now the point for consideration is whether the revision petitioner/accused discharged the burden of proof with positive



evidence by probablising the suggestive case.

12. As stated supra, A3 examined as D.W.3 and on behalf of the defense accused on Court summons, the Manager of Karur Vysa Bank (complainant bank) was examined as D.W.1 and marked Ex.D1 and D2 accounts opening form and the accounts statement for the account of the accused for the relevant period. D.W.2 is the Inspector of Police D.W.3 is the third accused. Though D.W.3 stated that Ex.P1 cheque, cheque was issued to some other person.

13. On perusal of the evidence of D.W.1 Manager of the Karur Vysya Bank (complainant Bank) and Ex.D1 bank account, it is seen that as found in the Ex.D1 Bank Account Opening Form of the respondent/complainant, it has been noted the monthly income of the respondent/complainant is only smaller amount of Rs.5,000/- and further as per the statement of account which is marked as Ex.D2 [24.04.2008 to 30.04.2009] it has been found that there is no amount existed and contra to the same, it has been shown as [-] minus account of Rs.9,491/- which is payable by the respondent/complainant to the bank towards balance due for the O.D Account borrowed by him. On this ground it is clearly proved that the respondent/complainant is not having any financial source to such larger amount of Rs.4,00,000/- to the appellants/accused 1 & 3.

14. The accused partnership firm has closed even in the year 2010 during such business transaction, Ex.P1 cheque was issued to one Prakash was settled towards the goods supplied by him and thereafter it was misused to make a unlawful gain. The complaint has been lodged by the respondent-complainant with help of the prakash.

15. In order to substantiate this, Ex.D1 Bank account, which shows that, the respondent/complainant is residing at the rental building and his wife is house wife, who is not having any source of income and apart from movable properties, like, T.V., Fridge, Washing Machine, etc., he has not having any immovable properties. Thus it is clear that, absolutely the respondent/complainant is not having sufficient financial sources for lending such alleged amount, even, he could not to have meet out his day to day affairs of his family through the sources mentioned above.

16. From the copy of the records, it was furnished by the accused, the accused taken the defense that on and from the year 2005 MICR cheque only was issued and presented and Ex.P1 is a non MICR.



17 (a). On perusal of Ex.P1 marked through D.W.1, I find that the complainant has no means to advance such a huge amount of Rs.4 lakhs and it is only oral evidence. However, Ex.D1 statement of bank accounts shows that it never exceeded Rs.10,000/- the account of company at relevant point of time and the entire amount ODT only assumes significance. It is the burden on the shoulder of the accused to prove non existence passing of consideration for the issuance of cheque. The same can be either by direct or by bringing on record, the preponderance of the probability or by reference of the suggestive upon which he relied on. It may not insist upon the accused to disprove the existence of the consideration by leading direct evidence as the leading negative evidence neither possible nor contemplated.

(b) In the instant case, the evidence of D.W.1 and Ex.D1 goes to show that the account of the complainant at the relevant point of time, does not exceeded Rs.10,000/- at any most point of the time entire amount lay in his account was run only in O.D.T credit also assumes significance and hence, the finding rendered by the learned Lower Appellate Court at Paragraph No.13 is found to be perverse.

18. The entire transaction for over a period is not a criteria, it only the financial position, on the date of the lending money or around the relevant date, are relevant and hence the evidence of D.W.1 is clear to the fact that private complaint is not having sufficient source of income to loan Rs.4 lakhs (the subject matter of the transaction) and hence whether their exist a legally enforceable debt on the date of the issuance of the cheque is bereft of details and the same is under cloud of suspension and thus this Court finds that the revision petitioner/accused has successfully demonstrated before the Court that the private complainant does not possess sufficient source of income to lend to Rs.4 lakhs at relevant point of time. In the decision reported in 2014 Madras Crl.DCC Page No.24 SC while lending, the source of advancing money is a relevant point period has held that, the same amounts to probablizing the defense case.

19. It remains to be stated that under Ex.P3 legal notice, the private complainant has alleged viz A2 has borrowed the amount on behalf of the A1 firm on 24.05.2008 for the business of A1. However in the complaint and the evidence as P.W.1, he has included by exoneration that A3 has issued cheque for the amount received by A2 and A1. In other words, I find there is a marked material contradiction has to be receipt of consideration by A3 under Ex.P3 notice, there is no reference with regard to A3 who is the one of the partner of the A1 firm. However in the



complaint and in the deposition, P.W.1 has stated that A3 has issued the cheque and hence I find that the evidence of P.W.1 regarding passing of consideration for A1 and A2 issuance of cheque by A3 suffers from material implementation amounting to material contradiction on the point of passing of consideration and issuance of the cheque by A3 therefor. In the above circumstances, the cloud has been created has to be issuance of the cheque by A3 to the private complainant.

20(a). Before the trial Court, A2 was acquitted and there is no appeal as against the acquittal of A2 also assumes significance and hence I find that A3 has successfully demonstrated that there does not exist any legally enforceable debt between the respondent-complainant and the accused and theory forwarded by the private complainant in Ex.P3 complaint is totally different from that of the complaint and the P.W.1 evidence passing off consideration for issuance of the cheque by A3 is under cloud. The complainant lacks sufficient funds in his account as reflected in Ex.B1 has stated by D.W.1.

(b) In the absence of any other explanation by the complainant that he had some other account or any evidence to show the source of income after the rebuttal, this Court holds that the accused has successfully demonstrated the rebuttal of presumption and then it becomes duty has caused upon the private complaint to demonstrate his source of income.

21. Admittedly, no re-examination or any additional documents was marked. In view of the same, I hold that, the order of conviction passed by both the Courts below is erroneous on the facts and circumstances of the case.

22. The finding rendered by the lower Appellate Court at Paragraph No.12 is found to be perverse does not reflected Ex.D1 and hence the order of the conviction is set aside.

23. Accordingly, this Criminal Revision Petition is allowed. The conviction and sentence passed by the Courts below is set aside and the revision petitioner is set at liberty and bail bond if any shall stand cancelled.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

nvi



To

1. The 1st Additional Sessions Judge of Erode.

2. The Judicial Magistrate No.III of Erode.

3. The Public Prosecutor, Erode.

Copy to:

The Section Officer (Records),
Criminal Section, High Court, Madras.

+1CC to Mr.M.Guruprasad, Advocate, Sr.No.48250

+1CC to Mr.V.S.Kesavan, Advocate, Sr.No.48067

order in
Cr1.R.C.No.465 of 2015

PA (CO)

K.RK. (20.10.2021)