

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Order
04.10.2021

Date of Pronouncing Order
08.10.2021

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THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

Cr1.R.C.No.896 of 2015

R. Murugesan

.. Petitioner

Vs.

M. Anbalagan

.. Respondent

PRAYER : Petition filed under Section 397 and 401 of the Criminal Procedure Code, to set aside the order dated 24.07.2015 passed by the Principal District & Sessions Judge, Dharmapuri in C.A.No.10/2012, confirming the order of conviction and sentence of one year simple imprisonment passed by the learned Judicial Magistrate (FTC) Dharmapuri in S.T.C.No.113/2011 dated 24.02.2012 and modifying the compensation amount as Rs.3,00,000/- instead of Rs.10,00,000/- and directed to pay the said compensation of Rs.3,00,000/- within, three months, in default to undergo further imprisonment of three months.

For Petitioner : Mr. G. Moorthy

For Respondent : Mr. M.R. Jothimanian

O R D E R

The matter is heard through "Video Conference".

2. Convicted sole accused is the revision petitioner herein.

3. This criminal revision petition is filed against the order dated 24.07.2015 passed by the Principal District & Sessions Judge, Dharmapuri in C.A.No.10/2012, confirming the order of conviction and sentence of one year simple imprisonment passed by the learned Judicial Magistrate (FTC) Dharmapuri in S.T.C.No.113/2011 dated 24.02.2012 and modifying the compensation amount as RS.3,00,000/- instead of Rs.10,00,000/- and directed to pay the said compensation of Rs.3,00,000/-, within, three months, in default to undergo further imprisonment of three months.

4. The respondent/private complainant filed petition under Section 200 of Cr.P.C., for the alleged offence under Section 138 of Negotiable Instruments Act.



5. The case of the prosecution is that

(i) the accused borrowed a sum of Rs.10,00,000/- on 16.10.2009 from the respondent for his family expenses and business development and promised to repay the same within, a period of one month and issued a post dated cheque bearing No.949089, posting the date as 16.11.2009, drawn on Canara Bank, Krishnagiri Branch for Rs.10,00,000/- in favour of the complainant. The complainant presented the said cheque for collection on 23.11.2006, with his bankers namely Indian Bank, Dharmapuri Branch, but the same was returned on the same date for the reason "Insufficient Funds" under a memo by the accused bankers. Hence, the complainant issued a statutory notice on 01.12.2009 which was acknowledged by the accused on 07.12.2009. Since the accused had not paid the cheque amount within, the grace period of 15 days granted under law, the complainant has initiated the private complaint.

6. On the side of the prosecution, P.W.1 was examined and through him the cheque was marked as Ex.P1; Return memo was marked as Ex.P2; Statutory notice was marked as Ex.P3; Postal acknowledgement was marked as Ex.P4 and a reply notice issued by the accused to the complainant was marked as Ex.P5. On the side of the defence, the accused was examined as D.W.1 and through him memorandum dated 29.05.2009 was marked as Ex.D1; complaint copy dated 16.10.2009 was marked as Ex.D2; C.S.Rs were marked as D.3 and D.4; Stop payment instructions dated 10.12.2009 was marked as Ex.D.5; and invoice list (11 numbers) was marked as Ex.D6 (series).

7. The case of the complainant is that the accused borrowed Rs.10,00,000/- on 16.10.2009 and towards repayment issued Ex.P1 cheque dated 16.10.2009. The defence of the accused is that he had not borrowed any amount from the complainant and that Ex.P1/cheque and another one bearing No.949090, two blank promissory notes and two stamp papers were handed over to the complainant as security for supply of large quantity of wall paints. Admits his signature in Ex.P1/cheque. When once, the drawer of the cheque admits his signature in a negotiable instrument, as per Section 118(a) of Negotiable Instruments Act "Until the contrary is proved, the following presumption shall be made, in respect of consideration, as to date and time of acceptance, as to time of transfer, as to order of endorsement, as to stamps and that the holder is a holder in due course".

8. The complaint had proved all foundational facts as adumbrated under Section 138 of Negotiable Instruments Act. Therefore, the presumption mandated under Section 139 of the Act shall be invoked in favour of the complainant that the cheque/Ex.P1 was issued for the discharge of existing liability. This presumption is a rebuttable one and the burden is upon the accused to rebut the same.



9. Accordingly, this Court finds that the respondent/private complainant has satisfied the basic ingredients for his invoking statutory presumption under Section 139 of Negotiable Instruments Act and such presumption is rebuttable one and it is now for the accused to rebut the presumption to the preponderance of probability level. Now it has been whether, the accused had rebutted the presumption by cogent and acceptable evidence. The specific defence of the accused is that the complainant made an order with the accused for supply of paints to the worth of Rs.20 lakhs and for the prompt supply of materials, it is said that the complainant had obtained two blank cheques, two blank pro notes, two stamp papers and two white papers as security for the accused.

10. D.W.1 has stated in his evidence that the complainant had not made payments for the supply of paints till February' 2009. When accused demanded the same, the complainant denied the payments and stated that only the accused has to pay Rs.2,00,000/- to him. D.W.1, further states that he had stopped supplying paints to the complainant and under such circumstance a Panchayat was convened on 20.05.2009 and in the result of the Panchayat, Ex.D1/memorandum was got up duly signed by the parties. Even P.W.1 admits about Ex.D1.

11. On perusal of Ex.D1/memorandum, the terms and conditions for supply and payment were arrived between the parties. It is the case of the accused that the complainant had to pay Rs.3,19,371/- to the accused. Had the accused has got any outstanding from the complainant, the same would have been discussed in the Panchayat. But Ex.D1/memorandum do not contain any such recital regarding the amount due to the accused from the complainant.

12. Further, the case of the accused is that he had given blank cheques to the complainant towards security for the prompt supply of paints in large quantity. When it is said that the complainant had not cleared the outstanding, naturally the accused would have asked for return of blank cheques and blank stamps papers from the complainant in the Panchayat. But Ex.D1 do not contain any such recital. When the scheme of supply and payment were sorted out under Ex.D1, it is no longer necessary for the complainant to retain any security obtained from the accused. Even D.W.1 admits in his evidence, when Ex.D1 was got up, the blank cheques were only with the complainant. Had, the blank cheques were with the complainant, why the accused had not chosen to get back the same. Therefore, the defence of the accused that he gave blank cheques towards security and that the complainant had to pay Rs.3,19,371/- to him are all not supported by Ex.D1 and so the same are negated.

13. Defence of the accused is that on 15.10.2009, the complainant came with some rowdy elements and created problems and so on 16.10.2009, the accused had preferred written



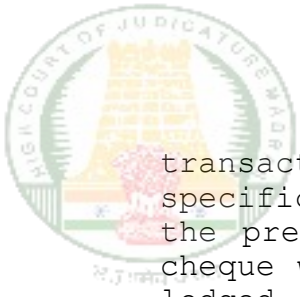
complaints both in Krishnagiri and Kandhikuppam Police Stations. Curiously, the date of borrowal alleged by the complainant is 16.10.2009. On the same date, the accused said to have preferred complaint with Kandhikuppam Police Station. The complaint was marked as Ex.D2. For the said complaint, Ex.D3/receipt was issued by Kandhikuppam Police. If really, the accused had given complaint on 16.10.2009, he could not have borrowed amount from the complainant on the same date. Therefore, it has to be seen whether Ex.D2 complaint is a true and genuine record. Had the complaint was given on 16.10.2009, the police would have issued the receipt of complaint either on the same date or on the succeeding dates. But, Ex.D3/receipt is said to have been issued on 22.11.2009 namely the day prior to the return of cheque by the bank.

14. The accused had given stop payments instructions to his bankers under Ex.D5 on 10.12.2009. But prior to the stop payment instructions, Ex.P1/cheque has come for collection on 23.11.2009 itself. Had, the accused had preferred police complaints on 16.10.2009, he could have very well given stop payment instructions to his bankers on the same date itself. But instead, only after receiving the statutory notice on 07.12.2009, the accused had preferred stop payments instructions. Therefore, the defence version that Ex.P1/cheque issued only towards security could not be accepted. Because, the accused has got many occasions to get back his blank cheques, but he had not made any attempts to get the cheques which shows the cheques would not have been issued as security and so the defence version is unbelievable. Thus, from the foregoing discussions, it is held that the accused had failed to rebut the presumption cast upon him by cogent and acceptable evidence.

15. Mere bare denial is not suffice. It has been held in Rangappa Vs. Sri Mohan's reported in 2010 (11) SCC 441 case that "in the absence of compelling justification, reverse onus clauses usually impose an evidenciary burden and not a persuasive burden.

16. Thus, this Court finds that except their denial, the accused has not let in any positive evidence to rebut the presumption. At the risk of repetition, however, for the sake of clarity, the defence of the appellant is that he had not borrowed any amount. In fact, the complainant has to pay some amounts, for the goods supplied. In the previous occasion, he had borrowed some amounts from the complainant in the year 2007-2008, at that time he had passed a blank cheque with signature and that has been misused by the complainant and a false case has been filed against him. In the reply notice/Ex.P5, he had taken such a stand.

17. Ex.D1 is the vital document relied on by the defence. However, it contemplates only terms to supply goods and payments for the same. Admittedly, the appellant had financial



transaction with the complainant on earlier occasion. The specific stand of the accused is that the cheque handed over on the previous occasion has been misused. But after the present cheque was presented before the bank for collection, the accused lodged a complaint with the Krishnagiri Police dated 16.10.2009, but it was acknowledged by the police only on 22.11.2009. The disputed cheque is dated 16.11.2009. The cheque was returned by the Bank on 23.11.2009. So having knowledge about the presentation of cheque, it appears Ex.D2/complaint with anti date was lodged to the police on 22.11.2009 in order to make a defence for the case.

18. Further, Ex.D5 is also filed by the appellant/accused before the trial Court, stop payment letter was given by the accused to his banker Canara Bank, Krishnagiri, that was received on 10.12.2009 by the bank much after the return of cheque for "Insufficient Funds". In Ex.D5, the accused had stated as follows:-

“என்னிடம் வியாபாரம் நிமித்தமாக பொருட்களை தருமபரியில் உள்ள எம்.அன்பழகன் கொள்முதல் செய்து கொண்டு இருந்தார். இவர் தனக்கு ரூபாய் .3,19,317/- கொடுக்க வேண்டும். இதனை கேட்க இவர் அலுவலகம் தருமபரி சென்ற பொழுது அடியாட்களை வைத்துக் கொண்டு என் பாக்கெட்டில் உள்ள காசோலை எண்கள் 949089, 9409090 ஆகியவற்றை எதுவும் நிரப்பப்படாமல் வலுக்கட்டாயமாக கையெழுத்து வாங்கிக் கொண்டார்.”

This said allegation is totally against the allegation made in the reply notice. Such a contradiction would go to show the veracity of the defence version.

19. The evidence D.W.1 adduced by him, the reply notice/P5 and letter given to the D5/Bank are contradictory to each other. Further, even as per the defence, the complainant and the accused is having business transaction with each other.

20. Thus, this Court finds that the evidence deposed by D.W.1 is found to be inconsistent with Ex.P5/reply notice which is totally inconsistent with Ex.D5/letter given to the bank for stop payment. Thus, the stand of the accused with regard to the alleged stop payment given to the bank as could be seen from Ex.D5, runs contrary to Ex.P5/reply notice and he has taken, yet another stand as D.W.1. Though, as an accused, he is entitled to take inconsistency. However, from the evidence of D.W.1, is the destructive to the contents of Ex.P5, which is found to be material contradiction at Ex.D5. Thus, the only irresistible conclusion is that the case projected by the defence is unbelievable.

21. So also, in the absence of any document from the accused, there cannot be any preponderance of probability suggesting or probabalising the suggestion that under the Ex.P1/cheque, no amount was transferred or Ex.P1/cheque is not representing any pre-existing, legally enforceable debt and hence, both the Courts below have rightly come to the conclusion



that the accused has miserably failed to probabalise the suggestive case and rejected the contention and hence, the conviction and sentence passed by both the Courts below cannot be held to be erroneous.

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22. The learned counsel for the revision petitioner would contend that out of compensation of Rs.3 lakhs awarded by the lower appellate Court, Rs.2.50/- lakh is already paid.

23. Per contra, the learned counsel for the respondent/complainant would state that cheque amount is Rs.10 lakhs. Initially, the Magistrate has ordered for compensation of Rs.10 lakhs. However, the same was reduced to Rs.3 lakhs by the appellate authority.

24. In the decision reported in 2021 SCC OnLine SC 788 [Triyambak S. Hegde Vs. Sripad], at para Nos.21 and 22, the Hon'ble Apex Court has held as follows:-

"21. During this period there would be a lot of social and economic change in the status of the parties. Further, as observed by this Court in Kaushalya Devi Massand Vs. Roopkishore Khore (2011) 4 SCC 593, the gravity of complaint under N.I. Act cannot be equated with an offence under the provisions of the Indian Penal Code, 1860 or other criminal offences. In that view, in our opinion, in the facts and circumstances of the instant case, if an enhanced fine is imposed it would meet the ends of justice. Only in the event the respondent-accused not taking the benefit of the same to pay the fine but committing default instead, he would invite the penalty of imprisonment.

Hence, appropriate modification is made to the sentence in the manner as indicated hereinbelow:

22. For all the afore stated reasons, the following order;

(i) The order dated 01.12.2009 passed by the High Court in Criminal Revision Petition No. 1282/2006 and 1481/2006 are set aside.

(ii) The conviction ordered in C.C. No.790/2000 by the learned JMFC is restored.

(iii) The sentence to undergo simple imprisonment for six months and fine of Rs.2,00,000/- (Rupees two lakhs only) is however modified. The Respondent/Accused is instead sentenced to pay the fine of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) within three months. In default of payment of fine the Respondent/Accused shall undergo simple imprisonment for six months.



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(iv) From the fine amount, a sum of Rs.2,40,000/- (Rupees two lakhs forty thousand only) shall be paid to the Appellant/Complainant as compensation.

(v) The Appeals No.849-850/2011 are accordingly allowed in part.

(vi) The pending applications, if any, stand disposed of."

25. Following the dictum laid down by the Hon'ble Apex Court, I find that in the instant case, due to the passage of time, lot of social and economic change in the status of the parties could have taken place and as observed by the Hon'ble Apex Court, on the facts and circumstances of the instant case, if an enhanced fine is imposed, it would meet the ends of justice. Only in the event of the revision petitioner/accused is not taking the benefit of the same to pay the fine but committing default instead, he would invite the penalty of imprisonment.

26. Accordingly, the conviction ordered by the learned Judicial Magistrate, Fast Track Court, Dharmapuri, in S.T.C.No.113 of 2011, as confirmed by the learned Principal District and Sessions Judge, Dharmapuri, in C.A.No.10 of 2012 is hereby confirmed. The sentence to undergo simple imprisonment for one year and the compensation of Rs.10,00,000/- awarded by the learned Magistrate and modified as Rs.3,00,000/- by the learned Principal District and Sessions Judge, is modified as that of fine of Rs.6,00,000/-.

27. In short, (1) the revision petitioner/accused is convicted under Section 138 of Negotiable Instruments Act and sentenced to pay a fine of Rs.6 lakhs, within, a period of three months in default of payment of fine, the revision petitioner/accused shall undergo simple imprisonment for one year.

(a) In respect of payment of fine, since the accused has already filed private complaint by way of compensation viz., Rs.2,50,000/-, shall stands adjusted and balance of fine amount of Rs.3,50,000/- has to be paid and on such payment, Rs.3,40,000/- has to be given to private complainant as compensation.

(b) In the event of non-payment of balance of fine amount viz., Rs.3,50,000/- within, a stipulated time, the revision petitioner shall undergo simple imprisonment of one year as stated in para 27 clause 1.

(2) from the fine amount, a sum of Rs.3,50,000/- [Rupees Three lakhs and fifty thousand only] has to be paid to the respondent/complainant as compensation and the earlier payment of Rs.2,50,000/- paid by the revision petitioner/accused pending



with the revision shall stand adjusted therefor.

28. Accordingly, this Criminal Revision Case is allowed in part to the extent of modification in the fine amount only.

29. In fine, the conviction under Section 138 of the Negotiable Instruments Act is confirmed and sentence of one year simple imprisonment and compensation awarded by the trial Court is modified as that of the fine amount as stated supra and it has to be paid to the private complainant within, three months, failing which, he has to undergo simple imprisonment as stated supra.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District & Sessions Judge, Dharmapuri

2.The Judicial Magistrate (FTC) Dharmapuri.

+1 cc to Mr.M.R. Jothimanian, Advocate Sr.NO. 53372

CrI.R.C.No.896 of 2015

RGN(CO)

A.SK(03.12.2021)