



Bail Slip

The Appellant/Accused namely Ramkumar, S/o. Rajagopala Mudhaliar was released on bail and by the order of this Court dated 21.09.2015 made in M.P. No. 1/2015 in CrI.R.C.No.999/2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Reserved on : 06.08.2021)

(Pronounced on : 13.08.2021)

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CrI.R.C.No.999 of 2015

Ramkumar

....Petitioner

.. Vs ..

Chelladurai

... Respondent

PRAYER: Criminal Revision Case filed under Section 397 r/w. 401 of Cr.P.C., to call for the records pertaining to the judgment dated 17.04.2015 in C.A.No.20 of 2012 on the file of the Principal District and Sessions Judge, Thiruvarur District and judgment dated 07.09.2012 in C.C.No.179 of 2011 on the file of the Fast Track Judicial Magistrate Court, Thiruthuraipoondi and set aside the same.

For petitioner : Mr.R.T.S.Kannan

For Respondent : Mr.L.Ramu

O R D E R

The convicted respondent/accused is the revision petitioner herein.

2. The respondent herein has filed a private complaint before the learned Judicial Magistrate, Fast Track Court, Thiruthuraipoondi, in C.C.No.179 of 2011, under Section 200 of Cr.P.C r/w Section 138 of Negotiable Instruments Act.

3. The respondent herein preferred the private complaint in C.C.No.179 of 2011, on the file of the learned Judicial Magistrate, Fast Track Court, Thiruthuraipoondi alleging that the appellant had borrowed a sum of Rs.10,00,000/- from the respondent on 07.11.2009, and handed over a blank signed post dated cheque for Rs.10,00,000/- drawn on the Indian Bank, Thiruthuraipoondi in Cheque No.937169, dated 16.11.2009. When the postdated cheque was presented for encashment with the Lakshmi Vilas Bank, Thiruthuraipoondi Branch and the same was



returned on 17.11.2009 with a bank memo as insufficient funds. He issued advocate notice on 12.12.2009 to the appellant and the appellant received the same on 16.12.2009. But he had not given any reply. The respondent knowing very well that there is no sufficient funds in his account, he had issued the postdated cheque to cheat the respondent. Hence the complaint.

4. He examined himself as P.W.1 and Ex.P1 to Ex.P11 were examined on the side of the revision petitioner/accused, no witness were examined.

5. The trial Court has convicted the accused and the appellate Court dismissed the appeal in C.A.No.20/2012 and hence the revision.

6. The learned counsel for the revision petitioner/accused contended that:-

(i) Even as per the complaint Ex.P11 he had only Rs.4,839/- at the relevant point of time and as no means to pay such a huge amount.

(ii) Exs.P5 to P10 were filed before the authorities, after the accused had filed petition under Section 91 of Cr.P.C on 28.09.2010.

(iii) The time of alleged borrowing and time for handing over the cheque is too short which is impossible in the regular course of business.

(iv) The complainant claimed that he had lent unaccounted money to others including the revision petitioner and hence the same cannot be termed as legally enforceable debt. In the absence of any proof for establishment of payment of money and Rs.10 lakhs by the complainant the case of the complainant has to be thrown out.

7. Heard the learned counsel for the respondent. Written submissions of both the counsels were taken into consideration.

8. Written submission filed on behalf of the revision petitioner is that the case of the respondent/complainant that he had lent a sum of Rs.10,00,000/- to this revision petitioner/accused on 07.11.2009. For which, the accused is said to have given a cheque bearing number 937169 dated 16.11.2009 for the said loan, which on presentation was returned on 17.11.2009 for "Insufficient Funds".

9. The case of the revision petitioner/accused is that:-

(i) During the pendency of above said C.C.No.179 of 2011, the revision petitioner who arrived as an accused has filed a



petition in CrI.M.P.No.7173 of 2010 under Section 91 of Cr.P.C to seek the documents viz., Income Tax Returns for the petitioner at the relevant point of time viz., 2007-2008, 2008-2009, 2009-2010, the petition was filed on 28.09.2010 and the same was allowed after contesting on 27.01.2011.

(ii) Thereafter, the respondent herein has chosen to file Exs.P5 to P10, Income Tax returns through auditor to prove that some amount has been paid and hence, Exs.P5 to P10 filed subsequent to the above said petition has to be disbelieved. He would further contend that the alleged loan was said to be on 07.11.2009 while, the cheque was dated 16.11.2009, registered notice issued by the respondent herein was dated 12.12.2009, complaint was filed on 18.01.2010 and Income Tax Returns were filed on 08.01.2010 for the assessment year 2009-2010 and for the assessment year 2010-2011 challan was not produced and hence, the exhibits are to be discarded and the cheque signature is signed by one person while the content was written by another person and therefore, he could say that when unfilled cheque was given to the respondent herein towards security for the said amount of Rs.50,000/-, the same was misused and the contents of the cheque has been writtten by different persons and the cheque was re-presented.

10. The complainant in order to prove his case has relied on two set of documents viz. i) Cheque (Ex.P1) ii) Copy of audited statements & Income Tax Acknowledgment (Ex.P5 to Ex.P10). The question which needs to be addressed is whether the accused has discharged the presumption under Section 139 of Negotiable Instruments Act.

11. In CrI.A.No.636 of 2019 [Basalingappa Vs.Mudibasappa], dated 09.04.2019 the Hon'ble Supreme Court has held that taking into consideration on Sections 118(a) and 139 of the Negotiable Instruments Act as under:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities



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can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support of his defence.

12. The Apex Court in the decision reported in CDJ 2005 SC 752 [G.Pankajakshi Amma & others Vs.Mathai Mathew (D) Thr.Lrs & Another], it has been held that:-

".....In these circumstances, it was absolutely necessary for the 1st Respondent to produce his books of accounts particularly as he has admitted that he was doing money-lending business and no court can come to the aid of the party in an illegal transaction. It is settled law that in such cases the loss must be allowed to lie where it falls. In this case as these are unaccounted transactions, the Court not have lent its hands and passed a decree. For these reasons also the suit was required to be missed. In the above view, the impugned Judgment is set aside. The order of the trial Court is restored."

13. A signature in the cheque-in-issue is admitted by the revision petitioner/accused and the case projected by the accused is that it was given as a security has demanded by the complainant though the amount has been paid however a cheque that was given for security never intended for presentation and has been misused for filing this case.

14. It remains to be stated that when the matter is pending before the Judicial Magistrate Fast Track Court, it appears that the accused has filed petition under Section 91 of the Cr.P.C for summoning the documents. The petition was ordered on 28.09.2010. Though Ex.P5 to P10 were seen to have been filed before the Income Tax Authority, however on perusal of the documents, I find that all the 3 previous years have been filed in the year 2010 only.

15. In other words for the financial years 2006-2007, 2007-2008, 2008-2009, all have been filed on 08.01.2010 and within 10 days, the present complaint has been filed and hence it creates a doubt in the mind of the Court as to the date of filing of I.T returns is only for a to purpose of filing the present case under Section 138 of Negotiable Instrument Act.



16. No doubt true that for 3 years they can file returns but however, no plausible explanation has been given for non-filing of the returns for the above said year also assumes significance.

17. On perusal of Ex.P10, it is pertinent to note that Income Tax Returns and acknowledgment for the relevant financial year viz., 2009-2010 is not filed in the Court. Only the accounts statement attested by the auditor which bears a date 05.10.2010 (admittedly after filing of the petition under Section 91 of Cr.P.C) is filed as Ex.P10. Even this auditor statement 5.10.2010 was prepared subsequent to filing of Section 91 of Cr.P.C petition by the accused to call for records and production of the said records from the Income Tax and CrI.M.P.No.7173 of 2010 which was allowed on 28.09.2010 and hence, this Court finds that Exs. P5 to P10 are purposely prepared filed before Income Tax filed for the parties.

18. Yet another point is that P.W.1 in the cross-examination has admitted that no accounts has been maintained by the complainant and thus this Court finds that the Income Tax Returns under Exs.P4 to P10 dated 08.01.2010 and accounts statement dated 21.02.2020 and 05.10.2010 are all prepared just for the purpose of filing the C.C. under Section 138 of Negotiable Instrument Act dated 08.01.2010.

19. As observed earlier, there can be belated filing but the dates are closely given with the each goes from the serious application and furthermore the answer elicited in the cross-examination of P.W.1 is that

என்னுடைய ஆட்டி கணக்கில் 2006ம் ஆண்டில் இருந்து யார் யாருக்கு எவ்வளவு, பணம் கொடுத்துள்ளேன் என்பதை காட்டவில்லை. நான் கடன் கொடுத்ததை யார் யாருக்கு எவ்வளவு, கொடுத்துள்ளேன் என்று ஆட்டி கணக்கில் காட்டவில்லை.

ஒவ்வொரு நபருக்கும் பணம் கொடுத்து வட்டி வசூல் செய்தது சம்மந்தமாக திணைப்பேரேடு, கணக்குப் பேரேடு, ஆகியவைகளை நான் பராமரிக்கவில்லை. அத்தகைய பேரேடுகள் எதுவும் இல்லாமல்தான் என்னுடைய வருமானவரி கணக்கை காட்டியுள்ளேன் /

"7. Further, when the books of accounts are admittedly not maintained by the compliant, there is no way that the Auditor could have seen any document or books or accounts to prepare the audited statement. As such, the audited statement filed with the Income Tax authorities, is based solely on the hearsay statement of the complainant, which cannot be relied even as "Secondary Evidence", under Illustration (d) of Section 63 and Section 65 (g) of the Indian Evidence Act, 1872. To admit the account book as evidence as relevant it should have been a



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"books of accounts regularly kept in the course of business" but in this case admitted case of the complainant himself is that he never maintained any book, much less the account book. Hence, the statement of account (EX.P5 to P10) given by the Auditor are neither relevant under Sections 34, 63 or 65 of the Evidence Act, 1872 nor have any probative value. Though in this case Ex.P5 to Ex.P10 are not admissible in evidence, for the reasons stated above, still it is not out of context to submit that though a document may be admissible, but as to whether the entry contained therein still requires to be examined in the facts and circumstances of the case, is supported by judgment of the Hon'ble Supreme Court in the case of Madan Mohan Singh & others V. Rajini Kanth & Another reported in CDJ 2010 SC 700 and the said judgment is followed and reiterated in the case of H.Siddiqui Vs. A. Ramalingam reported in CDJ 2011 SC 207, wherein at Para No.14 it is stated "....Therefore, it is the duty of the Court to examine whether documents produced in the Court or contents thereof have any probative value".

20. Thus this Court finds that in view of the admission of the signature in Ex.P1 cheque, the trial Court has rightly held that the complainant has entitled for the statutory presumption under section 139 of Negotiable Instrument Act. Merely because the accused has not entered into the witness box cannot be put against him since he can probablize the suggestive case by other attending materials. In the instant case, the accused has filed application in CrI.M.P.No.7173/2010 under Section 91 of the Cr.P.C to call for the records from the Income Tax. Only, thereafter the auditor statement was appeared to have been filed before the Court.

21. For the reasons discussed supra, this Court finds that Exs.P5 to Ex.P10 does not established to proof of the document. There needs to be an existence of legally enforceable debt in the instance case, no proof debt has been shown or marked as such Accounts book, daily cash book, ledger pro-note receipt etc., to establish the book so as to hold that the cheque had been legally enforceable debt.

22. Furthermore, it remains to be stated that the answer elicited in the cross-examination is to the effect that he has not maintaining any accounts and the documentary evidence of Exs.P.W.5 to P.W.10 is surrounded with doubt and furthermore he has not maintained any account books in support of the Income Tax Returns filed before under Section Exs.P5 to P10.

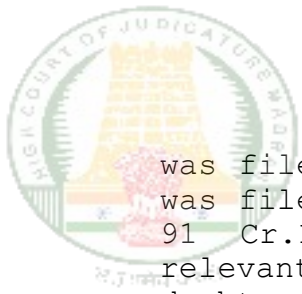


23. On perusal of the original records from the trial Court, no question has been put to the accused with regard to Income Tax Auditor statement namely Exs.P5 to P11 under Section 313 (i) (b) of the Cr.P.C and hence in the absence of the same being put to accused in the form of questioning, the same cannot be held against the accused as held by the Courts below and hence the said finding of the trial Court that the accused has not explained Exs.P5 to P11 is hereby stands vacated.

24. The another finding by both the Courts below that non examination of Auditor Mr.Jawahar and Mr. Gopalakrishnan are fatal to the accused case does not hold that for reasons that they are the witnesses of the complainant the said Auditor of the complainant and hence the same cannot be put against the accused. The said observation and finding by both the Courts below is legally unsustainable and accordingly, the same is hereby vacated.

25. In view of the discussions in the preceding paragraphs, this Court finds that on admission of the signature in Ex.P1 complaint and completion of the legal formalities under Section P2 to P4 both the Courts below has rightly come to the conclusion that the complainant is entitled for statutory presumption under Section 139 of the Negotiable Instruments Act.

26. Further, based upon the fact that after filing of Section 91 of Cr.P.C by the accused to summon Income Tax Returns which was ordered on 28.09.2010, it appears that the auditor statement for the financial year 2009-2010 was filed only on 5.10.2010 which is admittedly after allowing of the application by the accused and however, this vital aspect appears to have been last sight off by both the Courts below. Furthermore, though Ex.P5 to P10 are filed before the Income Tax Authorities few days before filing of the complaint, the lost of two exhibits of Ex.P10 namely auditor statement of the financial year 2009-2010 which is relevant to the cheque-in-issue was filed only on 05.10.2010 that is admittedly after the Section 91 Cr.P.C to call for the records filed by the accused and the coupled with a fact that earlier income tax returns under Exs.P4 to P9 for filed just on 08.01.2010 covering for the 3 financial years, 2006-2007, 2007-2008, 2008-2009 when a complaint was instituted on 18.01.2010 and thus to sum up this Court finds that cheque is dated 16.11.2009 and endorsement of return is 17.11.2009; statutory notice issued by the complainant is on 12.12.2009 it was served on the accused on 16.12.2009, all as could be seen from Ex.P1 to P4. It remains to be stated that Exs.P5 to P9 are to the effect that the Income Tax Returns for the last 3 financial year have filed on 08.01.2010 and complaint



was filed on 18.01.2009 Income Tax was and statement of accounts was filed before the Income Tax after the petition under Section 91 Cr.P.C was filed on 28.01.2010 and auditor statement for the relevant financial year is only on 5.10.2010 caused serious doubt as to probative value of Exs.P5 to P10 and hence, I find that the suggestive case of the defence is more probable on the strength of the above said admission of P.W.1, in the cross-examination, I find that the accused has successfully rebutted the legal presumption in favour of the complainant and thereby against it is for the complainant to show that is having financial capacity to lends such amount and such amount is also legally enforceable debt.

27. As per the answer elicited in the cross-examination of P.W.1, he has not maintained any accounts for the payment he has made and various loans he has given to 30 other persons and hence in respect of the amount alleged to have been given by the private complaint is appears to be unaccounted amount. Thus, the alleged liability to re-pay an unaccounted loan amount admittedly, not disclosed in Income Tax Returns cannot be legally recovered liability. If such a liability is held to be legally recoverable debt, it will rendered the explanation to Section 138 of Negotiable Instrument Act nugatory.

28. Both the Courts below has held that on the date of the borrower, he had sufficient income based upon Ex.P6, the trial Court has held that the cash in hand for the relevant year that the complaint is one Rs.1,29,913/- and relied upon Ex.P10, the case in hand is Rs.3,24,044/-.

29. It remains to be stated that the cheque amount is Rs.10 lakhs and admittedly Ex.P10 cannot be relied upon for the reasons stated supra and hence the above said finding of the trial Court that on the date of the borrowal the complaint had sufficient money in his hand cannot be legally unsustainable and accordingly the same is hereby stands vacated.

30. In this view of the matter this Court held that the statutory presumption in favour of the complainant has been successfully dislodged by the accused in view of the petition filed under Section 91 of Cr.P.C.

31. All the Exs.P4 to P7 are to make it believe story as if he had financial capacity has been .built up by the complaint 10 days before the filing of complaint under Section 138 of Negotiable Instrument Act was stands exposed by the cross-examination of P.W.1 and thus this Court holds that when the statutory presumption has been dislodged by the accused it is for the private complainant to demonstrate the financial ability to Rs.10 lakhs. None of the Exs.P4 to P9 could go to show that the



financial ability to lend and for the reasons recorded in the previous paragraphs, the Ex.P10 which was came into existence only after the allowing of the sent for petition 91 of Cr.P.C and hence this Court has no hesitation to hold that the same lacks probative value and hence the same cannot be taken on evidence accordingly, in sequel thereto the complainant has not demonstrated to pay a sum of Rs.10 lakhs as a loan to the accused. Consequently, this Court holds that the private complainant has not proved the pre-existing legally enforceable debt in the manner known to law and hence the conviction passed by both the Courts below are liable to be set aside.

32. Accordingly, this Criminal Revision is allowed and the conviction and sentence passed by both the Courts below are hereby set aside. The bail bond executed by the revision petitioner is stands cancelled.

s/d-
Assistant Registrar(CS V)

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Sub-Assistant Registrar

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To

1.The Principal District and Sessions Judge,
Thiruvarur District

2.The Judicial Magistrate (Fast Track Court),
Thiruthuraipoondi

3.The Judicial Magistrate No.I
Thiruthuraipoondi

4.The Chief Judicial Magistrate
Thiruvarur(for information)

Copy to

The Section Officer
Criminal Section(Records)
High Court, Madras 104.

+1 CC to M/s.R.T.S. Kannan, Advocate sr 40219

+2 Ccs to Mr.L.Ramu, Advocate sr 40456.

Cr1.R.C.No.999 of 2015

JPII(CO)
SP(28/10/2021)