



BAIL SLIP

The Petitioner / Accused viz., Tamilarasan was directed to be released on bail as per the order of this Court dated 28.03.2016 in CrI.M.P.No.2778 of 2016 in CrI.R.C.No.414 of 2016 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.11.2021

CORAM :

THE HONOURABLE MS. JUSTICE R.N.MANJULA

CrI.R.C.No.414 of 2016
and
CrI.M.P.No.3415 of 2016

Tamilarasan .. Petitioner/Appellant/Accused

Vs.

Murugan .. Respondent/Respondent/Complainant

PRAYER : Criminal Revision has been filed under sections 397 read with 401 of Criminal Procedure Code to set aside the Judgment dated 18.01.2014 made in C.A.No.40 of 2014 passed by the learned II Additional Sessions Judge at Pondicherry by confirming the judgment dated 30.10.2014 made in C.C.No.141 of 2008 passed by the learned Additional District Munsif at Puducherry.

For Petitioner : Mr.S.Ashok Kumar
for Mr.P.Palaninathan

For Respondent : Mr.R.Machavarthan,
Amicus Curiae

ORDER

This Criminal Revision Case has been preferred challenging the judgment of the learned II Additional Sessions Judge, Pondicherry dated 18.01.2014 made in C.A.No.40 of 2014.

2. This case has arisen out of a private complaint



filed by the respondent/complainant on the allegations that the petitioner borrowed a sum of Rs.5,00,000/- on 13.11.2006, another sum of Rs.5,00,000/- on 09.01.2007, Rs.4,00,000/- on 04.01.2007 and Rs.5,00,000/- on 09.01.2007, totally Rs.19,00,000/- for his business purpose. After repaying a part amount, he had issued two cheques dated 20.01.2007 and 05.02.2007 for the sum of Rs.6,90,000/- and Rs.8,99,000/- respectively towards discharging the loan amount. The cheques were drawn on the Federal bank, Pondicherry. The respondent/complainant presented the cheque for collection through his bank ICICI, Puducherry and the same was returned on 30.01.2007 and on 06.02.2007 for the reason 'insufficient funds'. After having issued the statutory notice and complying the legal mandates, the complainant has filed the private complaint against the accused for the offence under Section 138 of Negotiable Instruments Act.

3. After the case was taken on file and after completing the legal formalities, on the side of the complainant, he examined himself as PW.1 and marked 9 exhibits as Ex.P.1 to Ex.P.9. On the side of the accused, no witness was examined and no documents were marked.

4. At the conclusion of the trial and on consideration of the available material on record, the learned trial Judge had found the accused guilty for the offence under Section 138 of N.I.Act, convicted and sentenced the accused to undergo Simple Imprisonment for 2 years and ordered to pay a sum of Rs.19,00,000/- as compensation. Aggrieved over that the accused had preferred the appeal before the Sessions Court, Puducherry in C.A.No.40 of 2014. The appellate Court dismissed the appeal by confirming the judgment of the trial Court. Now this criminal revision case has been filed challenging the judgment of the appellate Court.

5. The learned counsel for the petitioner submitted that the Courts below had not appreciated the evidence in proper perspective. The complainant did not have sufficient means to lend a sum of Rs.19,00,000/- to the accused; though the complainant has stated that he had arranged loan amount by getting money from various persons, he has not chosen to examine them as witnesses; according to the petitioner/accused he had borrowed loan only from his brother-in-law through Balakrishnan; he had given the cheques for security and the complainant had misused the same. By making such statements, it is prayed that the criminal revision case should be allowed by setting aside the judgment of the appellate Court.

6. The learned counsel Amicus Curiae for the respondent submitted that the Courts below have properly appreciated the



evidence on record and convicted the accused and it has to be upheld.

7. The point for consideration is

Whether the conviction and sentence of the accused for the offence under Section 255(2) Cr.P.C., and 357(3) Cr.P.C., by the learned II Additional Sessions Judge basing on the materials available on record is fair and proper?

8. The main ground on which the petitioner has challenged the judgment of the Courts below is that the respondent/complainant did not have any means to lend Rs.19,00,000/- to the accused and that too without getting any proper security and other documents. The complainant himself admitted that he is working in Hindustan Unilever Company as an operator, his monthly salary Rs.13,000/-. In the evidence of PW.1 (complainant) it is stated that the accused was known to him. The accused is said to be running a lorry transport, Tea shop, Xerox shop and Courier Agency. The loan amount of Rs.19,00,000/- was given within a short period of 40 days. It is not the contention of PW.1, that he had the entire sum of Rs.19,00,000/- in his hands in order to lend it to the accused. His categorical submission is that he had raised the said amount, only by borrowing from his friends Arun, Bahour Kurivinatham, Sagayaraj and his uncle Balakrishnan. He has stated that his contribution towards the sum of Rs.19,00,000/- is only to the extent of Rs.4,00,000/-.

9. The learned counsel for the respondent submitted that the accused is known to the uncle of the complainant namely Balakrishnan, who is working in PRTC Depot and he had already lent a sum of Rs.1,00,000/- to him on daily interest basis. He further submitted that the said loan was repaid, and 5 cheques issued to him as security had been misused for the purpose of filing this case. The learned trial Judge has convinced himself to take the presumption available under Section 139 of Negotiable Instruments Act and convicted the accused. The execution of the cheques by the accused is not disputed. Once the execution is admitted as per Section 139 of N.I.Act., it has to be presumed that the cheque was issued only and for discharging a legally enforceable debt. No doubt, the above presumption is available to the respondent/complainant, since the accused did not deny the execution of the cheques. But the initial presumption can become conclusive only, if it is not rebutted by the defence. The specific stand of defence is that the complainant did not have sufficient means to lend a huge sum of Rs.19,00,000/-. Even according to his submissions, he did not have that much financial capacity. PW.1 has admitted that Balakrishnan is his uncle, though he denied about the transaction between the accused and the Balakrishnan. However,



the complainant himself has stated that a portion of the amount lent to the accused was contributed by the Balakrishnan as well.

10. In such circumstances, the complainant ought to have examined all his friends and relatives namely Arun, Bahour Kurivinatham, Sagayaraj and Balakrishnan for the purpose of establishing that the said persons had the capacity to lend him in lakhs in order to consolidate it and then give it as a loan to the accused. Since the petitioner/accused had taken the defence that the complainant did not have the means to lend a huge sum, he ought to have given with the benefit of cross examining those persons, who alleged to have contributed towards the loan of Rs.19,00,000/-. Withholding the said person from coming to the box would amount to withholding best evidence available in favour of the complainant and that would earn an adverse presumption against him. Since the complainant has stated that he did not possess Rs.19,00,000/-at the relevant time, he has the duty to prove the same and make the presumption under Section 139 of N.I.Act to become conclusive. It has been held time and again by the Hon'ble Supreme Court that the action taken for debts on cheques is largely civil in nature, but only to enforce the reliability of the cheques issued during business transaction, the criminal proceedings have been given with legal sanction.

11. The learned counsel for the petitioner submitted that out of contention and the decision of the Hon'ble Supreme Court rendered in Basalingappa -vs- Mudibasappa reported in 2019 (5) SCC 418, in order to support his submission that for rebutting the initial presumption the accused need not to come to box and he is liberty to take his defence from the weakness and contradiction in the evidence of the complainant and claim preponderance of probabilities in his favour. In the said judgment, it is held as under:-

13. This Court in Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35] had occasion to consider Section 118(a) of the Act. This Court held that once execution of the promissory note is admitted, the presumption under Section 118 (a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In para 12, the following has been laid down : (SCC pp. 50-51)



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"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon his failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the



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benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

14. S.B. Sinha, J. in M.S. Narayana Menon v. State of Kerala [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] had considered Sections 118(a), 138 and 139 of the Act, 1881. It was held that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, the following was held in para 28 : (SCC p. 49)

"28. What would be the effect of the expressions "may presume", "shall presume" and "conclusive proof" has been considered by this Court in Union of India v. Pramod Gupta [Union of India v. Pramod Gupta, (2005) 12 SCC 1] , in the following terms : (SCC pp. 30-31, para 52)

'52....It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be



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evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof".' "

15. It was noted in M.S. Narayana Menon case [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] , that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, 1872 the following was laid down in para 30 : (SCC p. 50)

"30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

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20. A three-Judge Bench of this Court in Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] had occasion to elaborately consider the provisions of Sections 138 and 139. In the above case, the trial court had acquitted



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the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed [Mohan v. Rangappa, 2005 SCC OnLine Kar 783] the judgment of the trial court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In para 13, the following has been laid down : (SCC p. 446)

"13. The High Court in its order [Mohan v. Rangappa, 2005 SCC OnLine Kar 783] noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."

11. In the case in hand, the petitioner/accused has consistently stated that the complainant did not have sufficient funds and it is not possible or probable to presume that he had lent the huge sum to the accused. Unless the cheques which were returned for 'insufficient funds' were proved to have been issued for legally enforceable debt, the action taken under Section 138 of N.I.Act will fail. Since the complainant did not prove that he had procured funds from his alleged friends and relatives by way of examining them, that would shift the preponderance of probabilities in favour of the accused. So it is unbelievable that the complainant had lent a huge sum in a short span of 40 days and that too to a person like the accused who is his casual acquaintance. Since the Courts below have not properly appreciated the preponderance of probabilities available in favour of the petitioner/accused, from the short falling evidence of the complainant, I feel it is fit for interference.



12. In the result, the Criminal Revision Case is allowed and the judgment of the Sessions Court is set aside. Consequently, connected Miscellaneous Petition is closed.

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Sd/-
Assistant Registrar(CS-VIII)

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Sub Assistant Registrar

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To

1. The II Additional Sessions Judge,
Pondicherry.
2. The Additional District Munsif,
Puducherry.

+1cc to M/s.P.Palini Nathan, Advocate, S.R.No.60773

Cr1.R.C.No.414 of 2016
and
Cr1.M.P.No.3415 of 2016

RR(CO)
SU(09/12/2021)