BAIL SLIP

The Petitioner/Accused namely P.Sivakumar M/37 years, S/o.Parameswaran Chettiar, was directed to be released on bail in and by the order of this Court dated 16/03/2016 and made in Crl.MP.No.3001 of 2016 in Crl.Rc.448 of 2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2021

CORAM:

THE HON'BLE Ms.JUSTICE R.N.MANJULA

Crl.R.C.No.448 of 2016

P.Sivakumar ... Petitioner

Vs.

V.Vijayakumar ... Respondent

Criminal Revision Case filed under Sections 397 and 401 Cr.P.C praying to set aside the judgment passed in C.A.No.5 of 2015 on the file of XVI Additional Sessions Court, Chennai, dated 20.11.2015, confirming and sentence passed by the learned Metropolitan Magistrate (Fast Track Court No.4, George Town, Chennai) in C.C.No.2510 of 2012 dated 10.12.2014.

For Petitioner : Mr.S.Kaithamalai Kumaran

For Respondent : Mr.K.Nirmal Kumar
for Mr.N.Narayanasamy

O R D E R

The Criminal Revision Case has been preferred challenging the judgment of the XVI Additional Sessions Court, Chennai, dated 20.11.2015 made in C.A.No.5 of 2015, confirming the judgment of the learned Metropolitan Magistrate (Fast Track Court No.4) George Town, Chennai, dated 10.12.2014 made in C.C.No.2510 of 2012.

2. This case has arisen out of a private complaint given by the petitioner/complainant on the allegations that the revision petitioner had availed a loan of Rs.13,50,000/- from the respondent and agreed to repay the same with interest at the rate of 12% per annum and also issued a

post dated cheque dated 10.07.2012 for a sum of Rs.13,50,000/- towards discharging the same. The above cheque was drawn on Vijaya bank, Olavakkode Branch, Palakkad District and the cheque was presented for collection with the respondent ICICI bank, R.K.Salai Branch, Chennai on 11.07.2012. It was returned on 14.07.2012 for want of sufficient funds. After issuing statutory pre-suit notice and complying with the legal mandates, the complainant has filed by the complaint against the accused for committing the offence under Section 138 r/w 142 of the Negotiable Instruments Act (hereinafter referred as N.I. Act).

3. The case was taken on file by the Metropolitan Magistrate (Fast Track Court No.4) George Town, Chennai in C.C.No.2510 of 2012 dated 10.12.2014. When the petitioner / accused was questioned about the offence committed by him, he pleaded innocence and claimed to be tried. Hence, the trial was conducted.

4. On the side of the complainant, one (1) witness was examined as PW.1 and six (6) documents were marked as Ex.P.1 to Ex.P.6. When the incriminating evidence found in the evidence of the prosecution was put to the accused and questioned under Section 313 Cr.P.C., he denied the same. On the side of the accused, he himself examined as DW.1 and three (3) documents were marked as Ex.D1 to Ex.D3.

5. After the conclusion of the trial and on consideration of the materials available on record, the learned trial Judge, found the accused guilty for the offence under Section 138 of N.I. Act, convicted and sentenced him to undergo Simple Imprisonment for 2 years and awarded an amount equal to the cheque amount (i.e.) Rs.13,50,000/- as compensation payable to the complainant.

6. Against the said conviction, the accused has filed an appeal in C.A.No.5 of 2015, before the XVI Additional Sessions Court, Chennai. The same was dismissed by the learned XVI Additional Sessions Judge vide judgment dated 20.11.2015, confirming the order of the trial Court. Aggrieved over the same, the petitioner/accused preferred the present Criminal Revision Case.

7.Heard the learned counsel for the petitioner/accused and the learned counsel for the respondent/complainant.

8.The learned counsel for the revision petitioner/accused submitted that even in the reply notice sent by him to the statutory notice, he had stated that the cheque was stolen by his Manager and given it to the complainant for the purpose of foisting a case; the documents produced by the accused would show that on the alleged date of loan transaction i.e., on 10.05.2012, he was not available in Chennai and he had participated in a chit auction at Palakkad, Kerala, conducted by the Kerala State Finance Limited; the lower Courts have omitted to appreciate those evidence in a proper perspective and given the benefit of the rebuttal proof to the revision petitioner; the respondent did not have financial wherewithal to lend a sum of Rs.13,50,000/- as the loan to the revision petitioner and the same was also not properly appreciated by the Courts below.

9.The learned counsel for the respondent/complainant submitted that the trial Court has dealt with the defence documents and recorded clear findings that it is non acceptable; during the course of cross examination of PW.1, it was suggested on behalf of the revision petitioner that the respondent/complainant did not have financial wherewithal. to lend a huge amount as loan to him and he stated that he is engaged in an export business and he is earning good income and is paying Income tax; the said fact was not denied by the revision petitioner; once the fact has been appreciated by the trial court and later re-appreciated by the Sessions Court, the High Court should not once again appreciate the question of fact in the revision proceedings, unless there is any patent omission or commission in appreciation of evidence and that caused gross discourage of justice.

10. Points for consideration:

“Whether the lower Appellate Court is right in confirming the judgment of the learned trial Judge and whether the judgment of the Appellate Court is fair, proper or legal?”

11. The fact that the revision petitioner and the respondent are known to each other is not denied. The contention of the revision petitioner is that the impugned cheque was not issued by him directly to the respondent by way of loan amount and that the cheque was stolen by his Manager Sivaprasad and handed over to the complainant for the purpose of this case. There is no document or evidence placed before the Court to substantiate the fact that the cheque was stolen by the Manager of the revision petitioner and it was misused by the respondent. When the execution of the cheque is not denied, the mandatory presumption under Section 118 and 139 of N.I.Act, goes in favour of the complainant and it has to be presumed that the cheque was

issued only for discharging a legally enforceable debt or liability. However, the accused is at liberty to rebut the initial presumption by either adducing probable evidence from his side or by exposing the improbabilities in the case of the complainant. In the present case on hand, the revision petitioner has primarily relied on Ex.D1 which is said to be the extract of the register of auction proceedings which was held on 10.05.2012. It is seen from the said document that the name of Sivaprasad has been written against No.23 and and it is written as 'Proxy - Sivaprasad'. It is claimed by the revision petitioner that the above endorsement 'Proxy – Sivaprasad' in Ex.D2 is produced to show that the revision petitioner had participated in the auction proceedings as a proxy for Sivaprasad, who is his Manager.

12. The learned trial Judge had appreciated the probability of the defence taken by the revision petitioner on the basis of Ex.D2 by observing that it is highly improbable for a proprietor to represent by his Manager. In the normal course it would be on the reverse only. The Manager would be sent by the proprietor to participate in the proceedings on his behalf. And it has been similarly re-appreciated by the Appellate Court also. As I find no factual illegality or any apparent error on the record in appreciating the drove fact; it is not necessary to look into it once again from a different angle.

13. In this context, it is relevant to cite the decision relied by the learned counsel for the respondent held by the Hon'ble Supreme Court in Kishan Rao Vs. Shankar Gouda and reported in (2018) 8 SCC 16. The relevant portion is extracted hereunder:

> "11.The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused.
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> 12. This Court has time and again examined the scope of Sections 397/401 CrPC and the ground for exercising the revisional jurisdiction by the High Court. In State of Kerala v. Puttumana Illath Jathavedan Namboodiri [State of Kerala v. Puttumana Illath Jathavedan Namboodiri, (1999) 2 SCC 452 : 1999 SCC (Cri) 275] , while considering the scope of the

revisional jurisdiction of the High Court this Court has laid down the following : (SCC pp. 454-55, para 5)

"5. … In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinising the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence. …"

13. Another judgment which has also been referred to and relied on by the High Court is the judgment of this Court in Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke [Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke, (2015) 3 SCC 123 : (2015) 2 SCC (Cri) 19] . This Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in para 14 : (SCC p. 135)

"14. … Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

14.In the above case also conviction of the accused was recorded, the High Court set aside [Dattatray Gulabrao Phalke v. Sanjaysinh Ramrao Chavan, 2013 SCC OnLine Bom 1753] the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis."

14. In the decision of the Division Bench of the Hon'ble Supreme Court held in the case of Bir Singh Vs. Mukesh Kumar and reported in (2019) 4 Supreme Court Cases 197, the above point is reiterated as under:

"16. It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record.

17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [Southern Sales & Services v. Sauermilch Design and Handels GmbH, (2008) 14 SCC 457] , it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error. The answer to the first question is therefore, in the negative.

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....

32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

35. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

36. Even a blank cheque leaf, voluntarily signed and

handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

37. The fact that the appellant complainant might have been an Income Tax practitioner conversant with knowledge of law does not make any difference to the law relating to the dishonour of a cheque. The fact that the loan may not have been advanced by a cheque or demand draft or a receipt might not have been obtained would make no difference. In this context, it would, perhaps, not be out of context to note that the fact that the respondent-accused should have given or signed blank cheque to the appellant complainant, as claimed by the respondent-accused, shows that initially there was mutual trust and faith between them.

38. In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant complainant, it may reasonably be presumed that the cheque was filled in by the appellant complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act."

15. It is worthwhile to refer the another judgment of the Hon'ble Supreme Court rendered in Kalamani Tex and others Vs. P.Balasubramanian reported in (2021) 2 CTC 357, in connection with the initial presumption under Section 118 and 138 of N.I.Act. In the said judgment it is held as under:

"14. Once the 2nd appellant had admitted his signatures on the cheque and the deed, the trial court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial court fell in error when it called upon the respondent complainant to explain the circumstances under which the appellants were liable to pay. Such approach of the trial court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.

15. No doubt, and as correctly argued by the Senior Counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in M.S. Narayana Menon v. State of Kerala [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39, para 32 : (2006) 3 SCC (Cri) 30] , which was relied upon in Basalingappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571] , a probable defence needs to be raised, which must meet the standard of "preponderance of probability", and not mere possibility. These principles were also affirmed in Kumar Exports [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823] , wherein it was further held that a bare denial of passing of consideration would not aid the case of the accused.

16. The appellants have banked upon the evidence of DW 1 to dispute the existence of any recoverable debt. However, his deposition merely highlights that the respondent had an over-extended credit facility with the bank and his failure to update his account led to debt recovery proceedings. Such evidence does not disprove the appellants' liability and has a little bearing on the merits of the respondent's complaint. Similarly, the appellants' mere bald denial regarding genuineness of the deed of undertaking dated 7-11-2000, despite admitting the signatures of Appellant 2 thereupon, does not cast any doubt on the genuineness of the said document.

17. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar [Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197, para 36 : (2019) 2 SCC (Civ) 309 : (2019) 2 SCC (Cri)

40] , where this Court held that: (SCC p. 209, para 36)

"36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

18. Considering the fact that there has been an admitted business relationship between the parties, we are of the opinion that the defence raised by the appellants does not inspire confidence or meet the standard of "preponderance of probability". In the absence of any other relevant material, it appears to us that the High Court did not err in discarding the appellants' defence and upholding the onus imposed upon them in terms of Section 118 and Section 139 of NIA."

16. When the initial presumption lies in favour of the complainant, the reverse burden is on the shoulder of the revision petitioner. Despite the revision petitioner has stated that the respondent did not have financial wherewithal to lend a huge sum of Rs.13,50,000/- as loan, he did not deny the nature of the business carried out by the complainant. No reliable rebuttal proof is given by the revision petitioner to substantiate the said point. The rest of his evidence does not have the strength to demolish the initial presumption that was drawn in favour of the defacto complainant. In view of the same, the initial presumption along with the materials produced by the respondent/ complainant evolves into conclusive proof. The Courts below have rightly appreciated the same in a correct perspective. In my opinion it does not warrant any interference of this Court.

17. At this juncture, the learned counsel for the revision petitioner submitted that some indulgence should be shown in the quantum of sentence awarded to the petitioner. It is seen that the Courts below have imposed a sentence of two years Simple Imprisonment and awarded a compensation of Rs.13,50,000/-. Since the lower Court has awarded compensation, I feel that the sentence may be reduced. Accordingly, the sentence of two years Simple Imprisonment is reduced to 6 months Simple Imprisonment. The award of compensation stands unaltered.

18. In the result, this Criminal Revision Case

is partly allowed. The judgment of the learned Metropolitan Magistrate (Fast Track Court No.4), Chennai, which is confirmed by the learned XVI Additional Sessions Judge, Chennai is modified to the extent that the accused is found guilty for the offence under Section 138 of N.I.Act and he stands convicted and sentenced to undergo 6 months Simple Imprisonment. The award of compensation stands unaltered. The period of incarceration undergone by the accused can be set off under Section 428 Cr.P.C. The learned trial Judge is directed to issue Non Bailable Warrant for securing the accused and send him to prison to undergo the remaining period of sentence.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

rpl

To

1.The XVI Additional District and
Sessions Judge, Chennai.

2.The Metropolitan Magistrate
(Fast Track Court No.4),
George Town, Chennai.

Copy To

The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Ms.Jeyaganeshan, Advocate SR.No.69430
+2cc to Mr.N.Narayanaswamy, Advocate SR.No.69655

Crl.R.C.No.448 of 2016

PL(CO)
GN(10/02/2022)