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BAIL SLIP

The Petitioner/Accused namely A.Sabarinathan, S/o. Annamalai was directed to be released on bail vide order dated 13.04.2016 made in CRL.M.P.No.4316 of 2016 in CRL.R.C.No.617 of 2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.11.2021

CORAM :

THE HONOURABLE MS.JUSTICE R.N.MANJULA

CRL.R.C.NO.617 OF 2016

A.Sabarinathan
S/o. Annamalai

.. Petitioner/Accused

Vs.

G.Balakrishnan

.. Respondent/Complainant

PRAYER : Criminal Revision has been filed under sections 397 read with 401 of Criminal Procedure Code to set aside the conviction imposed in the judgment dated 28.01.2016 made in C.A.No.30 of 2015 on the file of the Principal Sessions Court, Namakkal, confirming the judgment dated 19.06.2015 made in S.T.C.No.62 of 2014 on the file of the learned Judicial Magistrate, Fast Track Court, Tiruchegode.

For Petitioner : Mr.N.Manokaran

For Respondent : Mr.E.C.Ramesh

ORDER

This Criminal Revision Case has been preferred challenging the judgment of the Principal Sessions Court, Namakkal dated 19.06.2015 made in C.A.No.30 of 2015, confirming the judgment dated 19.06.2015 on the file of the learned Judicial Magistrate, Fast Track Court made in S.T.C.No.66 of 2014.



2. This case has arisen out of an alleged cheque transaction between the petitioner and the respondent. The respondent has filed a private complaint under Section 138 of N.I.Act against the respondent on the allegations that on 16.11.2013 the petitioner had availed a loan of Rs.7,00,000/- from him and assured to repay the same within one month. On the same day itself he gave a post dated cheque dated 16.12.2013 drawn on HDFC bank, Tiruchengode. The respondent put the cheque for collection through his Canara bank, Tiruchengode branch and the cheque was returned on 13.01.2014 for the reason that there was no sufficient funds on the account of the petitioner. After issuing the statutory notice and after complying the legal mandates, the respondent has filed a private complaint against the accused under Section 138 of N.I.Act. During the course of trial on the side of the complaint, 2 witnesses were examined as PW.1 and PW.2 and Exhibits P1 to P14 were marked. On the side of the accused, the accused himself got examined as DW.1 and Ex.D1 is marked.

3. After considering the materials on records, the learned trial Judge has found the accused guilty under Section 138 N.I.Act and convicted and sentenced him to undergo S.I for 18 months and imposed a fine of Rs.10,000/- ; in default to undergo 4 months S.I. Aggrieved over that the accused has preferred an appeal before the Principal Sessions Court, Namakkal in C.A.No.30 of 2014. The said appeal was also dismissed by confirming the judgment of the trial Court. Now this Criminal Revision case has been filed by the petitioner/accused challenging the judgment passed in C.A.No.30 of 2014.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondent

5. Points for Consideration:-

The learned counsel for the petitioner submitted that the respondent/complainant did not have any financial wherewithals to give a loan of Rs.7,00,000/- to the accused and hence the cheque was not issued for legally enforceable debt. The learned counsel for the petitioner further submitted that the connected case filed on the same day against the respondent on the basis of the cheque given for a value of Rs.8,00,000/- by the accused was dismissed on the ground that the respondent/complainant did not prove his means successfully before the Court and hence this case should have also been dismissed.



6. The relationship between the accused and the complainant is not in dispute. The complainant is said to be the maternal uncle of the petitioner. The petitioner did not deny the execution of the impugned cheque. His only contention is that the cheque was not given to the respondent for discharge of any legally enforceable debt. But he had given the cheque by way of security to one Prema and the same cheque was misused by the respondent for the purpose of filing the case against him. The next submission of the petitioner/accused is that the respondent did not have means to lend a heavy amount of Rs.7,00,000/- as loan to him.

7. The respondent has alleged that the said amount of Rs.7,00,000/- was generated by him by selling his property, from and out of his retirement benefits, by pledging jewels in the name of the accused and his wife. The attention of this Court was drawn to the evidence of PW.1 wherein he has stated that he had got retirement benefit on 31.08.2011 and it was to the tune of Rs.7,00,000/-. The respondent/complainant was working as a staff in TNSTC and he retired from service on 31.08.2011. According to his evidence he got the retirement amount within 10 months of his retirement. If so, he ought to have got the amount during June 2012, but the transaction in question relates to the year 2013 only.

8. The learned counsel for the petitioner produced the account statement of the respondent to show that he did not have an outstanding of Rs.7,00,000/- between the period from 31.08.2011 to 07.1.2014. From the statement of accounts, it is seen that the respondent had held only a paltry sum of Rs.473/- as the outstanding. The receipts for pledging the receipts have been produced as Ex.P.8, Ex.P.9, Ex.P.11 and Ex.P.12 and they would show that the total amount involved in those receipts are Rs.3,00,000/- only. Out of these Ex.P.8 and Ex.P.10 stand in the names of the wife of the accused Sumathi and they are dated 03.01.2013 and 06.12.2013. Another receipt dated 15.01.2013 stands in the name of the accused and it is for Rs.67,000/-. The dates of these receipts have got no relevance to the date of the transaction between the petitioner and the respondent and the impugned cheques. Even if it is presumed that the respondent had arranged finance through some other sources and later raised the money by pledging it through Ex.P.11 and Ex.P.12, the total sum comes to Rs.1,54,000/- only. Further, it is difficult to believe that the wife of the accused and accused themselves have consented to pledge the jewels to raise money and then give it to the respondent for the purpose of getting it as loan from him. If the respondent claims that the jewels which were pledged in the name of the accused and his wife were belonging to him, then also it is difficult to understand why he had chosen to



pledge them in the names of the accused and his wife. Apart from PW.1 no other independent witness has been examined to substantiate the manner in which the respondent had raised the sum of Rs.7,00,000/-.

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9. The respondent was working as a driver in TNSTC and he did not have any other source of income. He has not received 7,00,000/- as retirement benefits and no such entries are found to be made in his bank account during the relevant period.

10. The Courts below have chosen to give the benefit of sec.139 of N.I.Act in favour of the respondent. The petitioner/accused did not deny the execution of cheque. Hence as per Section 139 of N.I.Act, it has to be presumed that the cheque was issued only towards discharging a legally enforceable debt and the holder of the cheque has got the right to recover it from the executor. However, the said presumption is subject to rebuttal evidence that might be given by the accused in order to prove the contrary. The accused had examined as DW.1 and he reiterated in his evidence that he had given the cheques to one Prema by way of security for the chit amount and that has been misused by the respondent/complainant. It has been already observed that the respondent/complainant has not proved his source for Rs.7,00,000/-.

11. The improbabilities and unrealistic circumstances existing in the evidence of the respondent/complainant can also serve as the preponderance of probabilities of the defence statement for the purpose of rebuttal proof. The learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court rendered in Basalingappa -vs- Mudibasappa reported in 2019 (5) SCC 418 in support of the above legal point. In the said judgement 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)

"12. Upon consideration of various judgments as noted hereinabove, the position of law which



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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 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."



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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 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



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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 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."



12. Hence the omission on the part of the respondent/complainant to prove the source for Rs.7,00,000/- can also serve as a probable circumstance in favour of the petitioner/accused and shift the preponderance in his favour. The Courts below omitted to appreciate the above position of law in a proper perspective and concluded the case by convicting the accused and hence it warrants interference.

13. In the result, the criminal revision case is allowed. The judgment of the Courts below is set aside.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Sessions Court,
Namakkal.
2. The Judicial Magistrate,
Fast Track Court, Tiruchegode.
3. The Chief Judicial Magistrate,
Namakkal.

+1cc to M/s.N.Manokaran, Advocate, S.R.No.60947

+1cc to M/s.E.C.Ramesh, Advocate, S.R.No.61171

Cr1.R.C.No.617 of 2016

RSI (CO)
RLP (30/12/2021)