

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Reserved on : 27.01.2021]

[Pronounced on : 15.02.2021]

CORAM :

THE HON'BLE MR. JUSTICE A.D.JAGADISH CHANDIRA

Cr1.R.C.No.171 of 2014

and

M.P.Nos.1 & 2 of 2014

K.Pondy
S/o.Krishnaraj

... Petitioner/Accused

Vs

P.S.K.Sivalingam
S/o.Kengannan
Proprietor
Shrie Lingam Textiles
5. Kamaraj Nagar
Kallankadu, Alampalayam Post
Erode & District

... Respondent/Complainant

Prayer: Revision petition filed under Section 397 r/w 401 of Cr.P.C. to set aside the conviction and sentence imposed in the judgment dated 20.12.2013 in C.A.No.18 of 2013 on the file of the Additional District and Sessions Judge of Namakkal confirming the judgment dated 25.03.2013 made in S.T.C.No.381 of 2012 on the file of the Judicial Magistrate, Fast Track Court, Tiruchengode, Namakkal District by allowing the present Criminal Revision Petition.

For Petitioner : Mr.M.Balasubramanian
for M/s.I.C.Vasudevan

For Respondent : Mr.S.Kamadevan

O R D E R

(The case has been heard through video conference)

For the sake of convenience, the petitioner and the respondent will be referred to as accused and complainant respectively.

2.It is the case of the complainant that the accused purchased the textile goods from him under credit basis on 17.02.2010 and in order to discharge the said liability, he had issued post dated cheque bearing No.020514 dated 11.06.2010 for Rs.2,57,000/- drawn on Bank of Baroda, Tiruppur (Ex.P1) and as per the request of the accused, the complainant presented the said cheque for collection through Corporation Bank, Pallipalayam Branch on 24.11.2010 and the same was returned unpaid with an endorsement "payment stopped by the drawer" as per return memo dated 24.11.2010 (Ex.P2); the complainant issued a statutory demand notice dated 04.12.2010 (Ex.P3), which was received by the accused vide Ex.P4 and Ex.P5 dated 06.12.2010, 14.12.2010 respectively and the accused did not send any reply. Therefore, the complainant initiated prosecution in S.T.C.No.381 of 2012 before the Learned Judicial Magistrate, Fast Track Court (Magisterial Level), Tiruchengode, under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as N.I. Act) against the accused.

3.On appearance, the accused was questioned under Section 251 Cr.P.C. and he denied the accusation.

4.The complainant examined himself as P.W.1. and marked Ex.P1 to Ex.P5.

5.When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same and he examined himself as DW1 and one Ramakrishnan as DW2 and marked Ex.D1 to D7. The accused took two pleas in defence. The 1st defence raised was that he did not receive the legal notice and that the cheque was given along with four other cheques towards security to one Murugesan of Pallipalayam and the said Murugesan misused the cheque and handed it over to the complainant and through him the complaint was filed. Another defence taken by the accused was that the post dated cheque was given towards the purchase of textile under Ex.D3 to Shrie Lingam Textiles, Bill No.32 dated 17.02.2010, the complainant had not supplied the goods, whereas, the cheque was presented for collection and that he had given a complaint against the complainant before the Superintendent of Police, Namakkal and that no action was taken.

6.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 25.03.2013 in S.T.C.No.381 of 2012, convicted the accused under Section 138 of N.I. Act and sentenced him to undergo simple imprisonment for six months and to pay a compensation of Rs.2,57,000/- under Section 357 of Cr.P.C., against the conviction and sentence, the accused filed C.A.No.18 of 2013,

before the learned Additional District and Sessions Judge, Namakkal and the same was dismissed by the Judgment and order dated 20.12.2013. Aggrieved by the concurrent findings of the Courts below, the accused has preferred the present Criminal Revision under Section 397 read with 401 Cr.P.C.

7. Heard Mr.M.Balasubramanian, learned counsel appearing for the Revision Petitioner and Mr.S.Kamadevan, learned counsel appearing for the complainant.

8. Learned counsel for the Revision Petitioner would submit that the Courts below have erred in convicting the petitioner without considering the material fact and that there was no consideration for the cheque and there was no legally enforceable debt between the Revision Petitioner and the respondent. The Revision petitioner let in evidence by entering into the box stating that the cheque had been given to one Murugesan of Pallipalayam as security and the same was misused by him and the property of the petitioner was also usurped by a sale deed based on the Power of Attorney viz. Ex.D2. The complainant in collusion with the said Murugesan had forged the cheque and foisted a case in his name.

9. Learned counsel for the respondent / complainant would submit that the complainant has proved his case beyond reasonable. He would further submit that the accused had not replied to the notice immediately, whereas a belated notice has been sent after six months. The Trial Court taking into consideration the inconsistent plea raised by the accused, disbelieving him and convicted him finding that the accused had not rebutted the presumption by letting in cogent evidence.

10. Before advertng to the rival submissions, it is necessary to substantiate the principle that while exercising Revisional jurisdiction involving concurrent finding at two Courts below, the High Court cannot act as a second appellate Court [See State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others, etc. (2004) 7 SCC 659]. Very recently, in Bir Singh Vs. Mukesh Kumar [(2019) 4 SCC 197], the Supreme Court has held as under:

"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.

(emphasis supplied)

11. In the present case on hand, it is the submission of the complainant that he had supplied textiles to the accused in

credit basis and the accused in order to discharge his liability had issued a post dated cheque viz. Ex.P1. The accused had not sent any reply to the statutory notice immediately and has not repaid the amount within the time frame contemplated despite the accused personally receiving the legal notice as per Ex.P4 and the acknowledgment card as per Ex.P5. The accused had not denied the signature of the cheque whereas the accused had taken inconsistent defences before the Trial Court. At one point of time, he had taken a plea that he borrowed a loan from one Murugesan through the complainant and at that time the disputed cheque along with four other cheques were given to the said Murugesan of Pallipalayam and that were misused by the complainant and the property of the accused was also taken over by the said Murugesan and that the complainant in collusion with the said Murugesan had filed the complaint. Yet another plea taken by the accused is that the cheque viz. Ex.P1, was issued towards the supply of goods under Ex.D3 viz. Bill No.32 dated 17.02.2010 and since the goods were not supplied and the cheque was misused, a complaint was given to the Superintendent of Police vide Ex.D1 dated 25.05.2011 (xerox copy) the Trial Court raised a suspicion with regard to the genuineness of Ex.D1 and finding that too having been given after a month's time and finding that no further steps were taken by the accused to proceed with the complaint Ex.D1 disbelieved and further finding that the signature was not denied, found the accused guilty and the Appellate Court also confirmed the same. Both the Courts below found that the defence raised by the accused was differing and inconsistent and therefore arrived at a finding that as the accused had not sent any reply to the statutory notice despite personally receiving the same held that the accused had not rebutted the presumption.

12.It is well settled that the presumption mandated under Section 139 of N.I.Act includes presumption of existence of a legally enforceable debt or other liability, but at the same time, it should not be forgotten that the presumption contemplated under Section 139 of N.I. Act is a rebuttable presumption and that in every criminal case, the accused is to be proved guilty of offence either by leading positive evidence or by evidence in the form of presumption. In so far as the presumption contemplated under Section 138 of N.I.Act, it has been made clear by the Hon'ble Apex Court that the presumption under Section 139 of N.I.Act is a rebuttable presumption only when it is rebutted by the accused. Though the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability as held by the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118], in this case on hand the accused has not done the same and he has not rebutted the presumption under Section 139 of N.I.Act and thereby the Courts below have rightly found the accused guilty and convicted him.

Therefore, this Court does not find any infirmity or illegality or perversity in the findings of the facts arrived by the Courts below, warranting interference.

13. In the result, this Criminal Revision is dismissed as being devoid of merits. The conviction and sentence imposed by the Trial Court, which is confirmed by the Appellate Court stands unaltered. The Trial Court is hereby directed to secure the accused and commit him to prison to undergo sentence. Consequently, the connected miscellaneous petitions are also dismissed. The Registry is directed to transmit the original records if any, to the respective Courts forthwith.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Additional District and Sessions Judge
Namakkal District

2. The Judicial Magistrate
Fast Track Court
Tiruchengode
Namakkal District

3. The Chief Judicial Magisterial, Namakkal

4. The Deputy Registrar
Criminal Side
High Court, Madras

Cr1.R.C.No.171 of 2014

SV(CO)
SP(01/03/2021)

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