Bail Slip

The appellant/Sole accused namely S.Latha,Female aged 37, W/O Sathish Kumar, was directed to be released on bail as per the order of this Court, dated 19/07/2017 in CRL.MP(MD)No.6321/17 in CRL.RC (MD)No.572/2017 on the file of this Court.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.06.2021
DELIVERED ON : 30.07.2021

CORAM

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

CRL.R.C.(MD)No.572 of 2017

S.Latha : Petitioner/Appellant/Accused

Vs.

P.Ramesh Kumar : Respondent/Respondent/Complainant

PRAYER: Criminal Revision Petition filed under Section 397 Cr.P.C. r/w. Section 401 of Criminal Procedure Code, to call for the records pertaining to the judgment, dated 16.05.2017 on the file of the learned Judge, Mahilar Fast Track Court, Sivagangai, in Crl.A.No.14 of 2014 by confirming the conviction and sentence passed by the learned Judicial Magistrate, Fast Track Court, Karaikudi, in C.C.No.189 of 2012, dated 03.03.2014 and set aside the same and acquit the revision petitioner/accused.

For Petitioner : Mr.M.Saravanan

For Respondent : Mr.P.Saravana Kumar

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ORDER

This Criminal Revision is filed by the accused as against the judgment, dated 16.05.2017 on the file of the learned Judge, Fast Track Mahila Court, Sivagangai, in Crl.A.No.14 of 2014 by confirming the conviction and sentence passed by the learned Judicial Magistrate/Fast Track Court, Karaikudi, in C.C.No.189 of 2012, dated 03.03.2014.

2.Heard Mr.M.Saravanan, learned Counsel for the Revision Petitioner and Mr.P.Saravana Kumar, learned Counsel for the Respondent.

3.The brief facts of the case are as follows:

3.1.The complainant, Ramesh Kumar, in C.C.No.189 of 2012 on the file of the learned Judicial Magistrate, Karaikudi, is a business man dealing in handicrafts and art materials at Karaikudi. He is a tenant in the property of the accused. The accused, Latha, wife of Sathish Kumar, had borrowed Rs.10,00,000/- for the purpose of business, "AP Travels" from the complainant. She had executed a promisory note and handed over two cheques bearing No.135688, dated 01.11.2011, Vijaya Bank, Karaikudi for Rs.7,00,000/- and another cheque bearing No.135487, dated 01.11.2011, Vijaya Bank for Rs.3,00,000/-. On request of the accused, the complainant presented the first cheque. The cheque was dishonoured and complainant filed a case in the Court of the learned Judicial Magistrate, Karaikudi which is pending in S.T.C.No.321 of 2012.

3.2.The second cheque, which was issued by the accused, was presented by the complainant on 24.05.2012 in the complainant's bank, namely, ICICI Bank, Karaikudi Branch,. The said cheque was returned due to closure of account on 24.05.2012. Therefore, the second cheque was dishonoured due to the closure of account. Closure of account also attracts the provisions of Section 138 of Negotiable Instruments Act. Therefore, the complainant had issued notice to the accused directing her to settle the amount, failing which, he will initiate proceedings under Section 138 of Negotiable Instruments Act.

3.3.The notice issued to the accused was received by the accused, but, she did not settle the dues. Therefore, the complainant filed private complaint under Section 138 of Negotiable Instruments Act, as amended by Act 54 of 2004. The learned Judicial Magistrate, Karaikudi, had taken the private complaint on file and numbered it as C.C.No.189 of 2012 and summons were issued to the accused. When the accused appeared, the accused was furnished with the copies of the complaint and questioned, the accused pleaded not guilty and claimed to be tried. Therefore, the trial was ordered. The complainant himself examined as PW-1. The documents were marked as Ex-P1 to Ex-P6. Ex-P1 is the the dishonoured cheque. Ex-P2 is the bank returned memo. Ex-P3 is the notice sent to the accused. Ex-P4 is the postal receipt for booking the notice through registered post. Ex-P5, delivery note regarding the delivery of the notice on the accused. Ex-P6, is the reply notice from the accused.

3.4.PW-1, who was cross examined exhaustively and nothing was solicited from the cross examination of PW-1 favouring the accused. The Manager, ICICI Bank, Karaikudi Branch, was examined as PW-2. He had stated regarding the facts, where the cheque was dishonoured and issuance of memo to the complainant. The complainant's evidence was closed with PW-2. The incriminating portions of the evidence was put to the accused under Section 313 Cr.P.C. The accused denied the incriminating evidence against her. The accused had not let in any evidence, as defence witness. She had not examined any witness in support of her contention.

3.5.On appreciation of the evidence, the learned Judicial Magistrate, Karaikudi, had pronounced the judgment, whereby, the accused was convicted for the offence under Section 138 of Negotiable Instruments Act and sentenced to undergo the imprisonment for a period of six months and a compensation for a sum of Rs.3,00,000/-. Aggrieved by the judgment of conviction and order of sentence and compensation of Rs.3,00,000/-, the accused had filed Criminal Appeal in Cr.A.No.14 of 2014 before the learned Principal District and Sessions Judge, Sivagangai, The learned Principal District and Sessions Judge, Sivagangai, made over the case to the Court of the Special Judge, Mahila Court, Sivagangai. On appreciation of the evidence and on facts, the learned Special Judge, Mahila Court, Sivagangai, had confirmed the findings of the learned Judicial Magistrate, Karaikudi and dismissed the appeal. Therefore, the accused had preferred the above revision.

4.The grounds of revision are as follows:

i)The judgment of conviction and sentence passed by the trial Court and the appellate court are ex-facie illegal and not sustainable.

ii)The learned Trial Court and the Appellate court ought to have seen that the Respondent/Complainant projected his case.

a)that he being a tenant under the petitioner/accused was familiar to him and hence he gave Rs.10 Lakhs as loan to the petitioner/accused in the 5th month of 2011 after obtaining two post dated cheque, on bearing No.135688 for Rs.7 Lakhs and another one bearing No.135687 for Rs.3 Lakhs and an unfilled promissory note.

b)that the Respondent examined himself and his brother Pws1 & 2.

c)that mark Ex.P.1- the cheque No.135687 dated 01.1.11 for Rs.3 Lakhs, Ex.P.2- memo of the bank dated 26.05.12 for returning cheque as 'account closed', Ex.P3- the statutory notice dated 13.06.12, Ex.P.4-postal receipt for having sent the statutory notice dated 13.06.12, Ex.P.5-postal acknowledgement and Ex.P.6-the reply of the petitioner/accused dated 26.06.2012 to substantiate the charge.

d)He has not stated the date on which he filed the complaint before the Court concerned.

iii)The learned Courts below ought to have seen that the Petitioner/accused has put forth her case.

a) That she is a handicapped person, and she is looking after her mentally retarded brother and sister,

b) that one Rajeshkumar a brother of the Respondent *is a tenant in their properties,*

c)that she borrowed Rs.2 lakhs from Rajeshkumar by giving promissory notes and 2 cheques including P1 cheque as security and she gave several unfilled cheques towards interests therefor.

d)The petitioner/accused insisted Rajeshkumar to vacate from her property since he failed to pay the rent properly. The said Rajeshkumar has with a view to grab her properties filed civil and criminal cases through his brother and father against the petitioner and her husband by fabricating the said cheques and the promissory notes. Hence the petitioner closed her bank account. She did not borrow Rs.10 lakhs from the respondent/complainant and did not give him any cheque or promissory note to him as alleged.

iv)The learned Trial Court has been pleased topoint out in para 12 of the judgment that it is the duty of the complainant (respondent herein) to establish that he received the cheque in question for the discharge in whole or in part of any debt or liability but failed to see that the respondent/complainant has failed to prove the said fact.

v)The learned Trial Courts below have failed to see that the evidence of PW1 the respondent/complainant, when considered in the light of the answers elicited in cross examination, would show that the petitioner/accused borrowed money not from PW1 but from the brother of PW1 by giving 2 cheques including P1 and an unfilled promissory note. Thus the petitioner/accused did not give P1 cheque to discharge his debt or liability to the respondent/complainant.

vi)The learned courts below ought to have seen that the Respondent/Complainant has assertively stated in his statutory notice, complaint, proof of affidavit and in his chief examination that he became familiar with the petitioner/accused on the reason that he was doing handy-craft and Art materials business in the property of the petitioner/accused in Karaikudi as a tenant and as such he gave the loan to the petitioner/accused for the development of her A.P.Travels.

vii)The learned Trial Court and the Appellate Court ought to have seen that the Respondent Complainant has admitted in cross examination.

a) that he was not the tenant under the Petitioner/Accused and his brother Rajeshkumar was the tenant under the petitioner/accused.

b)that he id not do any business of his own and he and his father were assisting his brother Rajeshkumar for doing his business.

c)that he did not know whether the Petitioner/Accused was running A.P.Travels or not and how many vehicles & what type of vehicles were there to A.P.Travels.

d)that he did not know anything about the financial transaction made by his brother with the petitioner/accused.

e)that he did not know the date on which the petitioner/accused borrowed the money.

f)that he does not have any evidence to show that he was capable of giving Rs.10 lakhs as loan as he claimed

g)that he does no know as to how much of the rent arrears his brother owed to pay to the petitioner/accused.

h)that he, his brother & his father are residing in one and the same house.

i)that he obtained the cheque no.135688 for Rs.7 lakhs and a pronote along with P1 cheque from the petitioner while giving single loan of Rs.10 lakhs in respect of the dishonour of the above said cheque to the value of Rs.7 lakhs, PW1's brother Rajeshkumar issued the statutory notice dated 09.12.2011 stating that the petitioner/accused borrowed Rs.10 lakhs from the said Rajeshkumar.

j)that he is in possession of the unfilled pronote received from the petitioner/accused in respect of the very same loan but he did not produce it in this case.

k)that after sending in amendment to the statutory notice sent by his brother in respect of the cheque no.135688 for Rs.7 lakhs PW1 filed a case u/s.138 of Negotiable Instruments Act against the petitioner/accused. (The said case in C.C.No.153 of 2012 ended in acquittal).

l)and that his father has filed a civil case against the petitioner/accused based on a pronote.

viii)The courts below ought to have seen that the evidence deposed by the Respondent/Complainant with reference to the undisputable documentary evidence would show that the Respondent/Complainant's brother Rameshkumar had given loan to the Petitioner/accused on accepting P1 cheque along with another cheque bearing No.135688 and an unfilled promissory note as security. Thus P1 cheque was not given for discharging any debt or liability owed by the petitioner/accused to the respondent/complainant.

ix)the petitioner reserves his right to raise additional grounds at the time of arguments"

5.As per the written submissions of the learned Counsel for the Revision Petitioner is that in the evidence of PW-1, P.Ramesh Kumar, had admitted during cross examination that he is not doing any business. But his brother is only tenant under the respondent. PW-2 in his evidence deposed that he had entered into an agreement with the accused to purchase her property by mentioning Rs.40,00,000/- paid by cash and adjusting with other loan amounts. PW-2 admitted in his cross examination that he did not pay cash, while executing the agreement. The promissory note, that the accused had already been executed, had not been marked during the trial. The defence of the accused is that the brother of the complainant, as tenant of the respondent, had obtained the cheque by fraud from the accused and misused the same. PW-2 in his evidence had stated that he does not know the avocation of the landlady. PW-1 had admitted that he does not know the transaction between his brother and the accused. He does not have the records regarding the business done by him and also as proof to show that he has resources Rs.10,00,000/-. The accused had directed the brother of the complaint to vacate the property. Therefore, he had foisted his brother PW-1, to file this complaint to misuse Ex-P1, cheque. The evidence of the complainant would corroborate the claim of the respondent/accused. The accused had not properly rabbeted the presumption. The non consideration of the above by the Trial Court as well as the Appellate Court, is against the principle enunciated by the Honourable Supreme Court.

6.The learned Counsel for the Revision Petitioner relied on the ruling of the Honourable Supreme Court in ***Kumar Experts vs Sharma Carpet***, wherein, it was held that the use of the words “unless the contrary is proved” in Section 118 of the Act and the use of the words “may presume” and “shall presume” has given in Section 4 of the Indian Evidence Act, makes it clear that the presumptions to be raised under both the provisions are rebuttable.

7.The learned Counsel for the Revision Petitioner also relied on the ruling of the Honourable Supreme Court in the case of ***Krishna Janardhan Bhat vs Dattatraya G.Hegde***, wherein, the Honourable Supreme Court held as follows:

> *“25.Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.”*

8.The learned Counsel for the Revision Petitioner relied on the reported ruling of the Honourable Supreme Court in ***2007 (12) SCALE 96***, in the case of ***K.Prakashan vs P.K.Surendran***, wherein the Supreme Court held as follows:

12.The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118(a) therein, and secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 and 139 are rebuttable in nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision".

9.The learned Counsel for the Revision Petitioner also relied on the reported Rulings of Honourable Supreme Court in the case of ***John K.John vs Tom Varghese and another***, reported in ***JT 2007 (13) SC 222***, wherein, the Honourable Supreme Court held as follows:

"10.The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken.

10.The learned Counsel for the Revision Petitioner also relied on the reported rulings of this Court in ***N.Krishnagiri vs M/s.18 Step Medias Private Limited and two others***, reported in ***2017-1 LW (Crl) 348***, wherein, the learned Single Judge of this Court held as follows:

"24. It is an axiomatic principle in Law that there shall be a presumption unless the contrary is proved that the 'Holder of a Cheque' received the 'Cheque' in 'Discharge of a Liability'. The aim of bringing section

138 of the Negotiable Instruments Act, 1881 is to instill faith in the efficacy of banking operations and credibility in transaction of business on 'Negotiable Instruments'. It is true that the offence under section 138 of the Negotiable Instruments Act, is not akin to murder, Simple/Grievous hurt as the case may be. One cannot ignore a vital fact that an offence under section 138 of the Act is created purely by a legal fiction. When a cheque is issued not for the purpose of discharge of any debt or other Liability, the maker of the cheque is, undoubtedly, not liable for any prosecution, in the considered opinion of this court.

25. The ingredients of section 138 of the Act are (1) that there is a legally enforceable debt; (2) that the cheque was drawn from the account of bank for discharge in entirety or in part of any debt or other liability which presupposes a legally enforceable debt; and (3) that the cheque was issued and was returned because of 'insufficiency of funds'.

26. In this regard, this court pertinently points out that the presumption under section 139 of the Act extends only to the issuance of cheque towards discharge of legally enforceable debt or liability and it has to be raised only after the Complainant proves that such debt or liability, in fact, exists as on the date of cheque in question and that the cheque was given to him by the Accused. By now, the law is well settled that the 'Burden of Proof' for rebutting presumption is not the same for proving of a criminal charge. For rebuttal of presumption arising in favour of prosecution, the principle of 'preponderance of probability' clearly applies whereas to prove a 'Criminal Charge', a strict proof squarely applies.”

11.Therefore, the learned Counsel for the Revision Petitioner seeks indulgence of this Court to set aside the judgment and sentence passed by learned Judicial Magistrate, Karaikudi, and acquitted the accused from the charges.

12.The learned Counsel for the respondent submitted his side written arguments and the relevant portions of which are as follows:

“5.It is submitted that the Learned Trial Judge in his order, dated 03.03.2014, convicted the Revision Petitioner and sentenced her to undergo 6 months imprisonment and furthermore ordered to pay a compensation of a sum of Rs.3,00,000/- u/s 357(3) Cr.P.C., within a period of two months from the date of judgment, failing which, the Revision Petitioner has to

undergo 1 month imprisonment. Against which, the Revision Petitioner preferred an appeal in Crl.A.No.14 of 2014 before the District Sessions Court, Sivagangai, the said Appellate Court also confirmed the Trial Court Judgment by its judgment dated 16.05.2017. Against the concurrent findings of both the Courts below, the Revision Petitioner filed the above Criminal Revision Petition before this Hon'ble Court.

6.It is submitted that the Trial Court has clearly stated that the cheque was given by the Revision Petitioner alone and the signature in the cheque was also confirmed to be this Revision Petitioner. Secondly, the stand taken by the Revision Petitioner that the Respondent was not known to them and only it is the brother of the Respondent, who one Rajeshkumar, who lended a sum of Rs.2,00,000/- to the Revision Petitioner. The said contentions were also not proved by the Revision Petitioner by properly adducing any witnesses or evidences in this regard and even in respect of proving the source of fund. Also the Trial Court found that having complete knowledge of the presentation of the first cheque and its return, the Revision Petitioner purposefully in order to cheat this Respondent has closed her account leading to return the Second cheque terming as insufficient funds, being presented by this Respondent. Finally, the Trial Court, by concluding that the Revision Petitioner, has not adduced any evidence or witness to disprove the contentions raised by this Respondent in his complaint has confirmed that the Revision Petitioner is guilty of offence committed u/s. 138 of N.I.Act and sentenced to undergo 6 months imprisonment and furthermore ordered to pay a compensation of a sum of Rs.3,00,000/- u/s. 357(3) Cr.P.C., within a period of two months from the date of judgment, failing which, the Trial Court sentenced the Revision Petitioner to undergo 1 month imprisonment. Hence, concluding in all aspects, the judgment rendered by the Courts below needs no interference and has to be confirmed."

13.Therefore, the learned Counsel for the respondent submitted this revision does not lie, as perverse and the finding of the learned Judicial Magistrate is based only on appreciation of evidence let in before the learned Trial Judge.

The point for consideration

Whether the judgment of conviction passed by the learned Judicial Magistrate, Karaikudi, which was later confirmed by the learned Additional District Judge, Mahila Court, Sivagangai, confirming the judgment of the learned Judicial Magistrate, Karaikudi, dated 16.05.2017 is to be set aside as perverse?

14.The appeal before the learned Special Judge, Fast Track Mahila Court, Sivagangai, was dismissed after hearing the arguments. The learned Special Judge, had observed that even though the arguments putforth by the learned Counsel for the accused is found reasonable, the presumptions available in the case are in favour of the complainant under Section 138 of Negotiable Instruments Act. The person, who raises objection, as the accused under Section 138 Negotiable Instruments Act, had to enter the witness box and lead evidence. It is considered as rebuttable evidence. Here, in this case, rebuttable evidence was not let in by the accused.

15.The usual defence of the accused stated in the reply notice that the accused had borrowed Rs.2,00,000/- only from the complainant's brother and the accused had sought return of the documents executed by the accused from the brother of the complainant. But, he refused by stating that they have become invalidated. Therefore, the reply notice given under Ex-P6 on behalf of the accused is found that the accused denied the claim and refused the claim of the complainant. After recording all the evidence on the side of the complainant, the burden shift on the accused to discharge the burden cast upon the accused to let in evidence. Since the accused had not discharged the burden cast upon him, there is no material to consider the judgment of the Trial Judge or Special Judge, as the finding is perverse.

16.The Honourable Supreme Court in the case of State represented by the Drugs Inspector vs Manimaran, reported in (2019) 13 SCC 670, held as follows:

> "Criminal Procedure Code-1973, Section 401 – Revision jurisdiction- Scope – Revisional jurisdiction of High Court different from appellate jurisdiction – High Court, in revisional jurisdiction cannot interfere with concurrent findings of facts unless perverse or arrived at ignoring material evidence."

17.The Revision Court has only a limited discretion to interfere with the judgment of the Trial Court. Only if there is dispute regrading the evidence or recording of the evidence or perverse finding, the Revision Court can exercise its power. In the above circumstances, the argument of the learned Counsel for the Revision Petitioner that the judgment by the learned Trial Judge, which was confirmed by the learned Appellant Judge, is perverse, cannot be accepted. The learned Trial Judge had discussed the evidence available before the Court fairly. Therefore, the learned Appellate Judge had rightly rejected the contention raised by the learned Counsel for the accused.

In view of the above discussion, the point for consideration is answered in favour of the respondent/complainant and against the revision petitioner/accused.

In the result, the Criminal Revision is dismissed and the judgment, dated 16.05.2017 on the file of the learned Mahilar Fast Track Court, Sivagangai, in Crl.A.No.14 of 2014 by confirming the conviction and sentence passed by the learned Judicial Magistrate/Fast Track Court, Karaikudi, in C.C.No.189 of 2012, dated 03.03.2014, is confirmed. The learned Judicial Magistrate, Fast Track Mahila Court, Karaikudi, shall issue warrant against the accused in C.C.No.189 of 2012, so as to forward him to Prison to undergo the sentence of imprisonment.

Sd/-

Assistant Registrar (AD II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

cmr

To

1.The Judge, Fast Track Mahila Court, Sivagangai.

2.The Judicial Magistrate, Fast Track Court, Karaikudi.

3.The Chief Judicial Magistrate,
Sivagangai.

+1 CC to M/s.M.SARAVANAN, Advocate (SR-24620[F] dated 30/07/2021)

Pre-delivery order made in
CRL.R.C.(MD) No.572 of 2017
30.07.2021

MGJ(06.08.2021) 11P 5C