

BAIL SLIP

CRL.RC(MD).No. 732 of 2017

S. Marimuthu Samuel, S/o Sinnakani (Sole Accused) is released on bail vide court order dated 18.09.2017, made in CRL MP(MD). No.8516 of 2017 in CRL RC(MD).No. 932 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.02.2021

Pronounced on : 01.04.2021

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CRL.RC(MD).No. 732 of 2017

S. Marimuthu Samuel : Petitioner / Accused/Appellant

Vs.

Thirumalainambi : Respondent / Complainant/Respondent

PRAYER:- Criminal revision filed against the Judgment in C.A.No.47 of 2015 on the file of the III Additional Sessions Judge, Tirunelveli, dated 10.08.2017 confirming the conviction and sentencing the petitioner 4 months imprisonment and awarding compensation of Rs.1,00,000/- within one month in default 1 month imprisonment for the alleged offence under Section 138 of Negotiable Instruments Act imposed by the Judgment in C.C.No. 230 of 2006 on the file of the Judicial Magistrate, Nanguneri, dated 19.05.2015.

For petitioner : Mr. T.A. Ebenezer
For Respondent : No appearance

ORDER

This Criminal Revision is directed against the concurrent Judgments of conviction passed in C.A.No.47 of 2015, dated 10.08.2017 on the file of III Additional District and Sessions Court, Thirunelveli confirming the Judgment made in C.C.No.230 of 2006 dated 19.05.2015 on the file of the Court of the Judicial Magistrate, Nanguneri.

2. The accused is the revision petitioner. The respondent / complainant has preferred a complaint under Sections 138 and 142 of the Negotiable Instruments Act, 1881.

3. Despite the receipt of notice, the respondent has not chosen to appear either in person or through counsel. Heard the learned counsel for the petitioner.

4. For the sake of convenience and brevity, the parties herein after will be referred as per the status / ranking before the trial Court.



5. The case of the complainant is that the accused borrowed a sum of Rs.1,00,000/- on 06.04.2006 to meet out his family urgent needs from the complainant and agreed to repay the same within first week of July 2006, that when the complainant demanded the amount on 06.07.2006 the accused has issued a cheque bearing No.981532, dated 06.07.2006 drawn on State Bank of India, Nanguneri for Rs.1,00,000/- in favour of the complainant, that the complainant has presented the said cheque for collection on 06.07.2006 through his Banker Indian Overseas Bank Branch, Eruvadi Branch, that the same was returned dishonoured for insufficient funds in the Bank account of the accused, that the complainant has then sent a legal notice on 27.07.2006 demanding the payment of the amount covered by the cheque, that though the accused has received the notice on 28.07.2006, he has neither chosen to reply nor made any payment and that therefore, the complainant was constrained to file a complaint against the accused for the offence under Sections 138 and 142 of the Negotiable Instruments Act.

6. The learned Judicial Magistrate, after receiving the complaint, has recorded the sworn statement of the complainant and on perusing the records, after satisfying that there existed a prima facie case, has taken the case on file under Section 138 of Negotiable Instruments Act in C.C.No.230 of 2006 and ordered issuance of summon to the accused. After appearance of the accused, copies of the records were furnished to him under Section 207 Cr.P.C., on free of cost. When the accused was questioned about the offence alleged against him, he denied the commission of offence and pleaded not guilty.

7. During trial, the complainant has examined himself as PW.1 and exhibited four documents as Exs.P1 to P4. After closure of the complainant side evidence, when the accused was questioned under Section 313(i)(b) Cr.P.C., he denied the complainant's side evidence as false and stated that a false case has been foisted against him. Thereafter, the accused has examined himself as DW.1 and exhibited one document as Ex.D1.

8. The learned Judicial Magistrate, upon considering the evidence and on hearing the arguments of both sides, has passed the Judgment on 19.05.2015, holding that the complainant has proved his case beyond reasonable doubt, convicted the accused and sentenced him to undergo four months Simple Imprisonment and to pay a sum of Rs.1,00,000/- as compensation under Section 357 Cr.P.C., within a month, in default to undergo one month imprisonment. Aggrieved by the Judgment of conviction, the accused has filed the appeal in C.A.No.47 of 2015 and the learned III Additional District and Sessions Judge, Thirunelveli, on perusing the records and on hearing the arguments of both sides, has passed the impugned judgment on 10.08.2017 dismissing the criminal appeal and thereby, confirming the Judgment of conviction and sentence passed by the learned



Judicial Magistrate, Nanguneri. Aggrieved by the Judgment of the dismissal, the accused has come forward with the present revision.

9. The learned counsel appearing for the revision petitioner would contend that the accused has preferred a complaint before the police instead of giving reply notice and therefore, the failure to issue reply notice will not affect the case of the accused, that the Courts below have also failed to consider that the contradictions of the prosecution side with respect to the reply notice stating that the accused is well known to the complainant for the past 10 years contradicting his own statement in the Court to the effect that the accused is known to him for one year, that the Courts below failed to consider that the PW.1 states in his evidence that the accused filled up the cheque in the first instance and subsequently, changed his version that a person out of three persons accompanied the accused, had filled up the cheque, that the Courts below failed to consider that the failure on the part of the police to proceed with the proper action on the complaint given by the accused could not be taken against him, that the Courts below also failed to consider that one other cheque alleged to be issued to Sankarapandian is no way connected to the present case and the same could not affect the defence and that the Appellate Court failed to consider that the accused should be given proper hearing before convicting him and the Court without hearing the accused, has proceeded with the appeal.

10. Whether the impugned Judgment of the conviction passed in C.A.No.47 of 2015, dated 10.08.2017 on the file of III Additional District and Sessions Court, Thirnelveli, confirming the Judgment made in C.C.No.230 of 2006 dated 19.05.2015 on the file of the Court of the Judicial Magistrate, Nangunerei is liable to be set aside? is the point for consideration.

11. Before entering into the factual aspects of the case, it is necessary to refer Section 118 (a) and Section 139 of Negotiable Instruments Act which deal with statutory presumption:

*"118. Presumptions as to negotiable instruments-
118. Presumptions as to negotiable instruments- Until the contrary is proved, the following presumptions shall be made: -*

(a) of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration ;

139. Presumption in favour of holder.

139. Presumption in favour of holder. It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section



138 for the discharge, in whole or in part, of any debt or other liability."

12. It is the specific case of the complainant that the accused borrowed a sum of Rs.1,00,000/- on 06.04.2006 to meet out his urgent family needs from the complainant and agreed to repay the same within the first week of July 2006, that when the amount was demanded by the complainant on 06.07.2006, the accused has issued a cheque bearing No.981532, dated 06.07.2006 drawn on State Bank of India, Nanguneri for Rs.1,00,000/- in favour of the complainant under Ex.P1, that the complainant has presented the cheque for collection through his Banker Indian Overseas Bank, Eruvadi Branch on 06.07.2006, that the cheque was returned dishonored for want of funds in the bank account of the accused vide State Bank of India Memo dated 07.07.2006 under Ex.P2, that the complainant has then sent a legal notice on 27.07.2006, demanding the payment of the amount covered by the cheque under Ex.P3, that the accused has received the said notice on 28.07.2006 vide postal acknowledgment under Ex.P4 and that since the accused has neither sent a reply nor made any payment within the stipulated period, the complainant was forced to file a complaint under Section 138 of the Negotiable Instruments Act.

13. The defence of the accused, as evident from his evidence and the cross examination evidence of the complainant, is that the complainant was not known to him, that he has not borrowed any money from the complainant, that only after receipt of the lawyer notice on 28.07.2006, he came to know that the complainant has filled up the cheque given to his brother in law Sankarapandian as a security and issued a legal notice, that the accused has then sent a complaint against the complainant and his brother-in-law Sankarapandian to the District Superintendent of Police, Thirnleveli on 22.08.2006 and that since he has not borrowed any amount nor issued any cheque in favour of the complainant, the case of the complainant is liable to be rejected.

14. No doubt, the complainant PW.1 has given evidence reiterating the complaint contentions and deposed about liability of the accused, issuance of cheque therefor, dishonor of cheque for want of sufficient funds, issuance of statutory notice and the failure of accused to pay the amount within the stipulated period.

15. As already pointed out, the accused has admitted that Ex.P1 cheque was belonging to him, but according to him, the same was given to the complainant's brother in law Sankarapandian as a security for the mortgage loan. Moreover, it is pertinent to mention that the accused has not specifically disputed the signature found in Ex.P1 Cheque and it is not his case that he had given unfilled and unsigned cheques to the said Sankarapandian.

Considering the above, as rightly contended by both the Courts



below, the accused has indirectly and impliedly admitted the signature found in Ex.P1 cheque. On considering the evidence of the complainant and the admission of the accused, the Trial Court as well as the Appellate court have rightly drawn the presumption under Sections 118 and 139 of Negotiable Instruments Act in favour of the complainant.

16. As rightly contended by the learned counsel for the defense, the presumption available under Sections 118 and 139 of Negotiable Instruments Act, are always rebuttable in nature. It is necessary to refer the decision of the Hon'ble Supreme Court reported in **2010(11) SCC 414** in the case of **Rangappa Vs. Sri Mohan**, relied on by the learned counsel for the accused and the relevant paragraph No.13 reads as follows:

13. ...

Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused / defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view,, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a largely enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his / her own."

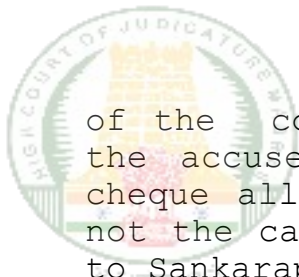
17. Considering the above, it is very much clear that the position of law is well settled that the accused, in order to rebut the presumption drawn in favour of the complainant under Sections 118 and 139 of the Negotiable Instruments Act, is not required to



through the evidence adduced by the complainant and that the standard of proof required is of preponderance of probabilities.

18. In the case on hand, admittedly, the accused after receipt of the statutory notice under Ex.P3, has not sent any reply. The accused, in an attempt to explain for non sending of reply to the statutory notice, has taken a stand that immediately after the receipt of the legal notice, he sent a complaint against the complainant and his brother-in-law Sankarapandian to the District Superintendent of Police, Thirunelveli and he has produced a copy of the complaint and the postal receipt for sending the same through registered post. As rightly observed by the learned Appellate Judge in the postal receipt filed by the accused, the Deputy Superintendent of Police, Thirunelveli was shown as the addressee but the complaint under Ex.D1 was allegedly shown to be sent to the District Superintendent of Police, Thirunelveli. The accused in his evidence before the trial Court would admit that he was not aware about the action taken by the police in response to his Ex.D1 complaint. As rightly pointed out the learned Appellate Judge, it is doubtful as to whether such a complaint was received by the police. Except the above sending of complaint to the police, the accused has not offered any other reason or explanation for not sending any reply to Ex.P3 notice.

19. Though the accused has alleged that he had obtained mortgage loan from the complainant's brother in law sankarapandian and at that time, as per the direction of the said Sankarpandian, he had given two unfilled cheques to the said Sankarapandian. Admittedly, the accused has not chosen to produce the mortgage deed nor the copy of the same. In his evidence before the Trial Court, he would say that the mortgage loan was not yet settled as the present case is pending. Except the above bald and vague allegations, the accused has not produced any iota of evidence to show that there existed loan transaction between himself and the said Sankarapandian. As rightly observed by the Courts below, the accused has also not taken any steps to summon the said Sankarapandian. As rightly pointed out the learned Appellate Judge, the accused himself admitted that another case filed by one Subbaiah is pending in C.C.No.238 of 2006 on the file of the Court of Judicial Magistrate, Nanguneri and that another case in C.C.No.74 of 2015 filed by one Ashok is also pending against him. No doubt, the complainant in his cross examination would say that the accused has filled up the cheque by himself and immediately he would say that one person out of three other persons, who hand accompanied the accused has filled up the cheque. Moreover, the complainant in his evidence would say that the accused was known to him for one year prior to the advancement of loan, but in Ex.P3 - notice he has stated that the accused was known to him for the past 10 years. As rightly observed by the trial Court as well as the Appellate Court, the above contradictions are not material enough to affect the case



of the complainant. As rightly observed by the Appellate Court, the accused has not clarified as to what happened to the other cheque allegedly issued by him to the said Sankarapandian. It is not the case of the accused that he had sent any letter or notice to Sankarapandian nor filed any case against the Sankarapandian.

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20. Considering the above, the finding of the trial Court as well as the Appellate Court that the complainant has proved the offence under Section 138 of Negotiable Instruments Act against the accused beyond reasonable doubt cannot be found fault with and this Court is entire agreement with the concurrent Judgments of the conviction passed by the courts below. Coming to the punishment awarded, as already pointed out, the learned Judicial Magistrate has sentenced the accused to undergo 4 months Simple Imprisonment and to pay compensation of Rs.1,00,000/- within one month in default to undergo one month Simple Imprisonment and the same was confirmed by the Appellate Court.

21. Considering the nature of offence and the quantum of the cheque amount, the punishment awarded by the Trial Court, which was confirmed by the appellate Court is very much reasonable and the same cannot said to be excessive. Hence, there is no reason to interfere with the judgments of conviction and sentence passed by the Courts below and consequently, this Court concludes that the Criminal Revision Case is devoid of merits and the same is liable to be dismissed.

22. In the result, the Criminal Revision Case is dismissed. The Trial Court is directed to take necessary steps to secure the petitioner / accused to undergo remaining period of imprisonment, if any.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1. The III Additional Sessions Judge, Tirunelveli.
 2. The Judicial Magistrate, Nanguneri.
 3. The Chief Judicial Magistrate, Tirunelveli
- +1 CC to M/s.T.A.EBENEZER, Advocate (SR-15272[F] dated 01/04/2021)

CRL.RC(MD).No. 732 of 2017
01.04.2021

SSS(CO)

KB(24.05.2021) 7P 5C

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