IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.10.2022

Pronounced on :27.10.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.R.C.No.1298 of 2016
and
Crl.M.P.Nos.11649 & 11650 of 2016

K.Raviramakrishnan .. Petitioner

/versus/

P.Velusamy .. Respondent

Prayer: Criminal Revision Case has been filed under Section 397 & 401 of Cr.P.C., to set aside the conviction and sentence passed in C.C.No.5258 of 2009 on 19.07.2013 by the Fast Track Court-1, Metropolitan Magistrate, Egmore, Chennai-8 and having been confirmed by the Learned IV Additional Sessions Judge, Chennai in C.A.No.152 of 2013 on 29.06.2016 and acquit the petitioner herein.

For Petitioner :Mr.C.S.Dhanasekaran

For Respondent :Mr.T.Shanmuga Boopathi

ORDER

The Petitioner was convicted for an offence under Section 138 of the Negotiable Instruments Act and sentenced to undergo 1 year S.I and was directed to pay a sum of Rs.25,00,000/- towards compensation to the complainant within 3 months i/d 3 months S.I by the learned Metropolitan Magistrate, Fast Track Court I, Egmore, Chennai under judgment dated 19.07.2013 in C.C.No.5258 of 2009. There against, petitioner preferred an appeal in C.A.No.152 of 2013 on the file of the learned IV Judge, Additional Sessions Court, Chennai, which came to be dismissed under judgment dated 29.06.2016. Against such finding, the present revision has been filed.

2. It is contended by the learned counsel appearing for the petitioner that the Courts below have failed to appreciate that the complainant had not produced any documents to prove the alleged money transaction to enforce a debt. The failure of the facts to prove the foundational fact will dis-entail the complainant to take advantage of presumption under Section 139 of the Negotiable Instruments Act, 1881. The complainant, who claims that the petitioner owes a sum of Rs.25,00,000/- has not produced any document to prove the debt other than the cheque marked as Ex.P1.

3. The complainant admits that he is involved in lending money for interest but he is not registered himself as a money lender, which is a mandatory requirement under the Tamil Nadu Money Lenders Act, 1957. He has not produced any document kept in the course of his business to prove any money transaction with the petitioner. The complainant claims the source of money lend was the transaction through in respect of the

property of one Haridoss for whom the petitioner was the power agent but the said Haridoss was not examined. Further, the conviction sentencing the accused to undergo one year imprisonment beside to pay compensation of the cheque amount is excessive.

4. To support of his argument, the learned counsel appearing for the petitioner relied the following judgments of the Hon'ble Supreme Court as well as this Court:-

(1)Mangilal v. State of M.P reported in (2004) 2 SCC 447;

(2)Anil Baburao Kataria v. Purshottam Prabhakar Kawane reported in (2010) Crl.L.J. 1217

(3)G.B.Finance Rep.by Power of Attorney Agent Thiru.Kotteeswaran v. V.Hothi and another reported in (2012) 2 MLJ (Crl.) 621;

(4)Vijay v. Laxman and another reported in (2013) 3 SCC 86;

(5)John K.Abraham v. Simon C. and another reported in (2014) 2 SCC 236;

(6)K.Subramani v. K.Damodara Naidu reported in (2014) 4 MLJ (Crl.) 608 (SC); and

(7)Pandurangan v. Sivakami reported in (2017) 3 MLJ (Crl.) 572.

5. Per contra, the learned counsel appearing for the respondent submitted that the petitioner having borrowed the money on 24.07.2007 issued the subject cheque Ex.P1 on 15.06.2009, which was returned when presented for collection. Therefore, the complaint under Section 138 of the Negotiable Instruments Act, was initiated after causing statutory notice. To prove the complaint, 11 exhibits were marked. The petitioner herein in response to the statutory notice issued a reply through his lawyer which is marked as Ex.P7. In the said reply, the petitioner contended that the cheque was forcibly taken by the complainant with the help of goondas. Therefore, criminal complaint 14.12.2009 has been lodged and pending in Crime No.635 of 2019 and the cheque was presented subsequent to that. Contrary to his complaint, it is proved that he has instructed the bank to stop the payment of the cheque stating that the cheque got lost. The inconsistency in

the case of the defence exposes the culpable mental state to cheat the complainant by issuing a cheque to discharge the debt but instructed the bank to stop payment as if the cheque got lost and at the same time, he had admittedly lodged the criminal complaint with frivolous allegations that the cheques were forcible taken from him. In fact, the criminal complaint was investigated and closed as "mistake of fact". Therefore, the learned counsel appearing for the respondent submitted that the finding of the Courts below after analysing the fact and law has to be confirmed.

6. To support of his submissions, the learned counsel appearing for the respondent relied upon the following judgments of the Hon'ble Supreme Court as well as this Court:-

(1)K.N.Beena v. Muniyappan and another reported in (2001) 8 SCC 458;

(2)Hiten P.Dalal v. Bratindranath Banerjee reported in (2001) SCC (Cri) 960;

(3)P.Venugopal v. Madan P.Sarathi reported in 2008(6)CTC 50;

(4)K.A.Abbas Sabu v. Joseph reported in 2010(4) Supreme 65;

(5)Rangappa v. Sri.Mohan reported in 2010(4)Supreme 169;

(6)Keshavamurthy v. Abdul Zabbar reported in CDJ 2013 SC 654;

(7)T.Vasantha Kumar v. Vijayakumari reported in 2015(8) SCC 378;

(8)Commissioner of Income Tax v. T.R.Rangarajan reported in (2005) 279 ITR 0587;

(9)Commissioner of Income Tax v.Lakshmi Trust Co., reported in (2008) 303 ITR 99;

(10)A.B.Shanthi v. Asst.Director of Inspections reported in 2007 (2) MLJ Crl. 446;

(11)M/s Jayam Co. v. T.Ravichandran reported in 2003 (2) CTC 31;

(12)Kailashchand Jain v. N.Seetharaman reported in 2007 (4) CTC 371;

(13)Gopal v. Balachandran reported in 2008 (1) CTC 491;

(14)Benedict Fernandez v. Rajiv Bhatia reported in CDJ 2008 MHC 771;

(15)Mr.Bipin Mathurdas Thakkar v. Samir alias (Bombay High

Court at GOA) in Crl.R.C.No.53 of 2014, dated 05.02.2015.

7. The substance of the complaint under Section 138 of the Negotiable Instruments Act, 1881, is that the revision petitioner/accused herein approached the respondent/complainant for finance to develop his business. Being a close friend, the respondent/complainant gave a sum of Rs.25,00,000/- on 24.07.2007. To discharge the said loan, the petitioner/accused issued a cheque bearing No.184699 dated 15.06.2009 for a sum of Rs.25,00,000/- drawn on UTI Bank. The cheque was presented on 20.10.2009 for collection. It was returned with a memo stating "payment stopped by the drawer". Intimating about the return of the cheque, the complainant had caused notice dated 26.10.2009. The petitioner has replied through his Lawyer on 04.11.2009 denying the issuance of cheque for discharging the debt. Claiming that the cheque was forcibly taken with the help of goondas and for which the complaint at Thirumangalam Police for the offence under Sections 406, 294(b) and 506(ii) of IPC r/w 4 of Tamil

Nadu Exorbitant of Interest Act, 2003 has been lodged and also bank has been instructed to stop payment. To this above reply, the respondent/ complainant had issued a re-joinder through the lawyer on 10.12.2009 stating that the money was advanced to him in connection with the sale transaction of a land with the petitioner and his partner A.K.Govindarajan.

8. In the above factual background, the complaint was taken up for trial and ended in conviction holding the petitioner guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881. The trial Court sentenced the petitioner to undergo SI for one year and also directed to pay compensation of Rs.25,00,000/- being the cheque amount. The compensation was directed to be paid within a period of three months, from the date of the judgment in default, to undergo SI for a period of three months.

9. The judgment of the trial Court in C.C.No.5258 of 2009, dated 19.07.2013 came to be challenged before the IV Additional Sessions Judge, City Civil Court, Chennai in Crl.A.No.152 of 2013. After re-appreciation of evidence, the lower appellate Court dismissed the appeal confirmed the trial Court judgment of conviction and sentence. The same has now been challenged in the revision for the reason stated above.

10. The complainant to prove his case has examined himself and the Bank Manager as PW-1 and PW-2 respectively, 11 Exhibits were marked. From those exhibits, it is clear that the cheque Ex.P1 was drawn by the petitioner/accused. In his reply, he had contended that the cheque was snatched from him with the help of goondas and he has given a complaint in this regard to the Police. Statutory notice Ex.P4 and the Reply Ex.P7 and the re-joinder by the complainant Ex.P8 read together proves that there was prior money transaction between the complainant/respondent and the accused/petitioner and the cheque (Ex.P1) was drawn by the

petitioner/accused from the account maintained by him in favour of the respondent/complainant. This is the reason why the petitioner admits in his re-joinder (Ex.P8) that he has instructed the Bank to stop payment. However, the stop payment instructions given by the petitioner/accused which is marked as Ex.P11 indicates that the petitioner has informed his Bank that the subject cheque was lost, which is factually contrary to the complaint to the police as if the cheque was robbed from him by the respondent/complainant. The re-joinder notice (Ex.P8) indicates that the complaint given by the petitioner/accused regarding extortion of the cheque by the respondent/ complainant has been enquired and the same has been closed as "mistake of fact". On receipt of this re-joinder, the petitioner/accused has not responded any further. Therefore, the contention of the learned counsel appearing for the respondent/complainant that the petitioner/accused to avoid his liability to pay back the loan amount had instructed the bank not to honour as if the cheque was lost and at the same time, had approached the police in suppression of the true fact, reported as if the cheque was snatched from him under threat. The police complaint has been referred as “mistake of fact” which indicates the cheque in dispute not been obtained under threat or force to invalidate its enforcement.

11. Regarding the plea that the respondent/complainant has no source of income to lend Rs.25,00,000/- and the transaction alleged to have been in cash, which is contrary to the RBI guidelines, so the case under Section 138 of the Negotiable Instruments Act, 1881. The short answer could be such plea is not maintainable and it is also unsustainable, since any violation in the Income Tax Act or RBI guidelines is a distinct offence, which if necessary open to the concerned authorities, to take action. The person, who has borrowed the money and issued cheque is not entitled to take a defence that payment of cash over and above the restrictions imposed by RBI cannot be enforced. It is not an criminal act to transact in cash directly over and above the restrictions imposed by RBI guidelines. It is violation of the rules and the said violation has to be dealt by other

authorities competent to take action, it is not a shield for a defaulter to avoid repayment. Further more from the extensive cross examination of the complainant/respondent, who has examined as PW-1, it is patently clear that, the petitioner and the respondent are known to each other and they had transactions in respect of the properties. It is suggested in the cross examination of PW-1 that, the money is only payable by one A.K.Govindarajan who was introduced to the complainant/respondent by the petitioner/accused. The cheque was forcibly obtained from the petitioner, since A.K.Govindarajan failed to pay the money. This suggestion to PW-1 has not only denied but also the complainant has categorically deposed that he does not know who is A.K.Govindarajan. In such circumstances, to probabilise the defence, the petitioner/accused ought to have examined the said A.K.Govindarajan which he has failed to do so.

12. Regarding the allegation that the respondent/complainant is an unregistered money lender and therefore, he cannot prosecute the petitioner

under Section 138 of the Negotiable Instruments Act, 1881, by referring the judgement of Bombay High Court in ***Anil Baburao Kataria v. Purshottam Prabhakar Kawane*** reported in ***[(2010) Crl.L.J. 1217],*** this Court finds that the fact of the case cited is different from the facts of the case on hand.

13. The complainant in the cross examination though admits that he is engaged in money lending business and he is not a registered money lender, as far as this transaction is concerned, even in his statutory notice, the complainant has categorically stated that the petitioner herein being a long time friend has lend money for free of interest. That being the case, when the transaction is not for interest, the Money Lending Act have no application.

14. The learned counsel appearing for the petitioner further submitted that the sentence imposed is exorbitant and contrary to the principle laid in ***Mangilal v. State of Mathyapradesh*** reported in ***[(2004) 2***

SCC 447]. The said judgment is in respect of award of compensation to the victim under Section 357 of Cr.P.C. The Hon'ble Supreme Court, while considering the grant of compensation to the victims, who lost their blood relatives at the hands of the accused persons, held that the power of the Court to award compensation to victims under Section 357 of Cr.P.C., is not ancillary to other sentences but is in additional thereto. While holding so, the Hon'ble Supreme Court has observed that before fixing the quantum of compensation, the accused/petitioner must be heard even though the statute is silent it. The said observation made in respect of IPC offences vis-a-vis Section 357 of Cr.P.C is not applicable to the offence under Section 138 of the Negotiable Instruments Act, 1881, which is a Composite Act dealing punishment and compensation. Under this Act, the offenders may be imprisoned to the extent of two years and imposed compensation twice the amount of the cheque. While the Act enables the Court to sentence imprisonment to the extent of two years or with fine, which may extent twice the cheque amount or with both, this Court finds that the sentence of one year and compensation to the extent of the cheque amount is reasonable and warrants no interference.

15. In ***Vijay v. Laxman and another*** reported in ***[(2013) 3 SCC 86],*** the Hon'ble Supreme Court while dealing with Sections 118 and 139 of the Negotiable Instruments Act, 1881 regarding presumption has observed:

> *"When a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Sections 118 and 139 of the NI Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. The purpose of the NI Act is clearly to provide a speedy remedy to curb and to keep check on the economic offence of duping or cheating a person to whom a cheque is issued towards discharge of a debt and if the complainant reasonably discharges the burden that the payment was towards a*

lawful debt, it is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence. However, the Negotiable Instruments Act incorporates two presumptions in this regard: one in Section 118 of the NI Act and the other in Section 139. Under Sections 139, 118(a) and 138 of the NI Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary swifts on the accused. The plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. The initial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby."

16. The standard of proof to rebut the presumption under Section 118 and Section 139 of the Negotiable Instruments Act, 1881 though not as high as required for the prosecution to prove and even preponderance of probability is sufficient for rebuttal. The accused cannot take inconsistent stand to claim that he has probabilise his defence. Inconsistent plea as a rebuttal evidence will improbabilise the rebuttal. In the instant case, the petitioner/accused had informed the bank that the subject cheque got lost he has intimated the police that the subject cheque was taken away by force by the complainant/respondent. But in the course of the trial, he has suggested to the witness that this cheque was given in respect of the liability of one Govindarajan. However, the issuance of the cheque and money transaction with the respondent/complainant has not been denied. The foundational fact of the drawing cheque and the privity has been proved by the complainant. No material placed by the accused to discharge the burden. Therefore, this Court finds no error in the finding of the trial Court. Hence, this criminal Revision Case is dismissed. Consequently, connected Miscellaneous

Petitions are closed.

27.10.2022

Index:yes/no
speaking order/non speaking order
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To :

1.The IV Additional Sessions Judge, Chennai.

2.The Fast Track Court-1, Metropolitan Magistrate, Egemore, Chennai.

DR.G.JAYACHANDRAN,J.

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Delivery Order made in
Crl.R.C.No.1298 of 2016
and
Crl.M.P.Nos.11649 & 11650 of 2016

27.10.2022