IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2022

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.RC.No.555 of 2018

K.Sampath ... Petitioner/accused

Versus

A.Rikab Chand Jain ... Respondent

PRAYER: Criminal Revision has been filed under Sections 397 and 401(1) of the Code of Criminal Procedure to allow the revision and to set aside the order dated 17.11.2017 passed by the learned II Additional District and Sessions Judge, Poonamallee in Crl.A.No.98 of 2014 against the order in STC.No.310 of 2012 on the file of the learned Fast Track Court, Judicial Magistrate Level II, at Poonamallee against the petitioner.

For Petitioner : Mr.B.Janakiram

For Respondent : Mr.E.Hariharan
for Mr.PL.Narayanan

ORDER

This revision is filed as against the judgment passed in Crl.A.No.98 of 2014 dated 17.11.2017 on the file of the learned II Additional District and Sessions Judge, Poonamallee thereby confirming the judgment passed by the trial court and also modified the order insofar as compensation is concerned passed in STC.No.310 of 2012 dated 10.10.2014 on the file of the Fast Track Court, Magisterial Level-II, Poonamallee, thereby convicted the petitioner for the offence punishable under Section 138 of NI Act.

2. The petitioner is the accused in the complaint lodged by the respondent for the offence punishable under Section 138 of NI Act. According to the respondent, the petitioner borrowed a sum of Rs.30,00,000/- who is being his neighbourhood. In order to repay the said loan amount, he issued two cheques for a sum of Rs.15,00,000/- each in favour of the respondent. The respondent presented the cheques for collection and both the cheques were returned dishonoured for the reason 'funds insufficient'. After causing statutory notice, the respondent lodged complaint.

3. On the side of the respondent, he examined PW1 and marked Ex.P1 to Ex.P7. On the side of the petitioner, he examined DW1 and marked Ex.D1 to D11. On perusal of oral and documentary evidence, the trial court found him guilty and sentenced him to undergo five months simple imprisonment and also directed the petitioner to pay fine of Rs.3,500/-, in default to undergo simple imprisonment for one month. Aggrieved by the same, the petitioner preferred appeal and the respondent also filed revision to enhance the punishment. The first appellate court passed common judgment, thereby confirming the conviction imposed on the petitioner for the offence punishable under Section 138 of NI Act and also awarded compensation of cheque amount instead of fine. Aggrieved by the same, the present revision has been filed.

4. The learned counsel for the petitioner would submit that there was no legally enforceable debt in favour of the respondent by the petitioner herein. The alleged cheques were issued for security purpose at the time of execution of power of attorney by his mother. His mother owned property and in order to deal with the same, she executed power of attorney in favour

of the respondent, which was marked as Ex.D1. In turn, the respondent executed sale agreement on the strength of the power of attorney in favour of one, Ajithkumar and the same was marked as Ex.D2. Thereafter, his mother executed sale deed in favour of the respondent in respect of part of the subject property which was marked as Ex.D5 on 23.03.2011. In view of the above, the respondent cancelled the agreement for sale by the deed of cancellation, which was marked as Ex.D6. In the meanwhile, the petitioner's mother died and as such, the petitioner derived the remaining property. Insofar as the remaining property, the petitioner again executed another power of attorney in favour of the respondent, which was marked as Ex.D7.

4.1 He further submitted that in pursuant to the said power of attorney, he executed another sale agreement in favour of one, Anand who is none other than his own brother in law, which was marked as Ex.D8. At the time of receiving consideration, the alleged cheques were issued as security purpose along with other documents. After execution of sale deed, the petitioner issued legal notice, which was marked as Ex.D9 calling upon the respondent to return all the documents which were received at the time of execution of power of attorney. It shows that there was no legally enforceable debt by the petitioner at any point of time and after registration of sale deed in his favour, he failed to return the same. Therefore, the petitioner caused legal notice, which was marked as Ex.D9.

4.2 He further submitted that even according to the respondent, no date of borrowal was mentioned in the complaint. When the respondent was lending such huge amount of Rs.30,00,000/-, except cheque, no other documents were executed by the petitioner in favour of the respondent. That apart, he did not possess any valid licence for doing money-lending business. Except the cheque, no other documents were marked by the respondent to prove his case. Even assuming that the petitioner borrowed loan for a sum of Rs.30,00,000/-, no money lender will lend money without execution of any pronote. Admittedly, there was no pronote executed by the petitioner or his mother. Therefore there was no legally enforceable debt and the alleged cheques were issued for security purpose.

4.3 He further submitted that the respondent filed suit in OS.No.560 of 2013 on the file of the Additional District Munsif Court at Poonamallee with regard to pathway for the property which was purchased by him. In the said suit, he filed proof affidavit and stated that the petitioner's mother never borrowed any loan amount. He also filed suit on the strength of the alleged cheques, which were involved in the present case for recovery of money in OS.No.197 of 2015 on the file of the Additional Munsif Court-III at Poonamallee and it is pending. He also submitted that the respondent had no source of income to lend such huge amount of Rs.30,00,000/- and he had no financial capacity. Further, the petitioner caused legal notice, which was marked as Ex.D9 dated 19.09.2011. When the petitioner caused legal notice to return all the documents which were received by the respondent, he could not have issued any cheque in the year 2012. It shows that the alleged cheques were issued as security purpose and not for any legally enforceable debt. In support of his contention, he relied upon the following judgments:

(i) ***Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai***

Patel & Anr of the Hon'ble Supreme Court of India in ***Crl.A.No.1497 of 2022***

(ii)***Anss Rajashekar Vs. Augustus Jeba Ananth*** of the Hon'ble Supreme Court of India in ***Crl.A.No.95-96 of 2019***

(iii)***Basalingappa Vs. Mudibasappa*** of the Hon'ble Supreme Court of India in ***Crl.A.No.636 of 2019***

(iv)***M/s.Kumar Exports Vs. M/s.Sharma Carpets*** of the Hon'ble Supreme Court of India in ***Crl.A.No.2045 of 2008***

(v)***Karthik V.R.Thondaiman Vs. R.M.Karthikeyan*** of the Madurai Bench of this Court in ***Crl.OP.(MD).No.19235 of 2013***

4.4 Per contra, the learned counsel for the respondent would submit that once the respondent discharged his burden as contemplated under Section 138 of NI Act, there is a presumption under Sections 118 and 139 of NI Act though it is rebuttable in nature. Therefore, the respondent proved his case beyond any doubt and the petitioner failed to rebut the same by proper evidence. He admitted his signature and issuance of cheque. Therefore, he is held liable to be punished under Section 138 of NI Act and both the courts below rightly convicted the petitioner. He further submitted that in fact, the first appellate court awarded compensation though the trial court failed to award any compensation.

5 Heard, Mr.B.Janakiram, the learned counsel for the petitioner and Mr.E.Hariharan, the learned counsel for the respondent.

6. The petitioner is the accused in the complaint lodged by the respondent for the offence punishable under Section 138 of NI Act. According to the respondent, the petitioner borrowed a sum of Rs.30,00,000/- and in order to repay the said amount, he issued cheques dated 25.06.2012 and 30.06.2012 for a sum of Rs.15,00,000/- each. Both the cheques were presented for collection and both were returned for the reason 'funds insufficient'. The respondent caused legal notice and on receipt of the same, the petitioner issued reply notice dated 02.08.2012, which was marked as Ex.P7. On the side of the petitioner, he marked Ex.D1 to Ex.D11. Ex.D9 was the legal notice issued by the petitioner to the respondent. On perusal of Ex.D9, revealed that the petitioner stated all the transaction

between the petitioner, his mother and the respondent, thereby called upon the respondent to handover all the original documents and title deeds and signed blank non judicial paper for value of Rs.20/- immediately. The relevant portion of Ex.D9 is extracted hereunder:

> *Therefore, please take notice that, you are asked to desist from making any unlawful claim from my client as the loan borrowed from you has been settled in full quit you are asked not to deal with the General Power of Attorney dated 04.05.2011 vide document No.888 of 2011 registered at SRO Avadi as the same is hereby cancelled. You are hereby asked to handover all the original documents and title deeds and signed blank non judicial paper for value of Rs.20/- to my client immediately without any further reference. You are also asked not to mischief with my client's property by attempting to put up over lock on the first floor of the premises under my client's occupation, if you fail to do so the aforesaid acts my client will approach the court of law against you for appropriate remedy in which event, you will be held responsible for all acts, things and consequences thereof.*

7. When it was being so, the petitioner could not have issued

cheques dated 25.06.2012 and 30.06.2012 in order to repay the loan amount borrowed by him for a sum of Rs.30,00,000/-. Admittedly, the respondent failed to state the date on which the petitioner borrowed such huge amount of Rs.30,00,000/-. However according to the respondent, the petitioner issued two cheques dated 25.06.2012 and 30.06.2012 for a sum of Rs.15,00,000/- each, whereas legal notice caused by the petitioner dated 19.09.2011. Therefore, no prudent man could have issued cheques when made so many allegations. It is also not disputed that the respondent duly received Ex.D9. However, no reply was issued by him.

8. On perusal of records, also revealed that the subject property was owned by the petitioner's mother, comprised in survey Nos.132/2A and TS.No.132/2A1B2 part admeasuring 0576 sq.mtrs (14 cents) and house situated at Door No.3, Barathiar Street, Gandhi Nagar West, No.5, Vilinjiampakkam Village, Poonamallee Taluk, Tiruvallur District. She executed power of attorney dated 29.09.2009 registered vide document No.1573 of 2009 in favour of the respondent, which was marked as Ex.D1, thereby the respondent was permitted to deal with the property. In pursuant

to the power of attorney, the respondent executed agreement for sale in favour of one, Ajithkumar registered vide document No.7205 of 2009 on 01.10.2009. However, subsequently it was cancelled by the cancellation of sale agreement deed registered vide document No.6511 of 2010 dated 29.06.2010. In the meanwhile, the petitioner's mother executed sale deed in favour of the respondent in respect of part of the property registered vide document No.3011 of 2011 dated 23.03.2011. In pursuant to the said sale deed, the respondent also cancelled agreement for sale i.e. Ex.D2.

9. In the meanwhile, the petitioner's mother died and after her demise, the petitioner derived title over the property, who is being the only legal heir. He again executed another power of attorney in favour of the respondent which was registered vide document No.880 of 2011 dated 04.05.2011. In turn, again the respondent entered into an agreement for sale with his own brother in law registered vide document No.4376 of 2011 dated 04.05.2011. During the said transaction, the original parent deeds of the subject property and blank signed stamp papers including the cheques which were allegedly issued in favour of the respondent for discharging the

legal liability. After these transactions, the petitioner called upon the respondent to return those documents. Therefore, the alleged cheques were not issued for any legally enforceable debt. Though the respondent discharged his initial burden arising out of Section 138 of NI Act, it is presumed that the cheques were issued for legally enforceable debt and under Sections 118 and 139 of NI Act, it is rebuttable in nature. Accordingly, the petitioner rebutted the presumption by reply notice, which was marked as Ex.P7.

10. On perusal of Ex.P7, revealed that the petitioner issued several notices dated 19.09.2011 and other notices including the police complaint dated 12.09.2011, 26.12.2011, thereby called upon the respondent to return the alleged cheques. However on receipt of the said notice, the respondent did not even reply to the notice dated 19.09.2011 and 03.12.2011. Further, it was specifically denied that the petitioner did not issue any two cheques and on the dates which were mentioned in the cheques. Both the cheques were received by the respondent on 29.09.2009 and failed to return the same to the petitioner after execution of sale deed in favour of the respondent by his

mother. Therefore, both the cheques were presented only for wrongful gain by misusing the said cheques. The said reply notice was also duly received by the respondent and even then, the respondent failed to send any rejoinder.

11. That apart, the petitioner cross examined the respondent extensively and clearly rebutted the presumption arising out of the provision under Sections 118 and 139 of NI Act. Further, the petitioner also produced the proof affidavit filed in OS.No.560 of 2013 on the file of the learned Additional District Munsif, Poonamallee filed by the respondent for pathway in respect of the property executed in favour of the respondent. The respondent also filed suit for recovery of money in OS.No.197 of 2015 on the file of the Additional District Court III, Poonamallee on the strength of the alleged cheques in the complaint. During his cross examination of two suits, there were contradictions in respect of the transaction between them. These contradictions lead to rebut the presumption by probable defence. Therefore at the time of presentation of cheques, there was no legally enforceable debt in favour of the respondent.

12. It is also seen from Ex.P1 and Ex.P2 i.e. the alleged cheques,

they were signed in one ink and filled up by another ink. Thus it is clear that the cheques did not represent a legally enforceable debt on the presentation. Further, the respondent had no licence to do the money-lending business. He failed to produce any evidence to that effect. He also failed to prove that he had financial capacity and also source of income to lend such huge amount. Further he did not even obtain any pronote from the petitioner while lending such huge money. Normally, a financier will not lend such huge amount without executing any document. According to the respondent, the petitioner borrowed loan on various dates and in order to repay the said amount, he issued cheques. The respondent did not even mention the date of borrowal and no documents were obtained from the petitioner while lending money. Though the respondent was ready to produce the documents to show his income or source of money, he failed to produce any document to that effect.

13. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be

present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

14. In the case on hand, the presumption under Section 118 of NI Act is not supported by a consideration. Unfortunately, the courts below without considering the above facts and circumstances, convicted the petitioner for the offence punishable under Section 138 of NI Act and it is liable to be set aside.

15. Accordingly, this Criminal Revision is allowed and the judgment dated 17.11.2017 passed by the learned II Additional District and Sessions Judge, Poonamallee in Crl.A.No.98 of 2014 and the judgment in

STC.No.310 of 2012 dated 10.10.2014 on the file of the Fast Track Court, Magisterial Level-II, Poonamallee are set aside. The petitioner is acquitted of all charges in STC.No.310 of 2012 dated 10.10.2014 on the file of the Fast Track Court, Magisterial Level-II, Poonamallee. Fine amount, if any paid, shall be refunded to the petitioner forthwith and the bail bond, if any executed, shall stand cancelled.

07.11.2022

Internet:Yes
Index:Yes/No
Speaking/Non speaking order
lok

G.K.ILANTHIRAIYAN. J,

lok

To
1.The learned II Additional District and Sessions Judge,
Poonamallee
2.The learned Fast Track Court,
Judicial Magistrate Level II, at Poonamallee

Crl.RC.No.555 of 2018

07.11.2022