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Crl.R.C.No.723 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.R.C.No.723 of 2022

A.Thilipkumar ... Petitioner

Vs.

T.Madhavan ... Respondent

Prayer:

Criminal Revision Case filed under Section 397 & 401 of Cr.P.C., to call for the records relating to the judgment dated 10.11.2021 made in C.A.No.74 of 2020 on the file of the III Additional District and Sessions Judge, Salem confirming the conviction imposed in the judgment dated 15.12.2020 made in S.T.C.No.53 of 2016 on the file of the learned Judicial Magistrate No.II, Sankari and set aside the same.

For Petitioner : Mr.A.Saravanan

For Respondent : M/s.K.Vasuvenkat



Crl.R.C.No.723 of 2022

ORDER

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This Criminal Revision Case is filed against the judgment dated 10.11.2021 passed in C.A.No.74 of 2020 on the file of the III Additional District and Sessions Judge, Salem confirming the judgment dated 15.12.2020 passed in S.T.C.No.53 of 2016 on the file of the learned Judicial Magistrate No.II, Sankari.

2. The respondent herein filed a private complaint under Section 200 Cr.P.C., against the revision petitioner and his wife for the offence under Section 138 of the Negotiable Instruments Act, before the Judicial Magistrate No.II, Sankari and the same was taken on file in S.T.C.No.53 of 2016. After trial, the learned Magistrate convicted the petitioner herein/A1 for the offence under Section 138 of the Negotiable Instruments Act and sentenced him to undergo 6 months simple imprisonment and to pay compensation of Rs.30,00,000/- in default to undergo, further period of one month simple imprisonment and acquitted the second accused. Aggrieved over the same, the first accused/petitioner herein filed an appeal in Crl.A.No.74 of 2020 on the file of the Principal Sessions Judge, Salem and

2/14



Crl.R.C.No.723 of 2022

the same was made over to the III Additional District and Sessions Judge, Salem. The learned III Additional District and Sessions Judge took up the appeal on file and after hearing the arguments on either side, dismissed the appeal by confirming the conviction and sentence passed by the trial Court. Aggrieved over the same, the accused has filed the present Criminal Revision Case before this Court.

3. The learned counsel for the petitioner/accused would submit that the respondent has not proved that the statutory notice was served on him. Unless, the statutory notice served on the accused, no cause of action would arise for filing a complaint under Section 138 of the Negotiable Instruments Act. The respondent/complainant has not filed any acknowledgment card to prove that the notice was duly served on the petitioner/accused. In proof affidavit filed by the respondent, it is stated that notice was served on 02.03.2013, but no proof of service has been filed by him. Once the accused denied the service of notice, in order to maintain the cause of action to file a complaint, the complainant has to substantiate his stand by producing proof of service as to the notice was duly served on the accused. During



CrI.R.C.No.723 of 2022

cross examination, though the petitioner/accused put a suggestion before the respondent/complainant regarding service of notice, the respondent was not properly explained the same. He would further submit that the petitioner neither borrowed any money nor issued cheque to the respondent and the petitioner is working in School and there is no need to borrow huge amount from respondent herein. But, the respondent was working in the Transport Corporation as Superintendent and he has no other source of income except his salary. The respondent has also admitted that he has no other source of income. The respondent has no means to lend a huge amount to the petitioner herein. Both the trial court and the appellate court wrongly appreciated the evidence and convicted the petitioner, hence the order of the both the courts are liable to be set aside. The learned counsel for the petitioner in support of his contentions placed reliance upon the decisions reported in

1. *CDJ 2007 SC 666=2007(14) SCC 750 [C.C.Alavi Hajii Vs. Palapetty Muhammed and another]*
2. *CDJ 2019 SC 148=2019(4) SCC 197 [Bir Singh Vs. Mukesh Kumar]*
3. *CDJ 2021 SC 098=2021 (5) SCC 283 [M/s.Kalamani Tex & Another Vs. P.Balasubramanian]*



Crl.R.C.No.723 of 2022

4.Judgment of the Hon'ble Supreme Court of India, dated 16.08.2022 passed in Crl.A.No.1260 of 2022 [Oriental Bank of Commerce Vs. Prabodh Kumar Tewari]

4. Learned counsel for the respondent/complainant would submit that execution of cheque is admitted and the signature of the cheque is not in dispute. Therefore, there is a presumption under section 139 of the Negotiable Instruments Act. Once execution of cheque is admitted, the court can draw presumption under Section 139 of the Negotiable Instruments Act and it is for the accused has to rebut the presumption that the cheque was not issued to discharge legally enforceable debt or liability. Further, he would submit that notice was duly served on the petitioner. Once the notice was correctly addressed, it is a deemed service under Section 27 of the General Clauses Act. Therefore, question of service of notice would not arise. The notice and the postal receipt are marked as exhibits and the petitioner has not denied the address mentioned in the postal receipt. Further, he would submit that he was working as Superintendent in Transport Corporation and also he has agricultural land and he has source of income. Petitioner has evaded to receive notice and not sent any reply purposefully. The petitioner has not disputed the cheque amount on any



Crl.R.C.No.723 of 2022

occasion. Both the Courts below rightly appreciated the evidence and convicted the revision petitioner and there is no merit in the Criminal Revision Case and the same is liable to be dismissed.

5. The respondent filed a private complaint against the petitioner herein and his wife for the offence under Section 138 of the Negotiable Instruments Act, alleging that the petitioner and his wife had borrowed sum of Rs.30,00,000/- from the respondent to promote their business and the petitioner issued post dated cheque to the respondent to discharge their liability. When the respondent presented the said cheque for collection on 09.02.2013 and the same was returned with an endorsement “funds insufficient”. Subsequently, on 01.03.2013, the respondent/complainant sent a legal notice to the petitioner to repay the cheque amount. Since the petitioner neither repaid the money nor sent any reply to the notice, the respondent was constrained to file a criminal complaint against the petitioner and his wife. The trial court found the petitioner guilty, convicted the petitioner and sentenced him to undergo six months simple imprisonment and to pay compensation of Rs.30,00,000/- in default to



Crl.R.C.No.723 of 2022

undergo simple imprisonment for one month and acquitted the second accused. Aggrieved over the same, the first accused/petitioner herein filed an appeal in Crl.A.No.74 of 2020. The learned III Additional District Judge who dealt with the case, dismissed the appeal by confirming the conviction and sentence passed by the trial Court.

6. The main contention raised by the learned counsel for the petitioner is that notice was not duly served on him and the respondent has no sufficient source of income to lend huge money to him. On perusal of the records, it is found that the respondent has not produced any acknowledgment card with regard to the receipt of notice by the petitioner. As per the evidence of the respondent/complainant, notice was issued on 01.03.2013 and the date of postal receipt was on 02.03.2013, but as per Ex.P4 filed by the respondent, it is mentioned that RL was delivered on 04.03.2013. Ex.P4 is only a letter given by the postal department, which shows that the notice was served on 04.03.2013. Once the accused has taken the defence that notice was not duly served on him, in order to maintain the cause of action to file a complaint for offence under Section



Crl.R.C.No.723 of 2022

138 of the Negotiable Instruments Act, it is for the complainant has to prove that the notice was duly served on the accused. The contention for the learned counsel for the respondent that since notice was correctly addressed, as per Section 27 of General Clauses Act, it was duly served, that cannot be accepted. As per Section 138 of the Negotiable Instruments Act, soon after the dishonour of cheque and after getting intimation from the bank, the complainant has to send statutory notice stating that the drawer of the cheque has to repay the money within the stipulated time. If he has not repaid money within the stipulated time, then the complainant can file a private complaint under Section 200 Cr.P.C., before the Judicial Magistrate. In proof affidavit filed by the respondent/complainant, he has stated that he sent legal notice to the petitioner on 01.03.2013 and the first accused/petitioner herein alone received the notice on 02.03.2013, however he has not sent any reply to that notice. Though he has stated that on 02.03.2013 notice was duly served to the petitioner herein, he has not filed any acknowledgment card with regard to the same. Instead, he filed Ex.P4 delivery report issued by the postal department. On perusal of the delivery report, it is found that there is no signature with regard to the receipt of



CrI.R.C.No.723 of 2022

notice is available in Ex.P4-delivery report. Once it is disputed that as to whether notice was received by the petitioner or not, the respondent/complainant should have examined the competent person from postal department, who has delivered the notice. Once the notice was sent through registered post with acknowledgment due, the postal authority would get signature in the acknowledgment card from the person who received the notice. The complainant has not examined any competent person from the postal department to prove through Ex.P4, notice was duly served on the petitioner. Ex.P4 is the delivery report said to be given by postal department, but the person who delivered the notice was not examined. Therefore, this Court finds that Ex.P4 is not proved by examining the competent person and the complainant has not proved the service of notice.

7. As far as the means of lending huge amount is concerned, admittedly, the respondent/complainant is working in the Transport Corporation and he is a public servant. Any government servant, who lending Rs.30 lakhs to a private person, he has to obtain permission from



Crl.R.C.No.723 of 2022

the department and also if any transaction amounts to more than Rs.20,000/-

it has to be made through only Bank. The respondent/complainant has not proved that on the date of lending huge amount, he was having the source of income. It is for the respondent/complainant has to prove that he was having sufficient money on the date of lending Rs.30 lakhs to the petitioner. The respondent/complainant in his proof affidavit has stated that the revision petitioner borrowed huge amount to develop his business. At that time, since he has not having such amount, he got the amount for loan from one Rajagopalan and the same has been given to the petitioner herein. The respondent repaid the said amount to the said Rajagopalan. The respondent/complainant has not produced any document to show that he repaid Rs.30 lakhs to the said Rajagopalan and the said Rajagopalan has not been examined as witness to prove that he obtained Rs.30 lakhs from Rajagopalan and lending the same to the revision petitioner. The respondent has not substantiated that he obtained money from one Rajagopalan and gave the same to the revision petitioner and later he repaid Rs.30 lakhs to the said Rajagopalan. Though execution and signature of the cheque is admitted by the revision petitioner, however, he denied the



Crl.R.C.No.723 of 2022

borrowal of money and he has also given explanation in his counter that under what circumstances he issued the cheque. The specific case of the complainant is that he got money from Rajagopalan and gave to the revision petitioner and he repaid the money to the said Rajagopalan and the revision petitioner issued cheque to discharge the legally enforceable debt. Since the petitioner/accused denied the said transaction, it is for the complainant to establish by examining Rajagopalan or atleast produce any document as to he received amount from Rajagopalan and he repaid the same.

8. There is a statutory presumption that the cheque was issued to discharge legally enforceable debt as per Section 139 of the Negotiable Instruments Act. It is for the accused to rebut the presumption in the manner known to law. No doubt, accused need not rebut the presumption by direct evidence and he can always rebut the presumption by preponderance of probablities. In this case, the revision petitioner has rebutted the presumption by preponderance of probabilities. Then onus of proof shifted to the respondent/complainant. The revision petitioner vehemently disputed borrowal of loan and the financial capacity of the respondent/complainant.



Crl.R.C.No.723 of 2022

The respondent has also specifically stated in his proof affidavit that he got money from one Rajagopal and he repaid the same to Rajagopal, that fact has not been established by the respondent/complainant. This Court finds that the respondent/complainant has not proved his case. In this case, the revision petitioner has rebutted the presumption by preponderance of probabilities. Both the Courts below failed to appreciate the same and convicted the petitioner.

9. Normally the Revision Court will not interfere with the judgment of the Courts below. This Court also conscious about the fact that Revisional Court cannot sit in the arm chair of the appellate court and re-appreciate the entire evidence as the appellate court and give independent finding. However, Revisional Court can always test the appreciation of evidence and if there is any perversity in appreciation of evidence and finds that the trial court or appellate court failed to appreciate the evidence, decision of the courts below can be interfered. A careful perusal of the entire materials and also the defence taken by the revision petitioner, this Court finds that the revision petitioner has rebutted the statutory



Crl.R.C.No.723 of 2022

presumption under Section 139 of the Negotiable Instruments Act by preponderance of probabilities. Both the Courts below failed to appreciate the same. Under these facts and circumstances, this Criminal Revision Case is allowed. Judgment dated 10.11.2021 passed in C.A.No.74 of 2020 on the file of the III Additional District and Sessions Judge, Salem confirming the judgment dated 15.12.2020 passed in S.T.C.No.53 of 2016 on the file of the learned Judicial Magistrate No.II, Sankari is set aside. Fine amount paid if any, is ordered to be refunded.

16.11.2022
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Index:yes/No
Internet:yes/No

To

1. The III Additional District and Sessions Judge,
III Additional District and Sessions Court,
Salem.
2. The Judicial Magistrate No.II,
Judicial Magistrate No.II Court,
Sankari.



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Crl.R.C.No.723 of 2022

P.VELMURUGAN, J.

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Crl.R.C.No.723 of 2022

16.11.2022