IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 31.01.2022.

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.R.C.No.878 of 2020

1. Hayagriva Cargo Movers Pvt. Ltd.,
   Fleet Owners and Transport Contractors,
   Represented by its Managing Director,
   Tholiyar Manivannan,
   16B, New No.65,
   Periyathottam Colony, 1st Street,
   Sugar Cane Post, Veerakeralam,
   Coimbatore-641 007.

2. Tholiyar Manivannan,
   Managing Director,
   Hayagriva Cargo Movers Pvt. Ltd.,
   16B, New No.65,
   Periyathottam Colony, 1st Street,
   Sugar Cane Post, Veerakeralam,
   Coimbatore-641 007. ... Petitioners

Vs.

R.Selvarajan ... Respondent

Prayer: Criminal Revision filed is under Section 397(1) r/w 401 of Criminal Procedure Code, pleased to set aside the order and Judgment dated 25.06.2021 in C.A.No.442 of 2018 on the file of the III Additional District and Sessions Judge, Coimbatore confirming the conviction and sentence imposed by the learned Judicial Magistrate Fast Track at Magisterial Level-I, Coimbatore, by its Judgment dated 11.09.2018 made in C.C.No.339 of 2016 and acquit the petitioners.

For Petitioners : Mr.S.Panneerselvan

For Respondent : Ms.V.Aishwarya
for R & P partners

ORDER

(This case has been heard through video conferencing)

The Criminal Revision Petition has been filed seeking to set aside the order dated 25.06.2020 in C.A.No.442 of 2018 on the file of the III Additional District and Sessions Judge, Coimbatore confirming the conviction and sentence passed by the Judicial Magistrate Fast Track at Magistrate level-I, Coimbatore vide order dated 11.09.2018 in C.C.No.339 of 2016.

2. For the sake of convenience the parties are referred as complainant and accused.

3. Brief facts of the case is as under:-

(a) A1 is a Private Limited Company, carrying on business in transport viz., Fleet Owners and Transport Contractors. A2 is Managing Director in A1 Company and A3 is the Director of A1 Company. The Directors are actively participating in the day to day affairs and running the business of A1 company. The case of the complainant is that A2, on behalf of A1 and with the consent and concurrence of A3, approached the complainant on 10.04.2014 and borrowed a sum of Rs.15,00,000/- from the complainant for their urgent business commitment and executed a promissory note/Ex.P1 by agreeing to repay the same with interest at 12 % per annum.

(b) After receiving the amount, the accused failed to repay either the principal or interest. The complainant had demanded the accused to repay the amount and thereby, the accused had issued a cheque/Ex.P2 dated 14.05.2015 bearing No.256060 for Rs.15,00,000/- drawn in Indian Bank, Vadavalli Branch, Coimbatore along with the covering letter/Ex.P4 dated 14.05.2015. As per the instructions of the accused, the complainant presented the cheque for collection on 15.05.2015 to the banker Indian Overseas Bank, Edayarpalayam Branch, Coimbatore and it was returned with an endorsement "Insufficient Funds", vide return memo/Ex.P3 dated 27.05.2015. Hence, the complainant issued a legal notice/Ex.P5 on 04.06.2015 to the accused and the same was returned by the postal authorities on 06.06.2015 with an endorsement "Intimation Given Not claimed", which were marked as Ex.P6 to Ex.P8. Thereafter also, the accused failed to make the payment of the cheque.

(c) Hence the complainant had filed a petition in C.C.No.339 of 2016 on the file of the Judicial Magistrate, Fast Track Court No.I, Coimbatore. On the side of the complainant, he examined himself as PW1 and Ex.P1 to Ex.P8 were marked and on the side of the accused, no oral and documentary evidence were adduced. The Trial Court, after elaborate enquiry, finding that the complaint had proved his case and found A1 and A2 guilty for the offence under Section 138 of Negotiable Instruments Act and convicted and sentenced A2 to undergo six months Simple Imprisonment and also directed A1 and A2 to pay a sum of Rs.15,00,000/- as per Section 357 (3) Cr.P.C payable to the complainant within two months from the date of that judgment and as per Section 255(2) of Cr.P.C , acquitted A3/Director of A1 Company.

(d) Against the judgment of conviction and sentence, A1 and A2 had filed an Appeal in C.A.No.442 of 2018 before the III Additional District and Sessions Judge, Coimbatore. The accused had contended that the Trial Court, had failed to analyze the oral and documentary evidence produced on both the sides and the amount of Rs.15,00,000/- is a huge amount and that the complainant has to disclose the source of income and the complainant had not produced the Income Tax returns for the assessment year 2013-2014. During the pendency of the Appeal, the accused had filed applications (i) Crl.M.P.No.7 of 2019 seeking to direct the complainant to produce the IT returns for the assessment year 2013-14 and (ii) Crl.M.P.No.8 of 2019 seeking to examine one Rajagopalan. He would further contend that the complainant had failed to examine the attestors to the promissory note and the money borrowed was only Rs.12,00,000/- and that the complainant had filled the cheque for Rs.15,00,000/- and filed the case.

(e) The Appellate Court finding that the accused had earlier filed the same application before the Trial Court under Section 91 Cr.P.C., and the Trial Court, had dismissed the application and despite its dismissal of the petition, the accused had not filed the applications challenging the same and filed the applications once again before the Appellate Court. In C.M.P.No.7 of 2019, the Appellate Court holding that the accused had admitted to having received a sum of Rs.12,00,000/- from the complainant, is estoped from raising the plea of financial capacity of the complainant, had dismissed the application. Further, the Appellate Court dismissed the application in C.M.P.No.8 of 2019, stating that the said Rajagopalan did not appear before the Trial Court despite the receipt of summons and the accused had not stated anything as to what were the steps have been taken by him to secure the said Rajagopalan.

(f) Further, the Appellate Court holding that the case of the complainant has been proved and the accused had failed to rebutt the presumption against him, dismissed the appeal by confirming the conviction and sentence passed by the Trial Court. Against which, the present Revision has been filed.

4. Learned counsel appearing for the petitioners would submit that the revision petitioners had borrowed only a sum of Rs.12,00,000/-, whereas, the complainant had filled the cheque for Rs.15,00,000/- and presented it for collection. He would further submit that the complainant had not proved his source of income and the Trial Court, had dismissed the petition. Learned counsel for the petitioners would further submit that during the pendency of the Appeal, at the request of the petitioners, the matter was referred to mediation and to show the bonafide, the petitioners were asked to pay a sum of Rs.5,00,000/- to the respondent/complainant by an order dated 08.12.2020. Pursuant to the order passed by this Court on 08.12.2020, the petitioners had paid a sum of Rs.5,00,000/- by way of Demand Draft dated 21.12.2020 and he would submit that the Respondent has also filed a civil suit and obtained a decree.

5. Per contra, Ms.V.Aishwarya, learned counsel appearing for the respondent would submit that respondent/complainant had proved his case beyond all reasonable doubts and the petitioners/accused neither denied the issuance of cheque not denied the signature in the cheque. The accused had admitted to have received a sum of Rs.12,00,000/- from the complainant. The Courts below rightly finding that the complainant had proved the case beyond all reasonable doubts had found the accused guilty for the offence and convicted as stated above. She would further submit that the accused had not rebutted the presumptions by letting in any evidence.

6. Before adverting to the rival submissions, it is necessary to substantiate the principle that while exercising Revisional jurisdiction involving concurrent finding at two Courts below, the High Court cannot act as a second appellate Court [See State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others, etc. (2004) 7 SCC 659]. Very recently, in Bir Singh Vs. Mukesh Kumar [(2019) 4 SCC 197], the Supreme Court has held as under:

> "17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [Southern Sales & Services v. Sauermilch Design and Handels GmbH, (2008) 14 SCC 457], it is a well

established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error.....

(emphasis supplied)

7. In the present case, the second petitioner as Managing Director of the first petitioner Company had borrowed a sum of Rs.15,00,000/- from the complainant on 10.04.2014. In support of the same, the accused had executed a promissory note/Ex.P1 agreeing to repay the amount with interest for 12% percent per annum. The accused after receiving the amount had not repaid the principal or interest and when demanded, had inorder to discharge the liability had issued the cheque/Ex.P2 dated 14.05.2015 along with the covering letter/Ex.P4 dated 14.05.2015. The cheque had been presented for collection on 15.05.2015 and the cheque had been returned with a memo/Ex.P3 dated 27.05.2015. After issuing statutory notice, the complaint has been filed.

8. Admittedly, it is the case of the petitioners/accused that the cheque was issued towards the security for a sum of Rs,12,00,000/- borrowed from the complainant and the complainant had filled the cheque for a sum of Rs.15,00,000/-. Though the accused had questioned the financial capacity, he has not rebutted the presumption passed under Section 139 of Negotiable Instruments Act. The Courts below disbelieved the accused and finding that the accused had not sent any reply to the statutory notice and the complainant had proved his case and had found the accused guilty.

9. At this juncture, it is useful to refer to the decision of the Hon'ble Apex Court in the case of Bir Singh Vs. Mukesh Kumar reported in [(2019) 4 SCC 197], has held as under:

> ''33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

35. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.''

10. The above view in Bir Singh cited supra has been approved by the Three Judges bench of Hon'ble Apex Court in the case of Kalamani Tex and Another Vs. P.Balasubramanian reported in (2021) 5 SCC 283.

11. It is well settled that the presumption mandated under Section 139 of N.I.Act includes presumption of existence of a legally enforceable debt or other liability, but at the same time, it should not be forgotten that the presumption contemplated under Section 139 of N.I. Act is a rebuttable presumption and that in every criminal case, the accused is to be proved guilty of offence either by leading positive evidence or by evidence in the form of presumption. In so far as the presumption contemplated under Section 138 of N.I.Act, it has been made clear by the Hon’ble Apex Court that the presumption under Section 139 of N.I.Act is a rebuttable presumption only when it is rebutted by the accused. Though the accused can discharge the burden under Section 139 of the NI Act by

preponderance of probability as held by the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118], in this case on hand, the accused has not done the same and he has not rebutted the presumption under Section 139 of N.I.Act and thereby, the Courts below have rightly found the accused guilty and convicted him. Therefore, this Court does not find any infirmity or illegality or perversity in the findings of the facts arrived by the Courts below, warranting interference.

12. Further in this case, during the pendency of the case, the matter had been sent for mediation and the petitioners had repaid the amount of Rs.5,00,000/- to the complainant and it has also been acknowledged by the complainant.

13. In this result, the Revision stands dismissed. The conviction of the petitioner under 138 Negotiable Instruments Act is confirmed. Taking into consideration, the petitioner/accused had paid the amount of Rs.5,00,000/- to the complainant during mediation, the sentence is modified to a sum of Rs.10,00,000/- which shall be paid as compensation to the respondent/complainant within a period of six weeks from the date of receipt of a copy of this order, failing which the sentence of imprisonment of six months as imposed by the Courts below shall stand revived.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

ham
To

1. The III Additional District and Sessions Judge,
Coimbatore.

2. -Do- Thro' The Principal District and Sessions Judge,
Coimbatore.

3. The Judicial Magistrate, Fast Track Court,
at Magisterial Level-I, Coimbatore .

+1cc to M/s.R & P Partners, Advocate Sr.5566
+1cc to M/s.S.Panneer Selvam, Advocate Sr.6370

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srg 16/03/2022