BAIL SLIP

The Petitioner/Accused Viz.,K.Ilayarajalingam, S/o.Kuppusamy Gounder, was directed to be released on bail as per the Order of this Court Dated 24/08/2017 in Crl.M.P.No.10654/2017 in Crl.RC.No.1123/2017, on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :14.06.2022

Pronounced on :20.06.2022

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Crl.R.C.No.1123 of 2017

K.Ilayarajalingam .. Petitioner /Accused

/versus/

K.Karthikeyan .. Respondent /Complainant

Prayer: Criminal Revision Case has been filed under Section 397 and 401 of Cr.P.C., praying to call for the records on the learned II Additional District and Sessions Judge, Erode in C.A.No.211 of 2016 and set aside the judgment dated 8.8.2017 and confirming the order of acquittal by the Judicial Magistrate, Fast Track Court No.1, Erode in S.T.C.No.152 of 2016 dated 17.11.2016 and prays to allow this revision petition.

For Petitioner :Mr.K.M.Subramaniam

For Respondent :No appearance

O R D E R

The revision petitioner is the accused in S.T.C.No.152 of 2016 on the file of the Judicial Magistrate, (Fast Track Court No.1), Erode in a private complaint initiated under Section 138 of Negotiable Instruments Act. The cheque dated 16.11.2015 drawn by the petitioner for a sum of Rs.9 lakhs in favour of one K.Karthikeyan/respondent is the subject matter of the complaint.

2. According to the complainant, the petitioner borrowed a sum of Rs.9 lakhs and to discharge the debt, he gave the subject cheque. However, on presentation of the same, it was returned with an endorsement "Insufficiency of fund". Hence, statutory notice dated 20.11.2015 was sent to the petitioner, which was received by the petitioner on 23.11.2015. The petitioner gave a reply dated 26.11.2015 containing false averments denying the liability and alleging the subject cheque was issued to one Ravi in connection with the loan transaction for purchasing three vehicles. To discharge the loan, the vehicles were handed over to Ravi, who sold the vehicles and appropriated the proceeds for the loan amount. He did not return the cheque given as security. The said cheque is being filed and presented in the name of the defacto complainant.

3. Before the trial Court, the complainant examined himself as PW-1. Five exhibits were marked. The trial Court held that the complainant failed to prove the fundamental fact that the cheque was issued towards legally enforceable debt. Though the accused failed to prove beyond doubt that the subject cheque was issued to one Ravi, when he availed finance for purchasing of three lorries, but by preponderance of probability he has discharged the initial burden of rebuttal the statutory presumption and therefore, dismissed the complaint and acquitted the accused.

4. The complainant preferred Appeal before the II Additional Sessions Court, Erode in C.A.No.211 of 2016. On re-appreciating the evidence, the appellate Court allowed the appeal stating that the failure of the accused to examine the said Ravi to whom he alleged to have given the subject cheque enures the presumption under Section 139 of Negotiable Instruments Act in favour of the complainant. The appellate Court held that the accused failed to rebut the presumption under Section 139 of the Negotiable Instruments Act. The capacity to advance loan of Rs.9 lakhs need not be proved by the complainant and therefore, dismissal of the complaint by the trial Court is erroneous.

5. The Appellate Court for the above said reasons, reversed the order of the acquittal and convicted the accused. One month Simple Imprisonment and compensation of Rs.9,000/-, in default, to undergo Simple Imprisonment was imposed.

6. The learned counsel appearing for the revision petitioner submitted that the appellate Court erred in reversing the well considered judgment of the trial Court. For advance of huge sum of Rs. 9 lakhs the complainant had no wherewithall. This has been raised in the reply notice itself. In spite of the said defence, the complainant has not produced any document to show, he had Rs.9 lakhs to advance loan to the accused/petitioner. In the cross examination, he has stated that he had given the entire loan of Rs.9 lakhs as cash in his house and the source of his income is 6 acres of agricultural land. Even for that he has not produced any document. Therefore, the trial Court has rightly held that by questioning the capacity of lending a huge sum of Rs.9 lakhs and by pleading that the subject cheque was not given to the complainant but to one Ravi in connection with purchase of lorries, the petitioner/accused has rebutted the statutory burden. Whereas, the complainant, inspite of rebuttal, had not produced documents to show his capacity to advance Rs.9 lakhs. Therefore, the learned counsel appearing for the petitioner prayed for reversing the appellate Court judgment and restored the trial Court order by allowing the revision petition.

7. In support of his argument, the learned counsel relied upon the judgment of the Hon'ble Supreme Court rendered in Basalingappa v. Mudiasappa reported in (2019) 5 SCC 418 wherein the Hon'ble Supreme Court has held as below:-

> "25.We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:
>
> 25.1.Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
>
> 25.2.The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.
>
> 25.3.To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not

only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4.That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden and not a persuasive burden.

25.5 It is not necessary for the accused to come in the witness box to support his defence.

30. ....complainant financial capacity. Court cannot insist on a person to lead negative evidence. The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse, cannot be supported.”

8. Heard the learned counsel appearing for the petitioner. There is no representation for the respondent, inspite of notice. Records perused.

9. The order of acquittal by the trial Court holding that the complainant under Section 138 of the Negotiable Instruments Act has failed to discharge the fundamental burden of proving his capacity to advance loan of Rs.9 lakhs, has been reversed by the appellate Court holding that the complainant need not prove his capacity but it is the burden of the accused to disprove the financial capacity of the complainant. Whether such finding is correct or legal is the question before this Court in the present revision petition filed under Section 397 and 401 of Cr.P.C.

10. The deposition of PW-1/complainant indicates that on 16.10.2015 he advanced loan of Rs.9 lakhs to the petitioner on his promise that he will repay the money within one month. The Cheque drawn at Axis Bank, Tiruppur Branch dated 16.11.2015 for Rs.9 lakhs was given to him as security. The petitioner promised that if the cheque is presented on the date it bears, he can realise the money. However, on presentation, the cheque bounced with an endorsement “insufficient fund”. In the cross examination, the complainant admits that he did not receive any other document as proof for advancing loan of Rs.9 lakhs, except the subject cheque. The cash was given in 500 and 1000 rupees denomination at his house. It was the savings kept in the house

and not drawn from the bank. Except he and the petitioner, none were present in his house at that time. Though he claims, he has 6 acres of land, he admits that he has not produced any document to show that he hold 6 acres of land. It is suggested in the cross examination to PW-1 that he has no source of income to advance loan of Rs.9 lakhs and that is the reason why he has not produced any document to prove his income.

11. The consistent defence of the petitioner eversince he received the statutory notice from the complainant/respondent is that there was no privity of contract and the cheque was not given to the complainant to discharge any legally enforceable debt and further, the complainant has no source of income to advance Rs.9 lakhs. When a specific defence raised by the accused person at the inception itself even before filing the complaint, the complainant is bound to explain in his complaint regarding the source of income. Failure to explain his source of income is fatal to the complaint. The person capacity to advance loan of Rs.9 lakhs is a very fundamental fact when the capacity is questioned. To add, the complainant admits that he did not receive any other document for advancing loan of Rs.9 lakhs, except the postdated cheque given to him. In any transaction, when cheque is issued, it is presumed to be issued to discharge the existing debt. Offence under Section 138 of Negotiable Instruments Act will get attracted, if the said debt happens to be legally enforceable. Therefore, the existing debt pre-suppose a presumption. If the accused able to prove by preponderance of probabilities that there was no existing debt on the date on which the cheque bears, then the complainant under Section 138 of the Negotiable Instruments Act cannot have the advantage of the statutory presumption under Section 139 of the Negotiable Instruments Act.

12. As pointed out by the Hon'ble Supreme Court in Basalingappa v. Mudiasappa reported in (2019) 5 SCC 418 (cited supra), when the capacity to advance loan or transaction for which the alleged cheque given is denied, the complainant cannot take advantage of Section 139 of the Negotiable Instruments Act without discharging his burden of proving the fundamental fact regarding transaction, which has created an existing debt (or) his capacity to advance loan atleast equivalent to the amount found in the cheque. In this case, for the cheque amount is Rs.9 lakhs, no other previous existing debt (or) transaction claimed in the complaint. No evidence was produced by the complainant to prove his financial capacity to advance a huge sum of Rs.9 lakhs.

13. Taking into consideration his background admittedly a small time farmer holding 6 acres of land and not even a bank savings account claiming he advanced loan of Rs.9 lakhs as against the postdated cheque and no other document obtained for the money transaction, is obviously bound to be suspected.

14. For the said reasons, this Court holds that the appellate Court erred in reversing the trial Court judgment. The finding of the appellate Court is legally not sustainable. Hence, the judgment of the appellate Court viz, II Additional District and Sessions Court, Erode in C.A.No.211 of 2016 dated 08.08.2017 is set aside. The judgment of the acquittal by the trial Court viz., Judicial Magistrate (Fast Track Court NO.1), Erode in S.T.C.No.152 of 2016 dated 17.11.2016 acquitting the petitioner is restored.

15. As a result, this Criminal Revision Case is allowed.

Sd/-
Assistant Registrar(CS-IV)

// True Copy //

Sub Assistant Registrar

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To:

1.The Judicial Magistrate,
Fast Track Court No.1, Erode.

2.The II Additional District and Sessions Judge, Erode.

+1cc to Mr.K.M.Subramaniam, Advocate SR.No.36858

Crl.R.C.No.1123 of 2017

KV(CO)
CB(01/07/2022)