BAIL SLIP

The Petitioner/Accused viz., K.Palanisamy was directed released on Bail in Crl.M.P.No.10870 of 2017 in CRL.R.C.No.1145 of 2017 dated 30.08.2017 on the file of the Honourable High Court, Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.03.2022

PRONOUNCED ON : 07.04.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.R.C.NO.1145 OF 2017

K.Palanisamy
... Petitioner/Appellant/Accused

Vs.

P.Balasubramanian
... Respondent/Respondent/Complainant

PRAYER: Criminal Revision is filed under Section 397 r/w 401 of the Code of Criminal Procedure, to set aside the conviction imposed in the judgment dated 16.08.2017 made in C.A.No.4 of 2017 on the file of the learned Second Additional District and Sessions Court, Erode confirming the judgment dated 24.11.2016 made in S.T.C.No.504 of 2012 on the file of the learned Judicial Magistrate, Fast Track Court No.2, Erode by allowing this Criminal Revision Petition.

For Petitioner : Mr.M.Ganesh for Mr.N.Manokaran

For Respondent : Mr.I.C.Vasudevan

ORDER

The petitioner was convicted by the learned Judicial Magistrate, Fast Track Court No.II, Erode (trial Court), vide judgment in S.T.C.No.504 of 2012, dated 24.11.2016 and sentenced to undergo one year Simple Imprisonment and to pay a fine of Rs.3,000/-, in default, to undergo three months Simple Imprisonment for offence under Section 138 of the Negotiable Instruments Act, 1881 (Hereinafter referred to as 'Act'). Aggrieved against the same, an appeal was preferred before the learned II Additional District and Sessions Judge, Erode (lower appellate Court) in C.A.No.4 of 2017. The lower appellate Court, by judgment, dated 16.08.2017, dismissed the appeal confirming the judgment of the trial Court, as against which, the present Criminal Revision Case has been filed by the petitioner.

2.The gist of the case is that on 28.05.2012, the petitioner/accused borrowed a sum of Rs.3,00,000/- from the respondent/complainant for his urgent need. In discharge of the liability, the petitioner issued a post dated cheque for Rs.3,00,000/- vide No.640722, dated 28.07.2012 in favour of Karur Vysya Bank, Komarapalayam Branch. When the respondent presented the above cheque for collection on 28.07.2012 through the Indian Overseas Bank, Moolapalayam Branch, Erode, the cheque was returned as unpaid due to insufficiency of funds in the petitioner's account with a bank memo 'Account Closed' on 30.07.2012. Annoyed over the same, the respondent issued a statutory notice to the petitioner to his residence address as well as office address on 11.08.2012. The said statutory notice was not received and returned with an endorsement 'Addressee initial differed so refused' on 17.08.2012. Again, another statutory notice with correct initial and address was issued on 23.08.2012. Despite intimation was given to the petitioner, the petitioner failed to receive the notice and the postal cover was returned with endorsement 'Not claimed' on 01.09.2012. Hence, the respondent filed a complaint before the trial Court for offence under Section 138 of the Act.

3.During trial, on the side of the complainant/respondent, he examined himself as PW1 and marked 8 documents as Exs.P1 to P8. On the side of the defence, 3 witnesses were examined as DW1 to DW3 and 4 documents were marked as Exs.D1 to D4. After ful-fledged trial, the trial Court convicted the petitioner as stated above. The lower appellate Court confirmed the conviction and sentence and dismissed the appeal.

4.The primary grounds, on which, the present revision has been filed, is that there is no evidence on record to prove the transaction between the petitioner and the respondent. Both the Courts below wrongly proceeded on the basis of presumption under Section 139 of the Act and wrongly construed that the presumption is wit regard to existence of a debt. The Courts below failed to note that the existence of legally enforceable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of the debt or other liability. In this case, there is no legal obligation to let in negative evidence to prove innocence in a criminal case. The accused can discharge his burden on the basis of the materials already brought on record as the accused has a constitutional right to maintain silence. Added to it, in this case, the petitioner examined three witnesses as DW1 to DW3 and marked four documents as Exs.D1 to D4 to rebut the presumption and to probablize his defence, but the Courts below failed to consider the same. The Courts below failed to note that when the issuance of the cheque is in dispute, it is for the complainant to prove under what circumstances, the subject cheque was issued. The 'execution' is totally different from 'issuance' of the cheque. Thus, the case of the respondent cannot be accepted simply on the basis of evidence of PW1 and Ex.P1. The cheque issued in favour of the respondent is denied. Admittedly, the respondent neither in the complaint, nor in his evidence stated about how he came in contact with the petitioner and what is the relationship between them and for what reason and by what means, hand loan of such huge amount was given. The burden of proof is always upon the respondent and there is no need for the petitioner to let in evidence to prove negative.

5.The submissions of the learned counsel for the petitioner is as follows:-

(i)The respondent admitted in cross examination that he is a land and vehicle broker and earlier, he was an auto driver. The respondent does not pay any income tax, his monthly income cannot be quantified. He claimed that during some months, he used to earn upto one or two lakh by way of brokerage commission. He further admitted that he has only one bank account in Indian Overseas Bank, Moolapalayam. During the relevant period, in his bank account, an amount of Rs.1,085/- was available. He further admitted that he came to know the petitioner through his friend, who is a resident of Bhavani. On his request, the respondent gave hand loan to the petitioner. The respondent's friend, who is a resident of Bhavani, is known to him for five years and he has not seen him for the past three years. The respondent further admitted that the petitioner got introduced by his friend in a tea shop. On his request, the respondent gave hand loan to the petitioner, which is highly unbelievable. The respondent confirmed that it is only a hand loan and not a loan on interest. He confirmed that he does not know Subramaniam (DW2), the Proprietor of Sivasakthi Finance, Erode as well as its Manager Devaraj (DW3). When the photo (Ex.D2) was shown to the respondent during cross examination, with reluctance he admitted his presence along with Subramaniam (DW2) and Devaraj (DW3). It was suggested to the respondent that he is a land broker and, is working for commission to facilitate Subramaniam's (DW2) business. It was also suggested to the respondent that Subramanian's son Parameshwaran (DW3) filed a case against the petitioner's wife in S.T.C.No.193 of 2012, which ended in acquittal.

(ii)In this case, the Bank Manager of Indian Overseas Bank, Moolapalayam examined as DW1, through him, the statement of account of the respondent marked as Ex.D1. It is seen that on 28.05.2014, the respondent, in his bank account, had an amount of Rs.1,085/- only. One Subramanian, Proprietor of Sivasakthi Finance, Erode was examined as DW2, who admitted that he is running a finance company, he is not sure about whether the petitioner was having any transaction with his company. DW2 admitted his presence in the photo (Ex.D2) along with his Manager Devaraj. DW2 stated that the third person in the photo (Ex.D2) is not known to him and later, he changed his version admitting that the third person in Ex.D2 is the respondent herein. DW2 gives explanation that he requested the respondent to move his bike, so that he can move his car, other than that he does not know anything about the respondent herein. DW2 admitted that his son Parameshwaran (DW3), resident of Coimbatore, was doing real estate business, his business activities is independent, not linked with Sivasakthi Finance. DW3/Parameshwaran admitted that he filed a complaint against the petitioner's wife Vijayalakshmi in S.T.C.No.193 of 2021, under Section 138 of the Act before the learned Judicial Magistrate, Fast Track Court No.I, Erode and through him, the copy of judgment in S.T.C.No.193 of 2012 was marked as Ex.D3. DW3 admitted that the case in S.T.C.No.193 of 2012 ended in acquittal for the reason that the petitioner's wife Vijayalakshmi is illiterate, does not know to sign and she used to affix her thumb impression only. On the contrary, the cheque pertaining to S.T.C.No.193 of 2012 was projected as though it was signed by the petitioner's wife. It was further suggested to DW2 and DW3 that by using the respondent, misused the cheque given by the petitioner for the earlier financial transaction with Sivasakthi Finance, Erode and projected as though the petitioner had taken loan from the respondent.

(iii)The learned counsel for the petitioner further submitted that the respondent is not a man of means and he is total stranger and he is unable to give particulars even the basic facts about the petitioner and the loan availed. The trial Court merely proceeded on assumption that the issuance of cheque (Ex.P1) is not in dispute and the presumption under Sections 118(a) and 139 of the Act would get attracted and rendered the judgment of conviction against the petitioner. The lower appellate Court, without independent analysis of evidence and materials, dismissed the appeal confirmed the judgment of the trial Court.

(iv)In support of his submissions, the learned counsel for the petitioner relied on the decision of the Hon'ble Apex Court in the case of "T.Nagappa Versus Y.R.Muralidhar reported in (2008) 5 Supreme Court Cases 633" wherein it is held that 'when a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof'. In this case, the petitioner had rebutted the presumption by cross examination of PW1, examination of DW1 to DW3 and by marking Exs.D1 to D4.

(v)He placed reliance on the judgment of the Hon'ble Apex Court in the case of "Rangappa Versus Sri Mohan reported in (2010) 11 Supreme Court Cases 441", wherein it had held that 'Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail'.

(vi)He further placed reliance on the judgment of the Hon'ble Apex Court in the case of "Basalingappa Versus Mudibasappa reported in (2019) 5 Supreme Court Cases 418" wherein the Hon'ble Apex Court held as follows:-

> "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.

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

(vii)Thus, the Hon'ble Apex Court in catena of judgments clearly held that the presumption under the Act can be rebutted, by way of cross examination of witnesses and by way of probablizing the defence. It is not necessary in all cases that the accused to get into the witness box to rebut the presumption. The accused is expected to dislodge the statutory presumption by probablizing his defence and the accused is not expected to prove the negative evidence beyond reasonable doubt. Hence, he prayed for acquittal setting aside the judgment of the Courts below.

6.The learned counsel for the respondent submitted that the petitioner makes a claim that signed blank cheque issued to Sivasakthi Finance, Erode, when he availed the loan for business need, was misused by DW2, who used the respondent to fill up his name in the cheque and proceed against the petitioner, cannot be accepted. As per Section 20 of the Act, once the signed cheque was issued and the signature is not disputed, the executant of the cheque gives an authority to the holder of the cheque to fill and present the same. In this case, admittedly, the petitioner has not denied the issuance of the cheque and the signature in it. The petitioner's defence that the respondent did not have capability to extend hand loan of Rs.3,00,000/-, is not a point to be considered. The Bank Manager of Indian Overseas Bank, Moolapalayam (DW1) in his cross examination stated that in the year 2012, the respondent had transaction for Rs.4,77,119/- and in the year 2013, he had transaction of Rs.6,78,467/- and in the year 2014, he had transaction of Rs.3,12,134/- in his account. Thus, the respondent is a man of means, who was having transactions in his account and he was capable of extending such hand loan to the petitioner.

7.The learned counsel further submitted that during trial, the petitioner failed to cross examine or put question to the respondent with regard to loan of Rs.3,00,000/- and whether it was withdrawn from the bank account or cash already available with him. Without putting such questions, the examination of the Manager of Indian Overseas Bank, Moolapalayam (DW1) and marking statement of account of the respondent (Ex.D1) is of no consequence. DW2, the Proprietor of Sivasakthi Finance, Erode clearly stated that he does not remember whether the petitioner had any loan transaction with his finance company. DW2 admitted his presence as well as his Manager Devaraj in the photo (Ex.D2) series. DW2 gave explanation for the respondent found in the photo (Ex.D2) series that he came to the Court complex to meet his Advocate, at that time, he found the bike of the respondent obstructing his way and requested the respondent to move the bike and nothing more. DW3, the son of DW2 admitted that he is independently doing real estate business in Coimbatore and the petitioner's wife Vijayalakshmi availing loan for Rs.5,00,000/- from him, for which, she issued a cheque, which got dishonoured and later, he filed a complaint before the learned Judicial Magistrate, Fast Track Court No.I, Erode in S.T.C.No.193 of 2012. During trial, the petitioner's wife took a defence that she is illiterate and she used to affix thumb impression. The copy of the judgment in S.T.C.No.193 of 2012 was marked as Ex.D3 and the evidence of Parameshwaran in S.T.C.No.193 of 2012 was marked as Ex.D4. During cross examination, it was suggested to DW3 that two blank cheques drawn on South India Bank of the petitioner's wife and two cheques drawn on Karur Vysya Bank of the petitioner and some blank stamp papers and promissory notes were signed and handed over by the petitioner to DW2, which now claims to be misused. The petitioner admitted that he signed and handed over the negotiable instruments including the cheque involved in this case. Nowhere, the petitioner is able to prove that he discharged his liability of Sivasakthi Finance, Erode.

8.The learned counsel further submitted that the trial Court, on the evidence and materials produced, found that the petitioner not discharged his liability invoking the presumption under Sections 118(a) and 139 of the Act, convicted and sentenced the petitioner. The lower appellate Court on independent analysis of evidence and materials, rightly confirmed the judgment of the trial Court. Hence, he opposed this Criminal Revision.

9.In support of his submissions, the learned counsel for the respondent relied on the decision of the Hon'ble Apex Court in the case of “Rohitbhai Jivananlal Patel Versus State of Gujarat and another reported in (2019) 18 SCC 106” wherein it had held that 'In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour.'

10.This Court considered the rival submissions and perused the materials available on record.

11.In this case, the respondent examined himself as PW1 and through him, Exs.P1 to P8 marked. The cheque in question was marked as Ex.P1. The bank return memo marked as Ex.P2. The cheque returned for the reason 'Account Closed' and thereafter, the statutory notice (Ex.P3) issued by the respondent to the petitioner. Since the initial found in the postal cover varied with the petitioner's initial, the same was returned to the respondent. Following the earlier notice, another statutory notice (Ex.P6) was sent to the petitioner, which was not received. Despite the petitioner aware about the statutory notice, he failed to receive the same and hence, no reply was sent. On the other hand, during trial, the petitioner put several questions to the respondent in his cross examination.

12.The primary ground, on which, the petitioner proceeded is that the respondent is total stranger and he is not known to him. The cheque (Ex.P1) is a blank signed cheque, which was given to Sivasakthi Finance, Erode. DW2, the Proprietor of Sivasakthi Finance, Erode misused the cheque by using the respondent. The respondent got no financial capability to lend such huge amount as hand loan to the petitioner. More so, when the respondent admitted that he was doing land and vehicle broker business and earlier, he was an auto driver, he should not have any regular income. During some months, he used to receive one to two lakh as income from brokerage. The statement of bank account of the respondent was marked as Ex.D1 through the Manager, Indian Overseas Bank, Moolapalayam (DW1). From the evidence of DW1, it is seen that during the relevant period, the respondent had a meager amount of Rs.1,085/- in his bank account. On perusal of Ex.D1, it is seen that though the respondent had some transactions in his account, these transaction confirmed that his account was used as accommodation account. Whenever any credit is given, on the next day or on the following days, the credits were withdrawn by self in cash.

13.The respondent feigns ignorance when he was shown the photo (Ex.D2). Though admitted his presence, he feigns ignorance about the other two persons, who are Subramaniam/DW2 and one Devaraj. Initially, the respondent shown some resistance and later, he admitted that in the photo (Ex.D2), Subramaniam/DW2 and one Devaraj are present. DW2 gave explanation for the presence of respondent in photo (Ex.D2) series that he came to the Court complex to meet his Advocate, at that time, he found the bike of the respondent obstructed his way and DW2 requested the respondent to move the bike and nothing more. DW3, the son of DW2 admitted that he filed a complaint against the petitioner's wife Vijayalakshmi in S.T.C.No.193 of 2012 and the same was ended in acquittal on 06.04.2015 for the reason that the petitioner's wife is an illiterate, who does not know to sign and she only affix her thumb impression. On the contrary, the cheque, in that case, was signed in the name of Vijayalakshmi. He further admitted that as against the judgment of acquittal, no appeal preferred. The stand of the petitioner is that when he availed loan from Sivasakthi Finance, Erode, he handed over some signed blank cheques, stamp papers and promissory notes. One of the cheque handed over to Sivasakthi Finance, Erode, was misused and presented the same through the respondent.

14.During trial, the respondent was cross examined in detail by the defence/petitioner. The respondent admitted that he extended hand loan to the petitioner on the request of his friend, a resident of Bhavani. The said person was not examined as witness during trial. The respondent admitted that even that person is known to him for five years and for past three years, he has not seen him. Further, the request for loan was made in a tea shop in Bhavani. Thus, on the facts and circumstances of the case, the respondent giving loan to the petitioner is unbelievable. Added to the fact that during the relevant period, the respondent was only a land and vehicle broker without any regular income. It is highly improbable that a person with such uncertain financial status would lend such huge amount to a stranger, that too a hand loan without any interest.

15.Thus, the petitioner had probablized his defence by way of cross examination of the respondent and examination of DW1 to DW3 and marking of defence exhibits (Exs.D1 to D4). Both the Courts below merely proceeded on the point that the issuance of cheque is not denied and convicted the petitioner invoking the presumption under Sections 118(a) and 139 of the Act.

16.The Hon'ble Apex Court in the case of Basalingappa (cited supra) had given guidelines under what circumstances, the presumption under Sections 118(a) and 139 of the Act to be followed that the statutory presumption under Section 139 of the Act is a rebuttal presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. It is not necessary for the petitioner/accused to get the witness into the box in support of his defence, Section 139 of the Act is only on evidentiary burden and not a persuasive burden.

17.In the light of the above discussions, this Court finds that the petitioner had probablized his defence and the cheque in question was not issued to the respondent in discharge of any legally enforceable liability.

18.Hence, the judgments of the Courts below are liable to be set aside and, are set aside. Accordingly, this Criminal Revision Case is allowed. The petitioner is acquitted from all the charges. Fine amount, if any, paid shall be refunded. Bail bond, if any, executed shall stand cancelled.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

vv2

To

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

2. The Judicial Magistrate,
   Fast Track Court No.II, Erode.

3. The Chief Judicial Magistrate,
   Erode (For Information).

Copy To

The Section Officer,
Criminal Side Record,
High Court, Madras.

+1cc to Mr.N.Manokaran, Petitioner, Advocate, S.R.No.24352

Crl.R.C.No.1145 of 2017

NR(CO)
RLP(20/04/2022)