IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.11.2022

Pronounced on : 11.2022

Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.R.C.No.1605 of 2017

R.Senthil Moorthy @ Senthil Kumara Moorthy .. Petitioner

/versus/

L.S.Sathish Kumar .. Respondent

Prayer: Criminal Revision Case has been filed under Section 397 r/w 401 of Cr.P.C., to set aside the judgment and conviction dated made in C.A.No.108 of 2015 on the file of I Additional District and Sessions Judge, Erode dated 03.11.2017 confirming the judgment dated 19.08.2015 made in S.T.C.No.279/2011 on the file of the Judicial Magistrate (F.T.C.No.II), Erode.

For Petitioner :Mr.P.Narayana Prasadh for
Mr.M.N.Balakrishnan

For Respondent :M/s.Hariniyadev
Mr.A.Palaniappan

ORDER

The Criminal Revision Case is directed against the concurrent findings of the Courts below, holding the petitioner guilty of dishonouring the cheque drawn for Rs.5,00,000/- in favour of the complainant, thereby committed offence under Section 138 of Negotiable Instruments Act and hence, sentenced to undergo One year Simple Imprisonment and fine of Rs. 5000/-, in default 1 month Simple Imprisonment.

2 The complaint against this petitioner alleges that, he borrowed Rs.5,00,000/- from the complainant on 14/09/2011 and promised to repay it within one month. He paid one month interest of Rs.5,000/-. To discharge the loan, he gave a cheque for Rs.5,00,000/- bearing No:16495 dated 14/10/2011 drawn on HDFC Bank, Ltd., Pollachi Branch. On presentation of the said cheque for collection, through Punjab National Bank, Cutchery Road, Erode Branch, it was returned as " Account closed". Since the cheque was issued from the account closed with an intention of cheating and to defraud the complainant, after causing statutory notice dated 22/10/2011 to the accused calling upon him to pay the cheque amount, then after on receipt of the reply with false allegations, the complaint filed before the Judicial Magistrate after issuing a rejoinder to the reply.

3 The said complaint was taken cognizance in S.T.C.No.279/2011(on the file of Judicial Magistrate, Pollachi). To prove the complaint, the complainant was examined as PW-1. Six (6) documents were marked as Ex.P-1 to Ex.P-6. In defence, the accused examined 2 witnesses and marked three (3) exhibits as Ex.D1 to Ex.D3.

4 The gist of the witnesses testimony and the content of the exhibits:

The complainant has deposed that for the existing debt, the cheque Ex.P-1 was issued by the accused. The cheque on presentation returned with endorsement memo stating that 'Account closed'. The Memo of the bank is Ex.P-2. The statutory notice dated 22/10/2011, to the accused informing the circumstances under which the cheque issued and its return on presentation and calling upon him to pay the cheque amount is Ex.P-3. The accused received the statutory notice on 22/10/2011 and the Postal Acknowledgment is Ex.P-4. The postal acknowledgment card is Ex.P-5. Stoutly denying the allegations found in the notice, the accused has replied through his lawyer and the said reply dated 05/11/2011 is Ex.P-6.

5 In the reply Ex.P-6, the accused has termed the complainant an outsider, unknown to him and never approached him for loan or received Rs.5,00,000/- or issued cheque to discharge the loan. On enquiry after receipt of the notice, he came to understand that the complainant is a close relative and associate of one Durairaj, who is doing real estate business. The said Durairaj approached the accused for purchase of the land owned by the accused and voluntarily advanced Rs.5,00,000/- for the said property. At that time, two cheques were given to Durairaj along with receipts. One of the cheques so given is misused by the said Durairaj through the complainant as if the complainant advanced loan and the subject cheque given to discharge the said loan and another cheque similarly misused as if it was given to one K.Sakthivel a close associate of Durairaj. Claiming that he does not know either the complainant-L.S.Sathishkumar or Sakthivel advised the complainant not to precipitate the matter further. The copy of the reply notice seemed to be marked to Durairaj and Sakthivel.

6 The accused to rebut the presumption and to substantiate the averment made in his reply notice has summoned both Durairaj and Sakthivel and examined them as DW-1 and DW-2 respectively. Through DW-2, the rejoinder sent by him to the reply of the accused as well as the complainant marked as Ex D-3. In this rejoinder (Ex D-3), it is stated that the contents of the reply notice are utter false and Sakthivel does not know the said Durairaj at all and not aware of the alleged agreement between the accused and the said Durairaj. He also does not know who the complainant is. In the deposition also DW-2, Sakthivel has not supported the case of the accused, but had spoken only about his complaint against the accused in S.T.C.No.

213/2012. The copy of which marked as Ex D-1. This witness has categorically denied the suggestion that he is known to Durairaj.

7 Durairaj, who was examined as DW-1, admits that the complainant Sathish kumar is his brother's son. This witness had denied the suggestion that the cheque in dispute was given to him as security in connection with a land transaction between him and the accused. Thus neither the ocular evidence nor the documents filed to rebut the statutory presumption has helped the accused to probablise his defence. Hence the Courts have held that having admitted the issuance of cheque, the accused is guilty of offence under section 138 of NI Act for dishonouring the cheque by closing the account.

8 In the revision petition, the learned counsel for the accused/petitioner submitted that the name of the accused/petitioner is Senthil Kumara Moorthy. Whereas the statutory notice Ex.P-1 was issued in the wrong name of Senthil Moorthy. The complainant has not proved his source of income to advance loan of Rs.5,00,000/-. He has explained how the said Rs.5,00,000/- given to the accused. There is no evidence of availing loan or no evidence of advancing loan. Ex.P-1 (cheque) which has come into the hands of the complainant through Durairaj has been misused, through the complainant who has no means to advance such a huge money as loan and without any privity of contract between petitioner and the complainant.

9 The Learned Counsel for the petitioner relying the Judgment of the Hon'ble Supreme Court rendered in ***Basalingappa –vs- Mudibasappa [2019 (5) SCC 418]*** submitted that the accused has discharged the burden of rebutting the statutory presumption by questioning the privity of contract and the capacity of the complainant to advance such a huge sum. Quoting the Hon'ble Supreme Court Judgment, the learned counsel submitted that, the test of proportionality should guide the construction and interpretation of reverse onus clauses on defendant-accused and the defendant-accused cannot be expected to discharge an unduly high standard of proof. When the financial capacity of the complainant is questioned, it is incumbent on the complainant to have explained his financial capacity.

10 On considering the defence taken by the accused in his reply notice, he has not stated that the complainant has no financial capacity to lend loan of Rs.5,00,000/- to him. The specific defence as found in the reply notice is lack of privity of contract and the cheque was not given to the complainant for any legally enforceable debt. However the accused admits that he gave the cheque to one Durairaj and also he received advance of Rs.5,00,000/- from Durairaj. The said Durairaj examined as DW-1 has denied the receipt of the cheque, he has only deposed that for the sale agreement between him and the accused he has initiated a civil Suit. Thus neither DW-1 nor DW-2 has supported the case of the accused. A vague suggestion during the cross examination that the complainant has no source of income and income tax return not filed will not be sufficient to reverse the onus after the foundational fact of the genuineness of the cheque and drawing the cheque after receiving cash been admitted.

11 The judgment of this Court in ***K.Ilayarajalingam –vs- Karthikeyan (2022 (3) MLJ (cri) 397)*** also is of no support to the case of the accused, since in that case on the receipt of the statutory notice, the accused consistently pleaded that the complainant has no resource to lend Rs.9,00,000/-. While the trial Court accepted the defence and acquitted the accused, the lower appellate Court interfered the acquittal and hence the High Court reversed the conviction and restored the order of acquittal passed by the trial Court. Contrarily, in the instant case, the accused through out the trial had only pleaded that he received cash but not from the complainant, but from Durairaj. He issued the cheque as security but not to the complainant.

12 The Courts below have considered the facts and arrived at concurrent finding on fact about the guilty. There is no error in appreciating the evidence and the law. The plea that the complainant had no source of income to lend Rs.5,00,000/- is a belated defence not reflected in the reply notice or proved through any contra evidence. Therefore the revision petition deserve to be dismissed.

13 Accordingly, this Criminal Revision Case stands dismissed.

...11.2022

Index:yes/no
speaking order/non speaking order
rpl

To :

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

2.The Judicial Magistrate (F.T.C.No.II), Erode.

DR.G.JAYACHANDRAN,J.

rpl

Pre-Delivery Order made in
Crl.R.C.No.1605 of 2017

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