IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 13.04.2023	Pronounced on:25.04.2023

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Revision Case No.113 of 2020
and
Crl.M.P.No.723 of 2020

Selvamani .. Petitioner

/versus/

A.Thangavel .. Respondent

Prayer: Criminal Revision Case has been filed under Section 397 & 401 of Cr.P.C., against the order passed by the learned I Additional District and Sessions Judge, Salem dated 2.11.2019 in C.A.No.91 of 2018 confirming the conviction of sentence passed by the learned Judicial Magistrate Fast Track Court, Athur in S.T.C.No.62 of 2013, dated 08.06.2018.

For Petitioner :Mr.V.V.Sairam

For Respondent :Mr.S.Kousik for
Mr.K.Sathish Kumar

O R D E R

The Criminal Revision Petition is by the accused, who was found guilty of offence under Section 138 of Negotiable Instruments Act, 1881 by the Courts below for issuing a cheque for Rs.8,50,000/- dated 29/04/2013 to the complainant, but failed to honour the same.

2. Mr.Thangavelu, the complainant in his complaint had stated that he and the accused are known to each other for years. On 28/02/2013 the accused, to meet his son‘s marriage expenses borrowed loan of Rs.8,50,000 and promised to repay the money within one month period and gave a post dated cheque for Rs.8,50,000/- to discharge the debt. The cheque dated 29/04/2013, when presented for collection returned along with a memorandum issued by State Bank of India dated 02/05/2013 stating that the cheque is returned for the reason “Insufficient fund”. The complainant issued a statutory notice dated 05.05.2013 to the accused, intimating that the cheque given by him to discharge the debt had been bounced for insufficient fund and calling upon him to pay the cheque amount. The accused, who received the notice gave a reply dated 31/05/2013. In his reply, the accused denied issuance of cheque and any

liability. Thereafter, the complaint under Section 138 of Negotiable Instruments Act, 1881 was present on 19th June 2013. It was taken on file on 24th June 2013 by the Judicial Magistrate Fast Track Court, Alanthur in S.T.C.No.62 of 2013.

3. To prove the complaint averments, the complainant, his wife and his brother mounted the witness box and examined as PW-1 to PW-3. Eight exhibits were marked on the side of the complainant. For the defence, 4 witnesses were examined and 9 documents were marked.

4. While the case of the complainant was that, the cheque Ex.P-1 was drawn by the accused to discharge the liability namely, the loan borrowed on 28/02/2013, the accused put forth a defence that Ex.P-1 cheque was given in the year 2007 in respect of a loan availed from one Sriram of Salem. The complainant arranged the said loan and as security for repayment, the subject cheque was obtained in blank by the complainant at the time of borrowing. In spite of discharging the said debt with Sriram in 2009, the cheque given as security to the complainant was

not returned to the accused in view of prevailing friendship he did not insist for return of the cheque. Later, the friendship broke taking advantage of the said blank cheque, the complainant has filed his name, date and amount as Rs.8,50,000/- and presented for collection with malafide intention.

5. According to the testimony of the accused examined as DW-1, his son met with an accident at Canada on 28/03/2007. To meet his medical expenses he requested the complainant to arrange finance. Accordingly the complainant arranged Rs.50,000/- as loan from one Sriram of Salem. For that loan, as a security blank cheque was given to the complainant. On 05/02/2009, he sold his land and on the same day discharged the loan borrowed from Sriram along with interest. The complainant promised to return the cheque later, but failed to return it. Contrarily presented the blank cheque by filling the name and amount fradulently.

6. Whereas on the side of the complainant, PW-1 has deposed that the accused and the complainant are employees in Tamil Nadu Transport Corporation and they know each other for a long time. To meet his son's

marriage expenses, the accused sought for a loan of Rs.8,50,000/- and therefore, on 28/02/2013, the wife of the complainant (PW2) brought cash of Rs.8,50,000/- to Vhazhapadi bus depot where the accused and the complainant were on duty and the money was handed over to the accused. The accused gave the post dated cheque Ex.P-1 at that time. The brother of PW-1 who accompanied PW-2 saw the money transaction.

7. The trial Court after weighing the evidence held that the complainant had proved the case and the statutory presumption against the drawer of the cheque not rebutted. The defence put forth by the accused through oral and documentary evidence does not rebut the legal presumption. The contention of the accused is that the cheque was given in the year 2007 and that was not returned, even after the discharge of the debt in the year 2009 by selling the property of the accused not probabilised through the testimony and documents relied by the accused.

8. The revision petition is filed stating that the finding of the Courts below holding the accused guilty of offence under Section 138 of the

Negotiable Instruments Act, 1881 and convicting him to pay compensation of Rs.8,50,000/- and in default, six months SI is erroneous and contrary to facts and law.

9. The learned counsel appearing for the revision petitioner/accused submitted that the Courts below have failed to apply the correct law regarding proof of liability of a debt for which the post dated cheque given. Relying upon the testimony of DW1 to DW4, the learned counsel appearing for the revision petitioner submitted that the accused admits the issuance of the blank cheque signed and given to the complainant, but it was in the year 2007 and not in the year 2013 as claimed by the complainant. He gave the cheque in the year 2007 as security in relation to the loan received for a sum of Rs.50,000 from one Shriram of Salem. The loan was arranged through the complainant. The said loan received from Sriram was discharged on 05/02/2009 by selling the property. However, the cheque given as security was not returned back by the complainant and he was dishonestly retaining it and later, misused to initiate the complaint.

10. The accused to prove the subject cheque pertains to the cheque book containing 20 cheques given to him in the year 2007 and out of 20 cheques ,he used 16 cheques to discharge the loan availed from TVS finance for purchasing a two wheeler in the year 2007-2008 had produced. Ex.D1 statement of account. According to the accused, while the cheques bearing other consecutive numbers were used in the year 2007-2008 to pay the EMI for the two wheeler finance availed, it is mysterious the previous cheque bearing number 0813881 surfacing after six years through the complainant.

11. The said explanation given by the accused is adequate to rebut the presumption, which statute confers on the complainant. The Rebuttal of presumption need not be beyond doubt, but sufficient if it is satisfied the degree of preponderance of probability. While the accused had sufficient income and his family members are well placed, there is no necessity for him to borrow money in the year 2013.

12. Relying upon the attendance register for 28/02/2013, which was produced and marked through DW-2 Mr.S.M.Suresh, Depot Manager at

Vhazapadi Depot, it was contended that on the date of alleged borrowing, the complainant was on duty and the probability of being at the depot at 11:30 a.m. is impossible.

13. Through DW-3 Mr.M.Manoharan, the Manager of State Bank of India, Belur branch, the accused has proved that the cheque bearing number 813881, which is the subject matter of the complaint was issued from his bank for the account number 11449225989. The cheque book of 20 cheques starting from 813881 was issued to him in the year 2007. Out of those 20 cheques, the cheques bearing numbers 813882 to 813897 where passed between 15/06/2007 and 11/09/2008 for Rs.1590/- each and debited from his account and transferred to the account of TVS finance. DW-4, Dharamveer, the Branch Manager of State Bank of India, Malliyankarai Branch, where the complainant holding his account was summoned to produce the statement of accused account and same was produced and marked as Ex.D-7. The learned Counsel for the Revision Petitioner referring Ex.D-7, submitted that this evidence is sufficient to prove the fact that the cheque was not issued to the accused in the manner

and date as found in the complaint and therefore, it is the burden of the complainant to prove beyond doubt about the enforceable liability and issuance of cheque on the particular day in a particular manner to discharge the liability.

14. Per contra, the learned counsel appearing for the Respondent/ complainant submitted that by establishing the fact that the subject cheque was given to him, while he was operating the account in the year 2007 and the subsequent cheques encashed much earlier will not lead to an inference that the subject cheque was given during the same point of time. Even according to the DW-2, the Manager of the Bank in which the accused maintaining the account, he has no record to show whether the other four cheques were presented if so, when. Therefore, the Court cannot presume that the subject cheque was given by the accused in the year 2007 because he has proved that 16 out of 20 cheques of consecutive numbers encashed during 2007 – 2008. Under Section 118 of the Negotiable Instruments Act, 1881, the statute provides a presumption as to the date of the cheque and that presumption cannot be rebutted by proving the prior or later cheque

encashed on a particular date. It is not a rule or presumption that cheques to be used in seriatim.

15. Further the learned counsel for the respondent submitted that it is not merely on presumption conferred under statute the Courts below convicted the accused for dishonour of the cheque issued to discharge the legally enforceable debt. The judgment is based on the positive evidence let in by the complainant by examining his wife as PW2 and brother as PW3 to show the wherewithal to advance loan of Rs. 8,50,000/- and the receipt of the money by the accused against the post dated cheque. The existing liability been proved through evidence and not by presumption.

16. The complaint is resisted by the accused on two fold. First, it was contended by the accused that the complainant has no wherewithal to advance a sum of Rs.8,50,000/-. Next, the subject cheque was given as security in connection with loan of Rs.50,000/- borrowed by the accused in the year 2007 from one Sriram of Salem.

17. Having admitted the issuance of cheque and projected a case of borrowing from one Sriram of Salem in the year 2007 and same been discharged in the year 2009. It is the burden of the accused to prove the said fact. Proof of sale of his property in the year 2009 is not a proof for his earlier borrowing or discharge subsequently or for the earlier borrowing the subject cheque was given as security. Without establishing these facts, mere proof of sale of his property much prior to the alleged date of liability or issuance of cheque cannot be a rebuttal to the presumption laid under Sections 118 and 139 of the Negotiable Instruments Act, 1881.

18. Whereas, the complainant through his wife and his brother had proved the substantial fact of borrowing and the source from which he lend. The accused being a known person, loan given for a short period to meet out the expenses of his son's marriage, on the promise that the post dated cheque given to discharge the debt will be honoured on presentation.

19. The learned counsel appearing for the Revision Petitioner/

Accused contended that while in the notice it is stated that the money was borrowed on 28/02/2013 to meet his son's marriage expense and promised that it will be repaid within a period of two months, but in the complaint before the Court, it is stated that the accused promised to repay the loan amount within one month. This discrepancy is very fundamental to render the case of the complainant unbelievable.

20. This Court does not view, the said discrepancy fatal to the case of the complaint. The discrepancy in the notice and the complaint regarding the promise to repay, one month as said in the complaint or two months as found in the statutory notice, the proven fact is that the cheque is dated 29/04/2013, i.e two months after the alleged borrowing and from that date the liability to honour the cheque commences.

21. Regarding the specific denial and the defence that the cheque was given to the accused six years earlier (in the year 2007) and it is misused in the year 2013, we find, there is no evidence to show that after discharge the alleged loan, there was any demand to return the cheque or

the refusal to return the signed cheque, no evidence to show the accused protested in writing or placed any complaint about it. The accused attempted to prove that on 28/ 02/2013, the complainant was on duty and not at Vazhapadi depot between 11.30 and 12.00 pm. However the attendance register and the testimony of DW2 indicates that on that day at 11:30 AM the complainant just completed his duty and he was at the Vazhapadi depot. Therefore the evidence of Ex.D-2 to Ex.D-4 is of little assistance to the accused.

22. The accused has failed to rebut the presumption even by preponderance of probability. Contrarily, the complainant had through positive evidence proved his source, payment of Rs.8,50,000/- and obtainment of cheque to discharge the debt. Therefore, this Court finds no merit in the revision petition. Hence, the conviction and sentence to pay the complainant a compensation of Rs.8,50,000/-, in default to undergo six months SI is confirmed.

23. From the records, this Court finds that the Revision Petitioner

has deposited Rs.2,00.000/-(Rupees two lakhs only) to the credit of S.T.C.No:62/2013 on the file of Judicial Magistrate, Fast Track Court, Athur as per the direction of this Court vide order dated 22/01/2020 while suspending the sentence. Therefore, while permitting the complainant to withdraw Rs.2 lakhs kept in deposit of STC account, one month time granted to the accused to pay the balance compensation of Rs.6,50.000/-.

24. In the result, **the Criminal Revision Petition No:113/2020 is dismissed.** Consequently, connected Miscellaneous Petition is closed.

25.04.2024

Index:yes/no
Speaking order/non speaking order
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To

1.The I Additional District and Sessions Judge, Salem.
2.The Judicial Magistrate, Fast Track Court, Athur.

Dr.G.JAYACHANDRAN, J.

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delivery Order made in
Crl.R.C.No.113 of 2020
and
Crl.M.P.No.723 of 2020

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