IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.04.2023

CORAM :

THE HONOURABLE Dr. JUSTICE **G.JAYACHANDRAN**

Crl.R.C.No.400 of 2020
and
Crl.M.P.Nos.3178 & 3179 of 2020

A.Subramanian .. Petitioner

Vs.

P.Kannammal ..Respondent

The Public Prosecutor ...Formal Party

PRAYER : Criminal Revision Case has been filed under sections 397 read with 401 of Criminal Procedure Code to set aside the judgment of the I Additional District and Sessions Judge, Erode on 31.10.2019 in Crl.A.No.97 of 2015 confirming the conviction and sentence passed by the learned Judicial Magistrate Fast Track No.II, Erode in S.T.C.No.331 of 2013 dated 21.07.2015.

For Petitioner	:	M/s.M.Lourdu
For Respondent	:	Steps not taken & died

ORDER

Heard the learned counsel for the Revision Petitioner.

2. This Criminal Revision Case is filed against the concurrent findings of the Courts below holding that the revision petitioner was guilty of offence under Section 138 of Negotiable Instruments Act for issuing a cheque for Rs.5,00,000/- to the respondent after closing the account.

3. According to the complaint, the revision petitioner borrowed a sum of Rs.5,00,000/- from the complainant on 22.12.2012. To discharge the debt, he gave the subject cheque dated 22.01.2013 for Rs.5,00,000/- When the cheque was presented for collection, it got bounced with a memo stating that “Account Closed”. Thereafter, the respondent has caused notice under Section 138 of Negotiable Instruments Act, dated 22.02.2013 calling upon the revision petitioner/accused to pay the cheque amount and intimating about the bouncing of the cheque. The statutory notice was received by the accused on 28.02.2013, however, he has not sent any reply. Thereafter, the complaint presented before the Fast Track Court, Erode was taken on file and the same has been assigned S.T.C.No.331 of 2013.

4. The complainant has explained her source of money to lend Rs.5,00,000/- to the accused, whereas the accused who had pleaded that he had no financial transaction with the complainant and the transaction was only with husband and son of the complainant not been proved even by preponderance of probability. Therefore, the accused was held guilty of offence under Section 138 of N.I.Act and the Trial Court sentenced him to undergo one year S.I and to pay a fine of Rs.5,000/-, in default, one month Simple Imprisonment.

5. Aggrieved by the judgment of the Trial Court, the accused preferred an appeal before the I Additional District and Sessions Judge, Erode. In the course of the appeal, he took out an application to adduce additional evidence. The lower Appellate Court allowed the petition filed under Section 391 Cr.P.C. The Auditor by name Subramanian was examined as DW.3 and through him Ex.D1 to Ex.D3 were marked. Relying upon these documents, the accused before the lower Appellate Court contended that there was a business transaction existing between him and the husband of the complainant. The two invoices marked as Ex.D1 and Ex.D2 raised by Sri Chinnamman Wax Printers in the name of Raja Tex, Karur, for a sum of Rs.1,45,000/- and Rs.2,98,480/- respectively, which are dated 20.03.2008 and 27.03.2008, go to show that there was a business transaction between him and the husband of the complainant. Further, Ex.D3-the Statement of Account ending that 20.07.2008 indicating that there was a running account between the Chinnamman Wax Printers and Raja Tex, Karur. It was contended that the subject cheque was given as a security for the goods supplied on credit by the husband of the complainant and not to the complainant to discharge any debt he owe to her.

6. The lower Appellate Court, after appreciating the defence taken by the appellant through the testimony of DW1 to DW.3 and the Exhibits D1 to D3 negatived the defence on the ground that these facts were not said when the legal notice Ex.P3 was issued. Further before the Trial Court, the accused who has examined D1 and D2, had not spoken about these invoice transactions. Furthermore, under Section 313 of Cr.P.C., questioning the accused had not explained the circumstance under which the subject cheque was issued. Therefore, the lower Appellate Court has confirmed the judgment of the Trial Court by dismissing the appeal vide judgment dated 31.10.2019.

7. The learned counsel for the revision petitioner/accused submitted that the recent judgment of the Hon'ble Supreme Court rendered in ***Rajaram Vs. Marudhachalam*** and the earlier Constitution Bench judgment of the Hon'ble Supreme Court clearly laid down the law that to draw presumption under Section 138 of N.I.Act. The complainant has to prove the foundational fact such as source of money and the alleged debt is legally enforceable. In this case, the complainant during the cross examination has admitted that she is a house wife and she has no business or source of income. She solely depends on her husband. While so, the Trial Court as well as the Appellate Court ought not to have drawn a presumption under Section 138 of N.I.Act. Further, the learned counsel also submitted that the accused by examining DW.1 to DW.3 as well as by making Ex.D1 to Ex.D3 has proved that there was an existing business transaction between the company run by the husband of the complainant and the firm run by the accused and in the course of the said business transaction, the subject cheque was issued during the year 2007-2008. Thereafter, the accounts has not been used and bank account also closed. The said cheque, given as a security, has been misused by the the complainant and presented the cheque for collection. That was the reason why the cheque was returned with an endorsement "Account Closed". Therefore, he submits that the cheque was given merely for security purpose in the business transaction and that will not attract the offence under Section 138 of N.I.Act and for failure of the complainant to prove the foundational fact, the judgment of the Trial Court as confirmed by the lower Appellate Court has to be reversed.

8. Notice to the complainant not served and the learned counsel for the revision petitioner submitted that the private notice sent by RPAD received by the respondent as early as March 2020 and he received information from the reliable source that the respondent/complainant has passed away.

9. The submissions made by the learned counsel for the revision petitioner and on perusal of the records as well as the judgment cited as precedent by the Courts below. This Court proceed to determine whether the subject cheque issued for any legally enforceable debt as held by the Courts below.

10. The case of the complainant is that the cheque Ex.P1 was issued to discharge the existing debt arose due to borrowing of the money earlier by the accused. In the cross examination, the complainant has said that the cheque was filled up by the accused and handed over to her after receiving the money. The said transaction has taken place at the residence of PW.1 in the presence of her husband and son.

11. Though in the cross examination, she has said that she has no independent income on her own, later she has also clarified that through agricultural and cattle rearing she has income and from out of her saving she has given a hand loan of Rs.5,00,000/- to the accused. Admittedly, the complainant is not a person of no means. Even according to the complainant, her sons and husband are carrying on business and the accused himself admits that he used to purchase materials from complainant's husband on credit basis. His own statement of accounts which is marked as Ex.D3 indicates that he used to purchase goods on credit basis and pay it later.

12. According to Ex.D3 as on 27.03.2008, he owed a sum of Rs.5,29,413.87 to Chinnamman Wax Printers for the material supplied to the accused. It is contended by the learned counsel for the revision petitioner that the cheque issued as security to Palanisamy, who is the owner of Chinnamman Wax Printers, cannot be misused by presenting the cheque in the name of his wife, who had no privity of contract and no right to enforce any debt against the accused.

13. In this regard the judgment of the Hon'ble Supreme Court which says that the complainant should prove the enforceable debt to sustain a complaint under Section 138 of N.I.Act relied.

14. This is a peculiar case where the cheque, which is the subject matter of the revision petition was written and signed by the accused. The return memo Ex.P2 indicates that on the date when the cheque drawn on Bank of India, Karur branch, the account already closed the account. On receiving the return memo, the complainant has caused notice Ex.P3 dated 22.02.2013 which was received by the accused on 28.02.2013. This fact is proved through the postal acknowledgment card marked as Ex.P4. Before the Trial Court, through DW.1 and DW.2, the accused able to establish the fact that the business transaction between her husband and the accused. In the cross examination it is elucidated from the complainant that her husband and sons are running business in wax printing and they have business transaction with the accused. This fact is no way rebut the presumption enumerated under Section 139 of N.I.Act.

15. In the appeal to improve his defence, the accused has summoned the Auditor Subramanian, who was examined as DW.3. Through him, two invoices and the statement of account ledger extracted from the statement of account has been marked. Examination of these three documents, the factum of transaction between the accused and the Chinnamman Wax Printers alone is proved. Further as per the statement of accounts relied by the accused on 27.03.2008, he owe a sum of Rs.5,29,413.87. There is no evidence to show that the said due was cleared subsequently. Going back to the defence taken by the accused that he gave the subject cheque as a security for the goods supplied on credit basis and the same has been misused by filling up the name of his wife, it is clear that there is existing debt payable by the accused.

Section 20 of N.I.Act reads as below:

> *"**20. Inchoate stamped instruments**:- Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having*

written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument any thing in excess of the amount intended by him to be paid thereunder"

16. Section 118 of the N.I.Act, says that there is a presumption unless contrary proof in respect of consideration, date and time of occurrence, the time of acceptance and the holder in due course. While there is a statutory presumption regarding the consideration and the holder in due course and substantially there is an admission on the part of the accused that he has given a cheque as a security and its own document says that a sum of Rs. 5,29,413.87 is due and payable to the husband of the complainant. The accused cannot take a plea that the said cheque dated 22.01.2013 was given as a security for the transaction, which took place four years ago.

17. As far as the source of income, the complainant in the cross examination has indicated her source and also though she is an house wife, her husband and son being the earning members, it cannot be ruled out that she has no wherewithal to lend Rs.5,00,000/- to the accused. Therefore, the citation relied upon by the learned counsel for the revision petitioner that the subject cheque was given only as a security and the complainant has no wherewithal to advance Rs.5,00,000/-, both factually not proved even by preponderance of probability. While there is a statutory presumption, mere denial or adducing evidence which does not shake the foundational fact proved by the complainant, can be taken as a probability. Therefore, this Court finds no error or perversity in the findings of the Courts below to interfere with the exercise of the revisional jurisdiction.

18. Hence ***this Criminal Revision Case is dismissed.*** Consequently, the connected Criminal Miscellaneous Petitions are also dismissed.

20.04.2023

Internet : Yes/No
Index: Yes/No

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

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

Dr.G.JAYACHANDRAN, J.

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