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Crl.R.C.No.167 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.03.2023

CORAM

THE HONOURABLE DR. JUSTICE **G.JAYACHANDRAN**

Crl.R.C.No.167 of 2020

K.Kirubakaran

... Petitioner

Vs.

A.P.Thiyagarajan

... Respondent

PRAYER: Criminal Revision case has been filed under Section 397 r/w 401 of Cr.P.C., to set aside the order made in Crl.A.No.06 of 2016, dated 27.11.2018 on the file of the learned Principal Sessions Judge, Salem, by confirming the order made in S.T.C.No.258 of 2012 dated 03.12.2015, on the file of the learned Judicial Magistrate, Fast Track Court, Attur.

For Petitioner : Mr.K.Sathish Kumar

For Respondent : Mr.V.Meenakshi Sundaram

ORDER

This revision is filed against the concurrent findings of the Courts below holding the revision petitioner guilty for the offence under Section 138 of the NI Act.



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2. The sum and substance of the complaint is that the complainant and the accused (Revision Petition herein) are friends and they were having financial transactions between them in connection with real estate business. While so, to discharge the debt the accused gave a cheque for Rs.5,00,000/- on 30.07.2011 and requested the complainant to present it after two months. Accordingly, the cheque was presented on 27.01.2012 and it was returned for insufficient funds. Hence statutory notice dated 25.02.2012 caused to the accused.

3. The accused, on receipt of the notice, gave reply that the cheque was not given to enforce any debt but was obtained on force for payment of Rs.2,00,000/- which arose in connection with an agreement of a property between the wife of the complainant and the accused. Further it was also contended that the complainant has been obtained pro-note for Rs.8,00,000/- by force. In the said reply, the accused admitted his liability of Rs.2,00,000/- and also agreed to pay another sum of Rs.1,00,000/-, which he undertook to pay totally Rs.3,00,000/- on or before August, 2012.



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4. Stating that the said contention in the reply notice is false, the complaint was filed and the same was taken on file by the learned Judicial Magistrate, Fast Track Court, Attur, in S.T.C.No.258 of 2012. The complainant examined himself as P.W.1 and marked the cheque as Ex.P.1; Chellan for deposit of cheque as Ex.P.2; Return memo as Ex.P.3; Statutory notice as Ex.P.4; Acknowledgement card to prove that the notice was received by the accused as Ex.P.5 and the reply notice of the accused as Ex.P.6.

5. The accused though had extensively cross-examined the complainant viz., P.W.1 has not let any evidence. Further in the course of trial, he has taken out a Miscellaneous Petition for production of income tax return and accounts by the complainant. Though the trial Court has partly allowed the application by directing the complainant to produce statement of account, which allegedly had taken in the course of business, the same was not produced by the complainant.



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6. While the complainant relying upon the admission of liability and issuance of the cheque, contended that the statutory presumption of liability is caused on the accused. Whereas the accused has contended that the failure of the complainant to produce his statement of accounts to show that sum of Rs.5,00,000/- was due and payable as on 30.07.2011, rebutted the statutory presumption and therefore, the complaint is liable to be dismissed.

7. However, the trial Court has rejected the defence raised by the accused and held that in the absence of production of so-called agreement entered between the complainant's wife and the accused and the tantric admission of liability of Rs.2,00,000/- and promise to pay Rs.3,00,000/- by August 2011, fortify the case of the complainant. Having while so, the accused was found guilty and sentence to pay fine of Rs.5,20,000/- in default to undergo 5½ months simple imprisonment. From and out of the fine amount, Rs.5,00,000/- was awarded as compensation to the complainant.



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8. Aggrieved by the same, the accused preferred an appeal before the learned Principal Sub Court, Salem, in C.A.No.6 of 2016. The accused in the appeal besides challenging the judgment of the trial Court on fact also had contended that the delay in re-presenting the petition was never condoned. However, the complaint was numbered and it is a procedural lapse vitiate the complaint in toto. The appellate Court relying upon the admission of the accused in Ex.P.6 repay to the tune of Rs.3,00,000/- had considered the defence of the accused as only a lame defence without basis. In respect of the condone delay petition in re-presentation by relying upon the *Actus Curiae Nemi Nem Gravabit* declined to entertain plea of the accused regarding the sustainability of the complaint.

9. The learned counsel appearing for the revision petitioner would submit that the admission of liability to the tune of Rs.2,00,000/- cannot pass on liability on the accused to pay Rs.5,00,000/- which is the amount found in the cheque and presented for collection. Admittedly, there was a business transaction between the complainant and the accused. Therefore, to substantiate the complaint fundamental fact that



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the sum of Rs.5,00,000/- due and payable to the complainant ought to have been established to draw statutory presumption. However, in this case, in spite of the order by the trial court to produce the statement of accounts, the complainant has failed to produce the accounts. The omission to produce the accounts to show that in the course of the business transaction, a sum of Rs.5,00,000/- was due and payable goes to the root of the complaint and therefore, the presumption drawn by the Courts below is erroneous.

10. This Court on first impression felt that the contention of the learned counsel appearing for the revision petitioner is legally sustainable in view of the judgments rendered by the Supreme Court that to draw presumption under Section 118 of the NI Act, the complainant ought to prove the foundational fact of liability of the accused. But on perusing the evidence and the documents find that the cheque has been written by the accused himself including the amount in words and figure, except the name of the drawee. While so, subsequent admission of liability and promise to pay a sum of Rs.3,00,000/- by August, 2012 gains significant.



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11. As pointed out by the Courts below only to avoid prosecution, the accused has restricted his liability to Rs.2,00,000/-, though he has issued cheque for Rs.5,00,000/- to the complainant. If really his liability is only to the tune of Rs.2,00,000/-, he would have either mounted the witness box and substantiated his defence found in his reply statement or at least produced the document which he referred in his reply notice. Having failed to do both, there is no other option to draw the presumption under Section 138 of the NI Act. Since there is no error or infirmity in the finding of the Courts below, this revision is liable to be dismissed.

12. Accordingly, the Criminal Revision Petition stands dismissed.

20.03.2023

Index: Yes/No

Internet: Yes/No

Speaking/Non-Speaking order

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Dr.G.JAYACHANDRAN, J

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To

1. The Principal Sessions Judge,
Salem.
2. The Judicial Magistrate,
Fast Track Court, Attur.

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