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Crl.R.C.No.44 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2023

CORAM

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

Crl.R.C.No.44 of 2020

J.Vittal Raj

... Petitioner

Vs.

B.Kumar

... Respondent

PRAYER: Criminal Revision case has been filed under Section 397 r/w 401 of Cr.P.C., to call for the records and judgment in C.A.No.545 of 2018, on the file of the V Additional Session Judge, Chennai, modify the order passed in C.C.No.1730 of 2017 on the file of the XX Metropolitan Magistrate Court, Ripon Building, Chennai, for examine the correctness, legality and property of the findings, conviction and sentence for the charges under Section 138 of the Negotiable Instruments Act and set aside the same.

For Petitioner : Mr.N.A.Kareem

For Respondent : Mr.K.Balaji

ORDER

The Criminal Revision is directed as against the judgment passed in C.A.No.545 of 2018 dated 04.11.2019, on the file of the learned V Additional Session Judge, Chennai, partially modifying the



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judgment passed in C.C.No.1730 of 2017 dated 07.09.2018 on the file of the learned XX Metropolitan Magistrate, Ripon Building, Chennai, thereby holding the accused/appellant guilty of offence under Section 138 of the NI Act.

2. The sum and substances of the complaint given by the respondent herein is that the revision petitioner herein agreed to sell his property in Thiruvur Village, Thiruvallur Taluk for the consideration of Rs.4,50,000/- and received the entire consideration on 24.07.2013 from the complainant/respondent herein. He executed a General Power of Attorney in favour the complainant. Later the complainant came to know that the accused/revision petitioner had already entered into a sale agreement with one Senthilnathan, in respect of the same property and a decree for specific performance has been passed in favour of the said Senthilnathan by the Sub Court, Thiruvallur. Having lost the title over the property and suppressing the fact, the accused has entered into agreement and received a sum of Rs.4,50,000/- and also executed Power of Attorney in respect of the property.

3. After repeated demand and persuasion to repay the money



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received as advance, the revision petitioner had given two cheques one for a sum of Rs.2,00,000/- bearing No.25419 dated 05.10.2016 and another for a sum of Rs.2,50,000/- bearing No.25420 dated 21.10.2016. Both cheques were drawn from the account maintained by the accused at State Bank of India, Nungambakkam Branch. When the cheques were presented for collection, the same were returned with endorsement “insufficient funds”. At the request of the accused, the cheques were re-presented on 14.11.2016 and 31.12.2016. For the second time, the cheques were re-presented on 05.01.2017, but again the same were dishonoured.

4. Therefore, statutory notice was issued calling upon the accused to pay the cheque amount within 15 days. However, the accused though received the statutory notice, has not come forward with the cheque amount. Therefore, the complaint under Section 138 of the NI Act was presented and the same was taken on file by the learned XX Metropolitan Magistrate, Chennai, in C.C.No.1730 of 2017.



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5. Before the lower Court, the complainant has examined himself as prosecution witness P.W.1 and marked nine documents as Ex.P.1 to Ex.P.9. The accused has not adduced any evidence to rebut the presumption. In the cross-examination of P.W.1 nothing has been elucidated to hold that the accused has discharged the burden by preponderance of probability. In the said circumstances, the trial Court held that the accused was found guilty and sentenced him to undergo one year simple imprisonment and pay fine of Rs.5,000/- in default to pay fine to undergo one month simple imprisonment. Besides that, compensation of Rs.4,50,000/- was also ordered.

6. Aggrieved by that, the accused preferred an appeal before the learned V Additional Sessions Judge, Chennai and the same was taken as C.A.No.545 of 2018. The accused as an appellant before the lower appellate Court reiterated the defence that the cheques were not issued for discharge of any debt. Further he has contended that the agreement to sell the property and the execution of Power of Attorney and later knowledge of suit filed by one Senthilnathan and the injunction



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obtained by him were not proved through any documentary evidence and also contended that the cheques were obtained by force in the Police Station and the statutory notice viz., Ex.P.6 was not issued on him.

7. These grounds were considered by the lower appellate Court but negatived, holding that the evidence shows that the statutory notice viz., Ex.P.6 dropped in the house of the appellant, which means to be a valid service. As far as the other connected documents, the lower appellate Court held that having admitted the issuance of cheques and failure to reply to the statutory notice sufficient to prove the fundamental fact requiring to draw the presumption.

8. Further more, the accused has filed an undertaking Memo on 30.09.2019, wherein he has agreed to pay Rs.2,00,000/- on or before 11.10.2019 and Rs.2,50,000/- on or before 30.10.2019, a total sum of Rs.4,50,000/- being the cheque amount. But after giving the said undertaking that he will discharge the cheque amount on or before 30.10.2019, he has not paid the money and not honoured his own



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promise. Therefore, the lower appellate Court dismissed the appeal considering the facts, law and the conduct of the appellant. Though the lower appellate Court set aside the fine imposed, confirmed the sentence of one year simple imprisonment and compensation of Rs.4,50,000/-, in default to pay compensation, simple imprisonment of another six months. This order is challenged in the present Revision Petition.

9. The learned counsel for the revision petitioner contended that Ex.P.6 notice was not duly served on the revision petitioner and therefore, there cannot be any cause of action to initiate criminal prosecution under Section 138 of the NI Act. That apart, non production of documents relating to the earlier transaction viz., the sale agreement, power of attorney in respect of the revision petitioner's property, it is contended that they are very essential documents to prove the enforceable debt and the complainant failed to produce it. The cheques were obtained under coercion in the Police Station and the same ought to have been accepted by the Court below.

10. This Court considering the documentary evidence placed by



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the complainant and his testimony finds that he has advanced Rs.4,50,000/- to the accused in connection with sale of property owned by the accused. Later it has been found that the property has been encumbered and the said fact has been suppressed by the accused. Therefore, after much persuasion, the accused has given two cheques for total sum of Rs.4,50,000/-. These two cheques were given to discharge his liability incurred by way of advance received by him.

11. Further, the reason for re-payment has been stated in the complaint and also deposed by the complainant. If there was no such transaction on or before, the cheques were not issued by the accused to discharge the said liability as repayment of advance amount towards persuaded contract, the burden is on the accused to let in evidence and disprove. But he has not even collected to the statutory notice which was served at his residence with intimation by the postal department. The petitioner suppressing the real fact conveniently claims that Ex.P.6 was not served on him.



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12. The postal cover and the acknowledgment card which were marked as Ex.P.7 and Ex.P.8, show that the cover has not been received by the accused in spite of intimation left at his residence. The postal department returned the notice back to the complainant, since the addressee failed to collect it despite intimation. The notice not claimed in spite of intimation. It is deemed to be adequate service. By refusing to collect the letter despite intimation, it is the fault of the accused and he cannot escape from the liability on the plea of notice was not served on him.

13. Insofar as the plea that the cheques were obtained in the police station under threat, in this connection, the revision petitioner has not even stated as to when the cheques were collected from him and in which police station. So it is crystal clear that the defence taken by the accused is only to evade the consequences of issuance of cheque for a sum of Rs.4,50,000/- without fund to honour it.

14. Further as pointed out by the lower appellate Court, during



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the pendency of the appeal, the accused agreed to pay the cheque amount in two installments on or before 30.10.2019. But he has not paid the money as agreed.

15. When the revision petition was pending, a conditional order has been passed by this Court while suspending the sentence. It is brought to the notice of this Court that the conditional order of depositing 50% of the cheques amount as directed by this Court, the revision petitioner has not been complied the said order also. Later, the accused came forward to pay a sum of Rs.4,50,000/- being the cheques amount and additional sum of Rs.1,00,000/- as compensation to the complainant on or before 08.11.2021. In partial compliance of this order, he has paid only Rs.2,25,000/- and even after 1½ years, he has not paid the balance amount he agreed.

16. In the said circumstances, this Court finds that the order of the lower appellate Court has to be confirmed. The accused/revision petitioner for issuing cheques for Rs.4,50,000/- to discharge his debt,



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without sufficient fund in his account, is convicted for the offence under Section 138 of the NI Act and sentenced to undergo one year simple imprisonment and to pay compensation of Rs.4,50,000/-. Taking note of the fact that the accused/revision petitioner has deposited a sum of Rs.2,25,000/-, the time to pay the balance amount of Rs.2,25,000/- is granted till 30.04.2023. As far as the imprisonment of one year simple imprisonment is concerned, the same stands confirmed.

17. Accordingly, the Criminal Revision Petition stands dismissed.

14.03.2023

Index: Yes/No

Internet: Yes/No

Speaking/Non-Speaking order

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To

1. The V Additional Session Judge,
Chennai.
2. The XX Metropolitan Magistrate,
Ripon Building, Chennai,



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Dr.G.JAYACHANDRAN, J

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