BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	29.09.2023
Pronounced on	23.11.2023

CORAM

THE HONOURABLE MR. JUSTICE P.DHANABAL

CRL.RC(MD)No.198 of 2019
and
Crl.MP(MD)No.6984 of 2019

Dhanapalraj ... Revision Petitioner

Versus

Sivanesaselvan ... Respondent

Prayer : The Criminal Revision Petition is filed under Section 397 read with 401 of Code of Criminal Procedure, to call for the records pertaining to the order of conviction in C.A.No.73 of 2018, dated 31.01.2019 passed by the Learned III Additional District & Sessions Judge, Thanjavur at Pattukottai in confirming the order passed by the Learned Judicial Magistrate at Pattukottai in S.T.C.No.53 of 2014 on 04.07.2018 and set aside the same.

For Revision Petitioner : Mr.K.Mahendran

For Respondent : Mr.B.S.Manjunath

ORDER

This Criminal Revision Petition has been filed by the Petitioner as against the judgment passed in C.A.No.73 of 2018, dated 31.01.2019 passed by the learned III Additional District & Sessions Judge, Thanjavur at Pattukottai by confirming the judgment and conviction passed by the Learned Judicial Magistrate at Pattukottai in S.T.C.No.53 of 2014 on 04.07.2018.

2. Wherein the Trial Court has convicted the Accused and sentenced him to undergo one year of Simple Imprisonment and to pay a compensation of Rs.7,00,000/- under Section 138 of Negotiable Instrument Act in default to undergo a further period of two months of Simple Imprisonment. As against the judgment and conviction passed by the Trial Court, the Accused has preferred an Appeal in C.A.No.73 of 2018 on the file of the learned III Additional District & Sessions Judge, Thanjavur at Pattukottai and same was also dismissed by confirming the judgment of the Trial Court. As against the judgment of the Appellate Court, the present Criminal Revision Petition has been filed.

3. The case of the complainant before the Trial Court is that on 07.01.2012, the Accused borrowed a sum of Rs.7,00,000/- and in order to settle the above said amount, the Accused issued a cheque dated 02.02.2012 for a sum of Rs.5,00,000/- and another cheque dated 08.02.2012 for a sum of Rs.2,00,000/-. The said two cheques were presented for collection by the complainant and the same were returned as insufficient funds. Thereafter, the complainant issued notice to the Accused on 13.03.2012 and the same was returned as unclaimed on 24.03.2012. Thereby, the complainant has filed cheque complaint to the learned Judicial Magistrate at Pattukottai and the same was taken cognizance and the summons was issued on the Accused. On appearance of the Accused the records relied on by the complainant were furnished to him under Section 207 of Code of Criminal Procedure. After hearing both sides and perusing the records, the Trial Court has explained the substance of acquisition and the Accused pleaded not guilty.

4. On the side of complainant, the complainant was examined himself as P.W.1 and Ex.P.1 to Ex.P.8 were marked. After completion of Complainant side evidence, the Accused was examined under Section 313(1)(b) of Code of Criminal Procedure with regard to the incriminating circumstances found against him and the same were denied as false. On the side of the Accused, the Manager, City Union Bank, Pattukottai Branch was examined as D.W.1 and bank statement was marked as Ex.R.1.

5. After evaluating the oral and document evidences adduced on either sides, the Trial Court has convicted the Accused for the offences under Section 138 of Negotiable Instrument Act and sentenced him to undergo one year of Simple Imprisonment and to pay a compensation of Rs. 7,00,000/- to the complainant and in default to undergo a further period of two months of Simple Imprisonment. As against the judgment and conviction, the Accused has preferred an appeal before the Principal District and Sessions Judge and the said appeal was made over to learned III Additional District and Sessions Judge, Thanjavur at Pattukottai in C.A.No. 73 of 2018. The Appellate Court also after elaborate discussions dismissed the appeal by confirming the judgment and conviction passed by the Trial

Court. As against the judgment of the Appellate Court, the present Criminal Revision Petition has been filed by the Accused/Revision Petitioner on the following grounds :

(a). The judgment of Lower Appellate Court is against law, weight of evidence and probability of the case. The Lower Appellate Court erroneously presumed that the Petitioner has borrowed the amount from the complainant and issued cheques in favour of the complainant.

(b). The Courts below erroneously presumed that the notice sent by the complainant returned with an endorsement "door locked" and further it was held that the Petitioner appeared before the Lower Court only on receipt of the notice sent by the Lower Court and presumed to come to the conclusion that the notice was served, the said observation is not at all correct in the eye of law. Since, if really the endorsement correct, then the complainant ought to have examined the postman to establish the fact that the door was locked or not.

(c). Both the Courts failed to note that the respondent has admitted in his cross examination that his income during the year 2013 is only Rs.1 lakh to 1 ½ lakhs. Further he admitted that Rs.7 lakhs is very high amount for him. Therefore, the Respondent did not have any sources of income to lend a sum of Rs.7 lakhs to the Petitioner and ought to have presumed that the Respondent did not have sufficient amount to part with the Petitioner.

(d). Both the Courts below failed to note that the Petitioner examined the Bank Manager as defence witness and established that the serial number mentioned in the cheque book have not used during the relevant period of time and there was no transaction of the other cheques contained in the cheque book.

(e). The Lower Appellate Court as well as the Trial Court has failed to appreciate the evidence given by D.W.1 that the cheques have material alteration.

(f). Both the Courts failed to appreciate the evidence of P.W.1 that the Petitioner hereiin issued the cheques for security purpose only.

(g). Both the Courts wrongly concluded that the Petitioner herein issued blank cheque so there is no material alteration.

(h). Both the Courts failed to considered the point that the loan availed by the Petitioner herein from the complainant's father in law only and not from the Respondent herein. The Petitioner herein has given his cheques as security for the loan obtained from the father in law of the complainant. But later the said loan was settled by the Petitioner. However, the Petitioner did not get back the cheques, because he died. After that the Respondent filed a complaint before the Court below.

(i). The Courts below failed to consider the fact that the disputed cheque was issued by a firm but the complaint has not been filed against the firm. Similarly, no statutory notice has been issued to the firm. Hence, the complaint itself is defective.

(j). The complainant has no sufficient means to lend such a hefty amount. In the evidence of P.W.1 during cross it has been admitted such a lended amount is a huge amount for him, his bank account during that period never had such a balance. It is also admitted by him that the lending of amount has not been disclosed in his income tax return and there is no record in proof of such lending. These are all the circumstances sufficient to show to rebut the presumption in favour of the complainant.

(k). The theory of Section 20 of Negotiable Instrument Act that the holder of the instrument entitled to fill the same is not applicable to the facts of the case since it is a definite case of the complainant a cheque was filed in every aspect and then alone handed over to him.

6. The learned counsel appearing for the Revision Petitioner would contend that the complainant has filed a cheque complaint as against the Petitioner alleging that he borrowed loan from the complainant and in order to settle the above said loan, he issued two cheques. One cheque is for a sum of Rs.5,00,000/- and another cheque is for a sum of Rs.2,00,000/- and the same were presented for collection but the said cheques were returned as insufficient funds and then the complainant issued notice and the same was managed to return by the Accused and thereby, he filed the complaint.

6.1. In fact, the Revision Petitioner had not borrowed any money from the complainant and he did not receive the notice issued by the complainant. Originally, the Accused had money transaction with the father in law of the complainant and for security purposes, he gave the cheques to him. After the demise of father in law of the complainant, they misused the above said cheques and filed this complaint. Further, the complainant has no financial capacity to pay such a huge amount to the Accused and the same was also admitted by the complainant at the time of his cross examination. Further, the cheque was issued in the name of Company and the Company was not added as party to this case. The Trial Court failed to consider the material alteration made in the cheques. The Trial Court has failed to consider the above such aspects and the Appellate Court also erroneously came to a conclusion that the financial capacity of the complainant will not affect the case since the Accused admitted his signature. Further, the Courts below failed to consider that the notice was not served to the Accused and thereby, no cause of action would arise to the complainant.

6.2. Even according to the case of the complainant, the Accused borrowed a sum of Rs.7,00,000/-. If so, there is no evidence with regard to the interest either in the complaint or in the notice, the complainant has not stated the place where the Accused borrowed the amount and how the amount was paid to the Accused. Thereby, the complainant failed to prove his case beyond any reasonable doubt. Per contra, the Accused examined the Bank Manager and there was no any transaction after the year 2008 but the cheque was issued in the year 2012. There is no chance to issue a cheque after a long period but the Trial Court failed to consider the same. Therefore, the Courts below have committed the grave error and erroneously convicted the Accused. Hence, the judgment and conviction of the Trial Court as well as the Appellate Court are liable to be set aside by allowing this Criminal Revision Petition.

7. The learned counsel appearing for the Respondent would contend that the Accused has not denied the signature found in the said cheques and further the complainant issued notice and the same was managed to be returned by the Accused. Once the Accused admitted his signature, it is for him to prove that the cheque was not issued for the legally enforceable debt. But in order to prove his case, he failed to enter into the witness box and merely examined the Bank Manager and the same is not sufficient to prove his case. The Trial Court took consideration of all these aspects and elaborately discussed about the presumption under Section 139 of Negotiable Instrument Act and the provision under Section 141 of Negotiable Instrument Act and fairly came to a conclusion that the prosecution has proved the case against the Accused and the Accused was convicted under Section 138 of Negotiable Instrument Act. The Appellate Court also passed the reasoned judgment and thereby, the present Revision Petition is liable to be dismissed.

8. This Court has heard the both sides and perused the records.

Upon hearing the both sides and perusing the records, the judgments of the courts below and the grounds, the point for consideration in this petition is Whether the judgment passed in C.A.No.73 of 2018 on the file of III Additional District and Sessions Judge, Thanjavur at Pattukottai is sustainable in law and on facts.

POINTS :

9. The case of the complainant is that the Accused known to him and thereby, he obtained loan from the complainant on 07.01.2012 and agreed to repay the amount within one month and the Accused issued cheques dated 02.02.2012 drawn on City Union Bank, Pattukottai Branch for a sum of Rs.5,00,000/- and another cheque dated 08.02.2012 on the same branch for a sum of Rs.2,00,000/-. When the cheques were posted for collection on 13.02.2012, the same were returned as insufficient funds on 16.02.2012. Thereafter, the complainant issued notice to the Accused on 13.03.2012 and the same was returned on 24.03.2012 as door locked and unclaimed. Thereby, the complainant has filed the complaint.

10. The contention of the Accused is that he had financial

dealings with the father in law of the complainant and thereby, his cheques were under custody of father in law of the complainant and those cheques were not issued for legally enforceable debt and the same were issued only for security purposes. In the mean time, the father-in-law of the complainant died, after demise of father-in-law of the complainant, he misused the cheques and filed this complaint. Therefore, the Accused admitted the signature found in the cheques. Once the Accused admitted the signature found in the cheques, it is his duty to prove the case for what purpose the cheques were issued. In order to prove the above said version of the Accused, he did not enter into the witness box and he examined the Bank Manager and marked Ex.R.1. The Bank Manager as D.W.1 has deposed about the account details of the Accused.

11. On careful perusal of the above said accounts and evidence, it revealed that the serial number mentioned in the cheque book have not been used during the relevant period of time and there was no transactions of other cheques contained in the cheque book. Now, the point is that once the Accused admitted his signature found in the cheque, it is a presumption that it is in favour of the complainant under Section 139 of Negotiable

Instrument Act and the Accused has to rebut the same through sufficient evidence.

12. In this context, the learned counsel appearing for the complainant would contend that the Accused failed to enter into the witness box and thereby, adverse inference can be drawn against him. It is true in this case, the Accused has not entered into witness box to put forth his contention. However, the mere non examination of Accused alone is not sufficient to draw adverse inference and other circumstances also have to be looked into. It is well settled in law that in every cases the Accused need not be entered into the witness box and the case of the complainant can be demolished through cross examination and other available evidence on the complainant side. In the above said backdrop, the Court has to see the evidence of P.W.1.

13. At the time of his cross examination, the P.W.1 has admitted that he has no income to lend such a huge amount of sum of Rs. 7,00,000/- and according to him, the amount of sum of Rs.7,00,000/- is a very huge amount. While so, it is duty of the complainant to prove his

financial capacity to lend money to have a huge amount of sum of Rs. 7,00,000/-. In this context, the P.W.1 admitted in his cross examination that in the year 2013 his income was only Rs.1,00,000/- to Rs.1,50,000/- and prior to that his income was only around Rs.1,00,000/-. While so, doubt would arise as to how the complainant had lend such a huge amount to the Accused, which has to be proved by the complainant. It is true that the presumption of Section 139 of Negotiable Instrument Act is in favour of the complainant. However, to invoke the presumption under Section 139 of Negotiable Instrument Act, the complainant has to prove the foundational facts with regard to the amount lending to the Accused and issuance of cheque.

14. In this case, the lending of amount to the Accused itself creates serious doubts and the complainant himself admitted that he has no means to pay the above said amount. It is well settled law that the Hon'ble Supreme Court in catena of judgments categorically held that the presumption under Section 139 of Negotiable Instrument Act is rebuttable presumption and through defence side evidence it can be rebutted and the complainant has to prove the financial capacity. But in this case, the

complainant before the Trial Court failed to prove the financial capacity of the complainant. Therefore, the complainant failed to prove the case beyond any reasonable doubt. The P.W.1 also admitted that the lending of money to the Accused has not been disclosed in his income tax return and there is no record to prove the above said lending of money to the Accused. Further, the complaint failed to explain about the alterations made in the cheque either in the complaint or in the evidence. Therefore, the reasonable doubt would arise about the case of the complainant and the Accused is entitled to the benefit of doubts. As far as the contention raised by the Accused that he has not received the notice and the company was also not impleaded as party are concerned, already the Court below has came to a conclusion that once the notice sent to the address mentioned in the complaint and the same was returned as refused, it is a presumption that it is deemed to be served to the Accused and the non impleading of the company as a party is concerned, according to Section 141 of Negotiable Instrument Act, it not covers within its ambit, the proprietary concern. The proprietary concern is not a juristic person so as to attract the concept of vicarious liability. Therefore, Section 141 of NI Act have no applicability in a case involving the offence committed by a proprietary concern. The Courts below have also elaborately discussed about the Section 141 of Negotiable Instrument Act and correctly came to a conclusion that the company is represented through its proprietor and the Accused is the proprietor and he himself added as a party and thereby, it will not affect the case of the complainant.

15. Therefore, this Court of the opinion that the complainant failed to prove the case beyond reasonable doubt. In this context, the Trial Court has failed to discuss about the financial capacity of the complainant. Further, the admissions made by the complainant have not been taken into account by the Trial Court and further, the Appellate Court came to a conclusion that the amount was issued for legally enforceable debt and the contention of the Accused that the complainant has no financial capacity to lend a amount cannot be accepted. The Courts below have committed error by not looking the financial capacity of the complainant. Though the Accused has not entered into the witness box to prove that the cheques were issued to the complainant's father in law for security purpose. The complainant himself admitted that he has no income to lend a above said money. While so, he has to explain that how the amount was given and why

the two cheques were given by the Accused and what about the interest for the amount lend to the Accused. Moreover, according to the defence, the Accused has not operated the account from the year 2008 and as per the evidence of D.W.1, the cheque book was not issued during the relevant period of time and there was no transaction on the other cheques contained in the cheque book. By these evidence, the defence has probablised his case that there is no legally enforceable debt and the above said aspects have not been considered by the Trial Court as well as the Appellate Court.

16. The learned counsel appearing for the Revision Petitioner relied on the judgment of Hon'ble Supreme Court made in ***K.Subramani Vs. K.Damodara Naidu*** case reported in ***(2015) 1 SCC 99*** wherein the Hon'ble Supreme Court held as follows :

> *"8. A three-Judge Bench of this Court in the decision in Rangappa case laid down that the presumption mandated by Section 139 of the NI Act includes a presumption that there exists a legally enforceable debt or liability and that is a rebuttable presumption and it is open to the*

accused to raise a defence wherein the existence of a legally enforceable deb or liability can be contested. Relying on the said ratio the High Court answered the two legal issues raised by it in the impugned judgment. Though the criminal appeals were preferred against the judgment of acquittal passed in all the cases arising under Section 138 of the NI Act, the factual matrix and the evidence adduced were different. The High Court after answering the two legal issues did not consider the merits of each case individually and has simply remanded the matter to the trial court for fresh consideration."

On careful perusal of the above judgment, it is clear that the presumption mandated by Section 139 of the NI Act includes a presumption that there exists a legally enforceable debt or liability and that is a rebuttable presumption and it is open to the Accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. In this case on hand also, the Accused has probable his defence through cross examination as well as the examination of D.W.1. Therefore, the above said case is squarely applicable to the present facts of the case.

17. Therefore, as discussed above this Court is of the opinion that the complainant failed to prove the complaint and thereby, the judgment and conviction of Trial Court and the confirmation of the same by the Appellate Court are unsustainable and the same are liable to be set aside.

18. In the result, this Criminal Revision Petition is allowed and the judgment and conviction passed by the Trial Court in S.T.C.No.53 of 2014 and the judgment of the Appellate Court by confirming the judgment of Trial Court in C.A.No.73 of 2018 are set aside. The Accused is acquitted from the charges for the offence under Section 138 of Negotiable Instrument Act and he, be set at liberty subject to other cases, if any. The bail bonds executed by the accused shall stands canceled. The fine amount if any paid by the appellant shall be refunded to him. The connected Criminal Miscellaneous Petition is closed.

23.11.2023

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Index:Yes/No
Speaking Order : Yes/No

P.DHANABAL., J.

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To

1.The III Additional District & Sessions Judge,
Thanjavur at Pattukottai

2.The Judicial Magistrate,
Pattukottai

PRE- DELIVERY JUDGEMENT MADE IN

CRL.RC(MD)No.198 of 2019
and
Crl.MP(MD)No.6984 of 2019

23.11.2023