BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 24.07.2023

Delivered On : 07.09.2023

CORAM

THE HONOURABLE MR. JUSTICE P. DHANABAL

Crl. R.C.(MD)No.254 of 2019
and
Crl.M.P.(MD)No.3747 of 2019

R.Mathankumar .. Petitioner

Vs.

S.Azhagesan .. Respondent

Prayer : This criminal revision case is filed under Sections 397 and 401 of Cr.P.C., to call for the records and set aside the judgment made in Crl.A.No.53 of 2017 dated 09.01.2019 on the file of the Additional District and Sessions Court, Theni at Periyakulam confirming the conviction and sentence imposed by the learned Judicial Magistrate, (Fast Track Court), Uthamapalayam, made in S.T.C.No.32 of 2015 dated 23.03.2017.

For Petitioner : Mr.K.P.S.Palanivel Rajan, Senior counsel
For Mr.K.Prabakaran

For Respondent : Mr.K.Guhan

ORDER

This petition has been filed by the petitioner to set aside the judgment and conviction passed by the Additional District and Sessions Court, Theni in Crl.A.No. 53 of 2017 on 09.01.2019, in confirming the judgment and conviction passed by the learned Judicial Magistrate (Fast Track Court), Uthamapalayam in C.C.No.32 of 2015 on 23.03.2017. In the trial Court, the complainant filed a complaint under Section 138 of Negotiable Instruments Act as against the petitioner and the trial Court convicted the accused and sentenced him to undergo three months simple imprisonment and to pay a compensation of Rs.4,00,000/- (Rupees Four Lakhs only) in default to undergo one month simple imprisonment by a judgment, dated 23.03.2017. As against the said conviction and judgment, the petitioner filed a criminal appeal in C.A.No.53 of 2017 and the same was disposed of by the learned Additional District and Sessions Judge, Theni at Periyakulam, by dismissing the appeal through its judgment dated 09.01.2019. Aggrieved by the said judgment, this present Criminal Revision Case is filed.

2.The case of the defacto complainant in trial Court is that the petitioner is known to the defacto complainant and he approached the defacto complainant for obtaining loan and on 15.02.2015, the petitioner borrowed a sum of Rs.4,00,000/- from the defacto complainant and assured to pay a same and for that, he issued a cheque bearing No.008808 Axis Bank, Kambam branch dated 16.03.2015. When the same was presented on 23.04.2015, the said cheque was returned unpaid as 'insufficient funds'. Thereafter, the defacto complainant sent a notice through his counsel on 24.04.2015. After receipt of the said notice, the petitioner/accused issued reply notice dated 30.04.2015 with false allegations. Thereafter, the complainant filed a complaint under Section 138 of Negotiable Instruments Act and the trial Court has taken cognizance for the offence under Sections 138 and 142 of Negotiable Instruments Act and issued summons and on summons, the petitioner/accused appeared before the trial Court and thereafter, the copy of the records were furnished to the petitioner under Section 207 of Cr.P.C. Thereafter substance of charge was explained to the petitioner and he denied the charges.

3.Thereby, the defacto complainant had examined P.W.1 to P.W.3 and marked Exs.P.1 to P.6 and on the side of the petitioner, D.W.1 and D.W.2 were examined and marked Exs.D.1 to D.3. After examination of complainant side witness, the accused was examined under Section 313(1)(b) of Cr.P.C., with regard to incriminating circumstances found in the prosecution evidences. The accused denied the evidences.

4.Upon perusing the oral and documentary evidence, the trial Court found the petitioner guilty for the offence punishable under Section 138 of Negotiable Instruments Act and sentenced him to undergo three months simple imprisonment and to pay a compensation of Rs.4,00,000/- (Rupees Four Lakhs only) in default to undergo one month simple imprisonment by a judgment, dated 23.03.2017. Aggrieved by the said conviction and judgment, the petitioner filed a criminal appeal in C.A.No.53 of 2017 before the learned Additional District and Sessions Judge, Theni at Periyakulam. The appellate Court also confirmed the judgment and conviction and dismissed the appeal through its judgment dated 09.01.2019.

5.Aggrieved by the said judgment, this revision case has been filed on the following grounds:-

The impugned order passed by the Courts below are against to law, weight of evidence and probabilities of the case. The trial Court failed to consider the evidences of D.W.1 and D.W.2. The petitioner borrowed a sum of Rs.2,00,000/- from the defacto complainant and the same was repaid. At the time of borrowal of money, the defacto complainant got some cheque leaves and stamp papers but the same were not returned to the petitioner. After repaying the principal amount, there was balance of some interest. For that, the defacto complainant retained the original documents and thereafter, presented the cheque and filed this complaint. The defacto complainant failed to prove that there was substantial liability at the time of issuance of cheque and legally enforceable debt. The alleged cheque amount was not borrowed by him. As per earlier borrowal, there was some balance of interest and thereby the defacto complainant misused the cheque and there is no legally enforceable debt.

6.The learned counsel appearing for the petitioner would contend that already the petitioner borrowed a sum of Rs.2,00,000/- from the defacto complainant as hand-loan and the same was settled in the presence of D.W.2 and thereafter, the some interest amount was remained unpaid and the defacto complainant retained the cheque along with unfilled signed blank papers and stamp papers, which were obtained by the complaint at the time of borrowal of said amount. But the trial Court failed to consider the same. Further the defacto complainant has not produced any statement of account to prove the alleged transaction. The defacto complainant himself filled the cheque and the same was admitted by him in the evidence. These discrepancies were not taken in to account by the Courts below and thereby, the judgment and conviction by the trial Court and confirmed by the appellate Court is liable to be set aside by allowing this revision.

7.To support his contention, he relied upon the following judgments:-

(I)Tedhi Singh v. Narayan Dass Mahant reported in (2022) 6 Supreme Court Cases 735.

(ii)John K.Abraham v. Simon C.Abraham and another reported in (2014) 2

Supreme Court Cases 236.

(iii)K.Prakashan v. P.K.Surenderan reported in (2008) 1 Supreme Court Cases 258.

(iv)Rangappa v. Sri Mohan reported in (2010) 11 Supreme Court Cases 441.

8.The learned counsel appearing for the respondent would contend that the petitioner had admitted the issuance of cheque and the signature found in the cheque. The burden of proof lies on the petitioner but he failed to prove his case. In fact the petitioner borrowed the amount and issued cheque and the same was presented to the bank and the same was returned as 'insufficient funds'. The petitioner in order to evade from paying the cheque amount, he had taken a false defence. The petitioner has examined P.W.1 to P.W.3 and marked Exs.P1 to P6 and presumption under Section 139 of Negotiable Instruments Act is in favour of the respondent. Once the petitioner admitted the signature and issued cheque, he has to prove that for what purpose cheque was given and burden of proof lies on the accused. The trial Court after elaborate discussion correctly convicted the accused and the appellate Court also dismissed the appeal and thereby, the revision is liable to be dismissed.

9.To support his contention, he relied upon the following judgments:-

(I)V.Karthikeyan v. T.Manoharan reported in 2017 (2) MWN (Cr.) DCC 157 (Mad).

(ii)T.Vasanthakumar v. Vijayakumari reported in 2015 5 LW 818.

10.Upon perusing the documents and evidences adduced on both sides and upon perusing the judgments of lower Courts, the points for determination in this petition is whether the judgment of the Additional District and Sessions Court, Theni at Periyakulam in Crl.A.No.53 of 2017 on 09.01.2019, in confirming the conviction and sentence imposed by the learned Judicial Magistrate (Fast Track Court), Uthamapalayam in S.T.C.No.32 of 2015 on 23.03.2017 is sustainable according to law and facts.

Point:-

11.The case in the trial Court is that the accused is known to the defacto complainant and the accused borrowed a sum of Rs.4,00,000/- as loan from the defacto complainant on 15.02.2015 and the petitioner/accused handed over the cheque dated 16.03.2015 drawn in favour of the petitioner in Axis Bank, Cumbam Branch. Thereafter, the cheque was presented for collection on 16.03.2015 and the same was returned as 'insufficient funds'. Then the complainant issued notice dated

24.04.2021, after the receipt of notice, the petitioner issued reply dated 30.04.2015 by denying his liability that already there was money transaction between them and he borrowed a sum of Rs.2,00,000/- and the same was paid in the presence of Ramamurthy. At the time of borrowal of aforesaid loan amount, the defacto complainant got signed blank cheques and Rs.50/- blank stamp papers with the signature of the petitioner/accused. Due to some unpaid interest, the aforesaid papers were not returned by the complainant to the petitioner/accused. Thereafter, the cheques were misused by the complainant and presented for the collection.

12.In order to prove the case of the defacto complainant, he examined P.W. 1 to P.W.3 and marked Exs.P1 to P6. P.W.1 deposed about the borrowal of amount by the petitioner/accused and presentation of cheque for collection and the cheque was returned as 'insufficient fund'. P.W.2 also deposed about the presentation of the cheque and the same was returned as 'insufficient funds'. P.W.3 also in his evidence stated about the issuance of cheque, presentation for collection and returned as 'insufficient funds'. The petitioner/accused also not denied the issuance of cheque and signature found in the cheque. The only contention of the petitioner is that he borrowed Rs.2,00,000/- from the complainant and thereafter, he paid entire amount and then some of the interest was remained unpaid. For that, the complainant refused to give the blank cheques and three signed stamp papers, which were handed over to the defacto complainant at the time of borrowal amount for security purpose. Since the petitioner/accused admitted the signature found in the cheque, he has to prove his case with sufficient evidence. Presumption under Section 139 of Negotiable Instruments Act would operate in favour of the complainant and he examined himself as P.W.1 and the petitioner was examined as D.W.1. The D.W.1 in his evidence stated that he borrowed Rs.2,00,000/- from the complainant on 18.09.2011. For that, he handed over Rs.50/- stamp papers, unfilled one cheque and two pro notes on 18.09.2011. For that, the defacto complainant issued a receipt and the same has been marked as Ex.D3 at the time of execution of Ex.D3. One Palanivelsamy was present and thereafter, the amount was repaid in the presence of Ramamurthy, D.W.2. At the time of settlement of money, interest of Rs.30,000/- was unpaid and the complainant assured to return the above said documents. Now due to aforesaid balance of interest, he filed this present cheque case.

13.The same D.W.1 in his cross examination, admitted that in the said Ex.D3, there is no mention about the number and date of the cheque. The said Ex.D3 was denied by the defacto complainant. While so, it is the duty of the petitioner/accused to prove the execution of Ex.D3. According to the petitioner at the time of execution of document Ex.D3, one Palanivelsamy was present but the said Palanivelsamy was not examined as witness to prove the aforesaid receipt Ex.D3.

Further there is no mention about the cheque number and the date of cheque in the aforesaid Ex.D3. Once the complainant denied the receipt, Ex.D3, it is the duty of the petitioner to prove the receipt but he failed to prove the receipt, Ex.D3. Further the alleged repayment was dated 10.05.2013. Thereafter the accused had not taken any steps to get back the documents executed by the petitioner/accused in favour of the complainant with regard to aforesaid receipt of Rs.2,00,000/-. The date of execution of the cheque is 16.03.2013. The alleged repayment of amount is in the year 2013. For more than two years, the petitioner/accused had not taken any steps to get back the unfilled documents. Even according to the petitioner at the time of borrowal of amount, the complainant obtained unfilled signed documents and gave a receipt Ex.D3, while so why any receipt was not obtained at the time of settlement of the said amount of Rs.2,00,000/- when the petitioner obtained receipt for handing over the documents to complainant i.e., Ex.D3 then without obtaining receipt for payment of Rs.2,00,000/- is unbelievable. Therefore, evidence of D.W.1 with regard borrowal of Rs.2,00,000/- execution of receipt of Ex.D3 and repayment of the said amount does not inspire confidence to this Court. Thereby the petitioner/accused failed to prove the execution of Ex.D3 and the repayment.

14.D.W.2 in his evidence stated that the petitioner/accused paid Rs. 2,00,000/- and there was a due of three months interest. Further D.W.2 has not stated anything about the alleged demand of return of the documents from the complainant and further since the evidence of D.W.1 does not inspire the confidence and then the evidence of D.W.2 is also creates serious doubt. The D.W.2 simply stated that the petitioner/accused gave a sum of Rs.2,00,000/- to the complainant and there is no date and time mentioned about the settlement. Therefore, the theory of defence was not proved by the petitioner/accused.

15.Per contra the complaint proved his case by examining P.W.1 to P.W.3 and marking Exs.P1 to P6 and the petitioner also admitted the signature and issuance of cheque. Thereby, presumption under Section 138 of Negotiable Instruments Act is in favour of the complaint/respondent. In order to rebut the presumption the petitioner/accused failed to adduce sufficient evidence. The trial Court after elaborate discussion, correctly held that the defacto complainant has proved the case and the defence failed to establish the case and convicted the accused and the appellate Court also elaborately discussed about the evidences and documents and correctly held that the defence theory was not proved by the petitioner/accused and the complaint proved his case then dismissed the appeal by confirming the judgment of the trial Court.

16.The learned counsel appearing for the petitioner relied on the judgment of the Hon'ble Supreme Court in the case of (i)***Tedhi Singh v. Narayan Dass Mahant*** reported in ***(2022) 6 Supreme Court Cases 735***, wherein this Court in para no.8 held as follows:-

> *"It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of 'probable defence' has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa (supra), this Court notes that Section 139 of the N.I. Act is an example of reverse onus [see (2010) 11 SCC 441). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist."*

(ii)***John K.Abraham v. Simon C.Abraham and another reported in (2014) 2 Supreme Court Cases 236***, wherein this Court in para no.9 and 10 held as follows:-

"9.*It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.*

10.Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent-complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross- examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him."

(iii)***K.Prakashan v. P.K.Surenderan*** *reported in* ***(2008) 1 Supreme Court Cases 258***, wherein this Court in para nos.21 and 22 held as follows:-

"21.*No exception to the aforementioned legal principle can* *be taken. What, however, did not fall for consideration in the aforementioned case was as to how the said burden can be discharged.*

22. It is now trite that if two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken. The appellate courts jurisdiction to interfere is limited. [See M.S. Narayana Menon (supra) and Mahadeo Laxman Sarane & Anr. v. State of Maharashtra, 2007 (7) SCALE 137] The High Court furthermore has not met the reasons of the learned Trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act without posing unto itself a further question as to how the said burden of proof can be discharged. It furthermore did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different."

(iv)***Rangappa v. Sri Mohan*** reported in ***(2010) 11 SUPREME COURT CASES 441***, wherein this Court in para nos.21 and 22 held as follows:-

"26.*In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of 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. However, there can be no doubt that there is an initial presumption which favours the complainant.*

27.Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

28.In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in *order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.“*

17.On careful reading of the above said judgments, it is clear that the presumption under Section 139 of Negotiable Instruments Act is rebuttable presumption and if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Further the burden was heavily upon the claimant to have showed that he had required funds for having advance money to the accused. In the case on hand, the accused admitted the signature found in the cheque and issuance of cheque but the contention of the petitioner is that he already repaid the amount but the said repayment was not proved by the petitioner. Thereby the aforesaid case laws will not be applicable to the present facts and circumstances of the case.

18.The learned counsel appearing for the respondent relied upon the judgment of the Hon'ble Supreme Court in the case of ***T.Vasanthakumar v. Vijayakumari*** reported in ***2015 5 L.W. 818***, wherein this Court in paragraph nos.9 and 10 reads as follows:

“9.*This Court has held in its three judge bench judgment in Rangappa v. Sri Mohan (2010) 11 SCC 441:*

"The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of 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. However, there can be no doubt that there is an initial presumption which favours the respondent complainant."

10.Therefore, in the present case since the cheque as well as the signature has been accepted by the accused respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence.

19.The learned counsel appearing for the respondent relied upon the judgment of this Court in the case of ***V.Karthikeyan v. T.Manoharan*** reported in ***2017 (2) MWN (Cr.) DCC 157 (Mad.)***, wherein this Court held as follows:-

"Once the issuance of the cheque is established and account

maintained by the accused also established, it is for the accused to dislodge the legal presumption either by direct evidence or by circumstances in nature to dislodge the legal presumption attached to the cheque."

20.On careful reading of the aforesaid judgment, it is clear that once the accused admitted the issuance of cheque or signature found in the cheque, the presumption under Section 139 of Negotiable Instruments Act would operate and the burden was on the accused to disprove the cheque or existence of legally enforceable debt.

21.Therefore, in the case on hand also, the accused admitted the issuance of cheque, signature of cheque and thereby, he has to disprove the cheque and his liability but he failed to prove the same. Thereby, the aforesaid case law will squarely applicable to the present facts of the case.

22.In this case, the oral and documentary evidences and witnesses clearly established the case of the complainant and the defence theory put forth by the accused was not proved and thereby, the trial Court as well as the appellate Court came to the fair conclusion and convicted the petitioner/accused for the offence under Section 138 of Negotiable Instruments Act. There is no infirmity found in the judgment of the Courts below and thereby this Court warrants no interference. Therefore, as discussed supra, this Court is of the opinion that Criminal Revision Case has no merits and deserves to be dismissed.

23.In the result, the Criminal Revision Petition is dismissed and the judgment and conviction passed by the Additional District and Sessions Court, Theni, at Periyakulam in Crl.A.No.53 of 2017 on 09.01.2019, in confirming the judgment and conviction passed by the learned Judicial Magistrate (Fast Track Court), Uthamapalayam in C.C.No.32 of 2015 on 23.03.2017 are confirmed. The bail bond if any executed by the petitioner shall stand cancelled. The trial Court is directed to take steps to secure the accused according to law. Consequently connected miscellaneous petition is closed.

07.09.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
Mrn

P.DHANABAL, J.

Mrn

To

1.The Additional District and Sessions Judge, Periyakulam, Theni.

2.The Judicial Magistrate (Fast Track Court), Uthamapalayam.

3.The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

Crl. R.C.(MD)No.254 of 2019

07.09.2023