BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 11.09.2023

Delivered On : 26.09.2023

CORAM

THE HONOURABLE MR. JUSTICE P. DHANABAL

Crl. R.C.(MD)No.387 of 2019
and
Crl.M.P.(MD)No.5688 of 2019

P.Thankamony .. Petitioner

Vs.

M.Sudeva Kumar .. Respondent

Prayer : This criminal revision case is filed under Sections 397 r/w. 401 of Cr.P.C., to call for the records pertaining to the judgment in C.A.No.5 of 2011 on the file of the Mahila Fast Track Court, Nagercoil in S.T.C.No.2048 of 2008 on the file of the learned Judicial Magistrate, Kuzhithurai, Kanyakumari District and set aside the same.

For Petitioner : Mr.T.Aswin Rajaasimman
M/s.For T.Lajapathi Roy Associates
For Respondent : Ms.M.Punitha Devakumar

ORDER

This petition has been filed by the petitioner to set aside the judgment and conviction passed by the Mahila Fast Track Court, Nagercoil in Crl.A.No.5 of 2011 on 09.08.2018, in confirming the judgment and conviction passed by the learned Judicial Magistrate, Kuzhithurai in S.T.C.No.2048 of 2008 on 13.12.2010. 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 sentence him to undergo six months simple imprisonment and to pay fine of Rs. 5,000/- (Rupees Five Thousand only) in default to undergo two months simple imprisonment by a judgment, dated 13.12.2010. As against the said conviction and judgment, the petitioner filed a criminal appeal in C.A.No.5 of 2011 and the same was disposed of by the Mahila Court (Fast Track Court), Nagercoil, by dismissing the appeal through its judgment dated 09.08.2018. Aggrieved by the said judgment, this present Criminal Revision Case is filed.

2.The case of the complainant is that on 25.10.2007, the petitioner borrowed a sum of Rs.3,00,000/- and for the aforesaid loan, the accused gave a cheque dated 25.07.2008 drawn in favour of the petitioner of State Bank of India, Manavalakurichi Branch. When the cheque was presented for collection through State Bank of India, Kuzhithurai Branch, the same was returned on 19.08.2008 as 'insufficient funds'. Thereafter, the complainant issued notice on 29.08.2008 and the same was returned as 'unclaimed'. Thereafter, the petitioner neither given reply nor repaid the amount. Hence, the respondent had given a private complaint before the learned Judicial Magistrate, Kuzhithurai. The learned Magistrate had taken cognizance in S.T.C.No.2048 of 2008 for the offence under Section 138 of Negotiable Instruments Act. Thereafter, issued process to the accused and accused was served copies under Section 207 of Cr.P.C., and then substance of the charge was explained to the accused and he denied charges.

3.The complainant had examined himself as P.W.1 and marked Exs.P.1 to P.10 and on the side of the accused, D.W.1 and D.W.2 were examined and marked Exs.D.1 to D.10. After examination of prosecution witnesses, the accused was examined under Section 313(1)(b) of Cr.P.C., with regard to incriminating circumstances found in the complainant side 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 six months simple imprisonment and imposed fine of Rs.5,000/- (Rupees Five Thousand only) in default to undergo two months simple imprisonment by a judgment, dated 13.12.2010. Aggrieved by the said conviction and judgment, the petitioner filed a criminal appeal in C.A.No.5 of 2011 before the Principal Sessions Court and the same was made over to Mahila Fast

Track Court, Nagercoil. The appellate Court also confirmed the judgment and conviction and dismissed the appeal through its judgment dated 09.08.2018.

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

The order of the Mahila Fast Track Court, Nagercoil is against law, weight of evidence and probabilities of the case. The case of the complainant/respondent herein is on 25.10.2007 he gave a loan amount of Rs.3,00,000/- to the accused/petitioner and the petitioner gave a post dated cheque dated 25.07.2008 to the respondent as a guarantee for the loan and the respondent deposited the cheque for collection on 25.07.2008 and on 19.08.2008, the cheque was returned for insufficient funds in the appellant account and the respondent had sent a legal notice to the appellant on 29.08.2008 but is is also returned as "not claimed". Hence, he was constrained to file a complaint against the respondent under Section 138 of N.I. Act. The signature was admitted but as per case is not given to the respondent as a guarantee and there are two cheques were given to Sujith Auto Finance as surety for purchase of a vehicle and the loan amount was settled and those financier had called him to hand over the entire loan documents in addition to that cheques but on very same date he was at Chennai hence he asked my driver to get those documents and he intentionally handed over those cheques to the respondent. The cheque is not the post dated cheque. The petitioner gave those two cheques as a guarantee for his vehicle loan to the Sujith Auto Finance and it was misused by his own driver namely, Raja and the petitioner gave a complaint against him to the Manavalakurichi Police Station on 25.10.2008. The petitioner came to know the petitioner's fraudulent activity only which he received the notice of the case in S.T.C.No.2048 of 2008 before the Judicial Magistrate No.I, Kuzhithurai and immediately he filed a complaint against him. The respondent is the building contractor he worked with him on contract basis but he refused to pay the share to the petitioner. Hence he filed a complaint against him for obtaining the amount and to wreak on vengeance, the respondent had filed this instant case in S.T.C.No.2048 of 2008 before the learned Judicial Magistrate No.I, Kuzhithurai. The petitioner raised these entire allegation in the trial Court but the lower Court without adverting that had allowed the appeal and upheld that conviction in S.T.C.No.2048 of 2008 before the learned Judicial Magistrate No.I, Kuzhithurai. Aggrieved the same, he have filed the instant Criminal Appeal before this Court.

6.The learned counsel appearing for the petitioner would contend that the petitioner has not stated when the accused approached the complainant and when demanded amount and when the amount was paid have not been explained by the complainant. No mention about the date in which the cheque was handed over to the complainant. In the notice, the complainant has not mentioned when the amount was borrowed and for what purpose, the amount was borrowed, whether any legally enforceable debt or not have not mentioned either in the complaint or in the notice. Further the presumption under Section 139 of Negotiable Instruments Act was rebutted by the petitioner through marking documents and examining the witnesses. Though the petitioner admitted the signature found in the cheque, he probabilized the defence. In fact the cheque was stolen by one Rajan and thereby, the petitioner has given complaint dated 25.10.2008. But no action was taken by the police. Further the petitioner had given a complaint after 28.10.2008 as against one Sriram and Suba Devakumar. Further on the side of the petitioner, he examined D.W.1 and D.W.2 and marked Ex.D1 to Ex.D2. But without considering that aforesaid evidence and documents adduced by the petitioner, the trial Court has convicted the petitioner and the appellate Court also failed to taken into consideration the aforesaid aspects and confirmed the trial Court and judgment without any basis. The judgment passed by the Courts below are liable to be set aside by allowing this revision case.

7.The learned counsel appearing for the respondent would contend that the petitioner has borrowed a sum of Rs.3,00,000/- from the respondent on 25.10.2007. For that amount, he issued a cheque dated 25.07.2008 and the same was presented for collection on the same day and the same was returned as unpaid with endorsement 'insufficient funds' on 19.08.2008. Thereafter, the respondent issued notice to the petitioner and same returned as unclaimed. Thereafter, the petitioner neither replied nor repaid the amount. Therefore, the complainant has filed a complaint under Section 138 of Negotiable Instruments Act before the trial Court and the same was taken on file and then issued process to the petitioner and he appeared through counsel on the side of the complainant examined himself as P.W.1 and marked Ex.P1 to Ex.P10. The petitioner admitted the issuance of cheque and signature found in the cheque. No sufficient rebuttal evidence adduced by the petitioner to substantiate his contention and to rebut the presumption under Section 139 of Negotiable Instruments Act. Thereby, the trial Court has correctly convicted the accused and the appellate Court after analysis of the evidence, dismissed the appeal by confirming the judgment of the trial Court. Therefore, this revision petition is liable to be dismissed.

8.Upon perusing the documents and evidences adduced on both sides and upon perusing the judgments of Courts below and grounds, the points for determination in this petition is whether the judgment of the Mahila(Fast Track Court), Nagercoil in Crl.A.No.5 of 2011 on 09.08.2018, in confirming the conviction and sentence imposed by the learned Judicial Magistrate No.I, Kuzhithurai in S.T.C.No.2048 of 2008 on 13.12.2010 is sustainable according to law and facts.

Point:-

9.The case of the complainant before the trial Court is that the petitioner borrowed a sum of Rs.3,00,000/- on 25.10.2007 and issued a cheque dated 25.07.2008 for a sum of Rs.3,00,000/-. At request of the petitioner, the said cheque was presented for collection on 25.07.2008 through his banker State Bank of India, Kuzhithurai Branch and the same was returned on 19.08.2008 as unpaid with a memo stating that 'funds insufficient'. Thereafter, the respondent issued notice on 29.08.2008 and the same was returned as unclaimed. Thereafter, the petitioner neither repaid the amount nor sent reply. Hence, he failed the complaint.

10.According to the petitioner, he purchased the jeep from one Josh, Manavalakurichi bearing registration No.TN-0400-7137 on 30.07.2007. For that on 16.08.2007, he borrowed loan of Rs.30,000/- from Sujith Auto mobiles and he deposited two cheque leaves for security purpose. In the said jeep, one Rajan was appointed as driver. While so, he sold the said jeep to one Jeevanatham for a sum of Rs.51,000/- and he went to Chennai. In the meantime, he asked his driver Rajan to get back the cheque leaves from the owner of Surjith auto mobiles. The owner of the auto mobiles also issued the cheques to said Rajan. The aforesaid two cheque leaves were not returned by the said driver Rajan to the petitioner. When he asked about the cheques to the said Rajan, told that he already torn the cheques. Believing the words of driver, he did not take any action but on 24.07.2008, so called torn cheque was presented for collection for a sum of Rs.3,00,000/- and the same was returned on 29.07.2008. Since he was in Chennai, he did not know anything about the collection and return of cheque. Thereafter, he came to know about the aforesaid transaction of cheque.

11.In order to prove the case of the complainant, he was examined as P.W. 1 and marked Ex.P1 to Ex.P10 and he deposed about the issuance of cheque by the petitioner and presentation of cheque for collection and the return of cheque as 'insufficient funds'. Further he marked the cheque as Ex.P1 and on perusal of the Ex.P1, it reveals that the accused issued a cheque for a sum of Rs.3,00,000/- and the same was returned as 'insufficient funds' through memo which was marked as Ex.P3 and the respondent issued notice on 29.08.2008 and the same was returned as unclaimed and in order to prove the case of the complainant, he marked Ex.P1 to Ex.P10. Therefore, from the evidence of P.W.1 and Ex.P1 to Ex.P10, they reveal that the accused had issued a cheque for a sum of Rs.3,00,000/- in favour of the complainant and the same was presented for collection and then returned 'insufficient funds'. Thereafter, issued notice to accused and the same was returned as unclaimed. Therefore, the complainant has proved his case through sufficient evidence.

Moreover, the accused also admitted the signature found in the cheque and therefore, there is presumption under Section 139 of Negotiable Instruments Act is in favour of the complainant.

12.In order to rebut the presumption under Section 139 of Negotiable Instruments Act, the accused was examined as D.W.1 and he deposed that he never issued cheque dated 25.10.2007. Since he was not in town on the date of issuance of notice, he was unable to receive notice and he had given disputed cheque and another cheque to one Sujith Auto mobiles, Manavalakurichi for security purpose and the same was handed over to his driver Rajan. Thereafter, the said Rajan and complainant have misused the cheque and filed this complaint. Further the accused has examined another witness D.W.2 namely Velayutham and he deposed that he was working as Branch Manager of State Bank of India, Travancore and the cheque bearing No.67010851306 was issued by the Bank. But the petitioner failed to examine the aforesaid owner of Sujith auto mobiles, to prove his contention and further he himself admitted the signature found in the cheque and there is no explanation as to why two blank cheque leaves were given to the auto mobiles that too for a sum of Rs.30,000/-. These conducts of petitioner/accused creates doubts over the evidence of D.W.1. Therefore, the evidence of D.W.1 is doubtful and not reliable.

13.Per contra the complainant has proved the case by examining P.W.1 and marking Ex.P1 to Ex.P10 and thereby, the case of the complainant was proved through sufficient evidence.

14.The learned counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of ***Basalingappa v. Mudibasappa*** reported in ***(2019) 5 Supreme Court Cases 418***, wherein the Hon'ble Supreme Court in para nos.11, 12 and 28 held as follows:-

> *"11. Next provision, which needs to be noticed is Section 139, which provides for presumption in favour of holder. Section 139 lays down:"139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, 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."*
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> *12.The complainant being holder of cheque and the signature on the cheque having not been denied by the accused, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before we refer to judgments of this Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn. A Three-Judge Bench of this Court in Kali Ram Vs. State of*

Himachal Pradesh, (1973) 2 SCC 808 laid down following:

"23. ……………………One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

28.There is one more aspect of the matter which also needs to be noticed. In the complaint filed by the complainant as well as in examination-in-chief the complainant has not mentioned as to on which date, the loan of Rs.6 lakhs was given to the accused. It was during cross-examination, he gave the date as November, 2011. Under Section 118(b), a presumption shall be made as to date that every negotiable *instrument was made or drawn on such date. Admittedly, the cheque is dated 27.02.2012, there is not even a suggestion by the complainant that a post dated cheque was given to him in November, 2011 bearing dated 27.02.2012. Giving of a cheque on 27.02.2012, which was deposited on 01.03.2012 is not compatible with the case of the complainant when we read the complaint submitted by the complainant especially Para 1 of the complaint, which is extracted as below:"1. The accused is a very good friend of the complainant. The accused requested the Complainant a hand loan to meet out urgent and family necessary a sum of Rs.6,00,000/(Rupees Six Lakh) and on account of long standing friendship and knowing the difficulties, which is being faced by the accused the complainant agreed to lend hand loan to meet out the financial difficulties of the accused and accordingly the Complainant lend hand loan Rs.6,00,000/(Rupees Six Lakh) dated 27.02.2012 in favour of the Complainant stating that on its presentation it will be honored. But to the surprise of the Complainant on presentation of the same for collection through his Bank the Cheque was returned by the Bank with an endorsement "Funds Insufficient" on 01-032012."*

15.On careful reading of the aforesaid judgment, it is clear that in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused.

16.The learned counsel appearing for the petitioner relied upon the judgment of this Court in the case of ***Pandurangan v. Sivakami*** reported in ***(2017) 2 MWN (Cri) DCC 113***, wherein the Hon'ble Supreme Court in para nos.11, 12 and 28 held as follows:-

> *"14.Absolutely there is no dispute whatsoever in the above decision of the Honourable Supreme Court. In fact Section 139 of Negotiable Instruments Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. The Honourable Supreme Court held 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' 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. The Honourable Supreme Court also held that the accused can rely on the materials submitted by the complainant in order to raise such a defence and in some cases the accused may not need to adduce evidence of his/her own.*
> *15. The above observation of the Apex court is also clearly show that to prove the preponderance of probabilities the accused need not get himself examined. He can rely upon even the materials and evidence of the complainant. This Court after scanning the entire evidence of P.W.1 as discussed above, have serious doubt about the legally enforceable*

debt. From the admissions of P.W.1 in the cross examination, the legal presumption attached to the cheque has been dislodged by the accused. The burden shifted on the complainant to establish the consideration has not been proved in the manner known to law. Therefore, the legally enforceable debt cannot be inferred merely on the cheque. Hence, this Court is of the view that the findings of the Court below has to be interfered with and the same is interfered. The order of the Courts below are set aside. The points are answered accordingly. In view of the above, the revision case is allowed and the revision petitioner/accused is acquitted from the charges. Fine amount ordered to be returned to the accused."

17.On careful reading of the aforesaid judgment, it is clear that Section 139 of Negotiable Instruments Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. The Honourable Supreme Court held 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' 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. The Honourable Supreme Court also held that the accused can rely on the materials submitted by the complainant in order to raise such a defence and in some cases the accused may not need to adduce evidence of his/her own.

18.In the case on hand, the petitioner failed to establish his defence through sufficient evidence and there is no sufficient rebuttal evidence. The accused himself admitted the signature found in the cheque and failed to adduce sufficient rebuttal evidence and the aforesaid case law submitted by the petitioner will not help to decide the case in his favour.

19.The trial Court in its judgment elaborately discussed about all the aspects and correctly came to a fair conclusion and the appellant Court also passed reasoned judgment and correctly dismissed the appeal by applying wrong proposition of law. There is no any infirmity found on the judgment and conviction passed by the Courts below and thereby, the Criminal Revision Case has no merits and deserved to be dismissed.

20.In the result, the Criminal Revision Petition is dismissed and the judgment and conviction passed by the Mahila Fast Track Court, Nagercoil in Crl.A.No.5 of 2011 on 09.08.2018, in confirming the judgment and conviction passed by the learned Judicial Magistrate No.I, Kulithurai in S.T.C.No.2408 of 2008 on 13.12.2012 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.

26.09.2023

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

To

1.The Judge, Mahila(Fast Track Court), Nagercoil.

2.The Judicial Magistrate, Kulithurai.

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

P.DHANABAL, J.

Mrn

Crl. R.C.(MD)No.387 of 2019

26.09.2023