



Crl.R.C.(MD).No.11 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 22.06.2023

Pronounced on : 17.07.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.R.C.(MD)No.11 of 2020

and

Crl.M.P.(MD)No.3889 of 2023

1.Swathi Steels
represented by its Proprietor
M.P.Sivaramakrishnan

2.M.P.Sivaramakrishnan

... Petitioners/Appellants/
Accused Nos.1 and 2

Vs.

C.Ashok

... Respondent/Respondent/
Complainant

PRAYER: Criminal Revision Petition has been filed under Section 397 read with 401 of Cr.P.C., to call for the records relating to the Judgment of Conviction and sentence dated 02.03.2019 in Criminal Appeal No.127 of 2018 on the file of the learned Sessions Judge, Tiruchirapalli Division, Tiruchirappalli confirming the Judgment of Conviction and sentence dated 25.08.2018 in S.T.C.No.768 of 2015 on the file of the learned Judicial Magistrate No.II, Tiruchirapalli and set aside the same.



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For Petitioners : Mr.VR.Shanmuganathan

For Respondent : Mr.B.Jameel Arasu

ORDER

This Criminal Revision case is directed against the concurrent judgments of conviction passed in Crl.A.No.127 of 2018 dated 02.03.2019 on the file of the Principal Sessions Court, Tiruchirapalli, confirming the judgment made in S.T.C.No.768 of 2015 dated 25.08.2018 on the file of the Court of the Judicial Magistrate No.II, Tiruchirapalli.

2. The petition in Crl.M.P.(MD)No.3889 of 2023 has been filed, invoking Section 391 Cr.P.C., for reception of additional evidence.

3. The revision petitioners are the accused 1 and 2. The respondent/respondent/complainant has filed a complaint against the revision petitioners/appellants/accused under Section 138 r/w 142 of Negotiable Instruments Act.



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For the sake of convenience and brevity, the parties herein will be referred as per their status / ranking before the trial Court.

4. The case of the complainant is that the second accused being the friend of the complainant has borrowed a sum of Rs.12,50,000/- (Rupees Twelve Lakhs and Fifty Thousand only) from the complainant on 12.11.2012 for his family expenses and for business development, that the second accused has agreed to repay the said amount with interest within one month, that since the amount was not repaid within the time agreed, the complainant approached the second accused on 12.12.2012 and demanded to return the amount, that thereafter the second accused has issued a cheque bearing No.318598 dated 12.12.2012 drawn on Andhra Bank, Cantonment Branch, Tiruchirapalli for Rs.12,50,000/- (Rupees Twelve Lakhs and Fifty Thousand only), that the second accused had also agreed to pay the interest amount after two months, that the second accused had then immediately contacted the complainant and requested him not to present the cheque for collection on that day itself, but to present on 11.01.2013, that the complainant had accordingly presented the cheque for collection through his Axis Bank, Thillai Nagar Branch,



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Tiruchirapalli on 11.01.2013, that the cheque was returned for the reason 'account was closed', that the complainant has then sent a legal notice dated 28.01.2013 demanding to pay the amount covered by the cheque, that though both the accused have received the notice, they have not sent any reply nor made any payment and that therefore, the complainant was constrained to lodge the above private complaint.

5. The learned Judicial Magistrate, after receiving the complaint, has recorded the sworn statement of the complainant and on perusing the records, after satisfying that there existed *prima facie* case, has taken the case on file in S.T.C.No.768 of 2015 for the offence punishable under Section 138 of Negotiable Instruments Act and ordered issuance of summons to the accused. After appearance of the accused, copies of records were furnished to them under Section 207 Cr.P.C. on free of cost. When the accused were questioning about the offence alleged against them, they denied the commission of offence and pleaded not guilty.

6. During trial, the complainant has examined himself as P.W.1 and exhibited 5 documents as Ex.P.1 to Ex.P.5. After closure of the



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complainant's side evidence, when the accused were questioned under Section 313(1)(b) Cr.P.C., they denied the complainant's side evidence as false and further stated that a false case has been foisted against them. Though the accused have stated that they are having defence evidence, they have not adduced any evidence subsequently.

7. The learned Judicial Magistrate, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the judgment dated 25.08.2018 convicting the accused for the offence under Section 138 of Negotiable Instruments Act and sentenced to undergo 1 year simple imprisonment and to pay a compensation of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) under Section 357 Cr.P.C. Aggrieved by the said judgment of conviction and sentence, the accused have preferred an appeal in Crl.A.No.127 of 2018 and the learned Principal Sessions Judge, Tiruchirapalli, on perusing the records and on hearing the arguments of both the sides, has passed the impugned judgment dated 02.03.2019 dismissing the appeal and thereby confirming the judgment of conviction and sentence passed in S.T.C.No.768 of 2015 dated 25.08.2018 by the learned Judicial Magistrate No.II, Tiruchirapalli.



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Challenging the dismissal of appeal, the accused have preferred the present revision.

8. Whether the concurrent judgments of conviction passed in Crl.A.No.127 of 2018 dated 02.03.2019 on the file of the Principal Sessions Court, Tiruchirapalli, confirming the judgment made in S.T.C.No. 768 of 2015 dated 25.08.2018 on the file of the Judicial Magistrate Court No.II, Tiruchirapalli is liable to be set aside? is the point for consideration.

9. Pending the above criminal revision, the accused have filed an application under Section 391 Cr.P.C. for reception of additional evidence. In the affidavit filed in support of the said petition, the accused have stated that the second accused borrowed a sum of Rs.2,00,000/- (Rupees Two Lakhs only) for his business purposes from the complainant, for which, he had executed blank promissory notes and blank cheques and handed over the same to the complainant as security, that the second accused had repaid the loan amount later, but the complainant did not return the blank promissory notes and blank cheques, though he assured to return the same, that the complainant with intend to cheat and extract money had misused the blank cheques and blank promissory notes and by fabricating them,



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has filed the present case and also a suit in O.S.No.104 of 2013 on the file of the District Court, Tiruchirapalli, that the complainant had set up one R.Venkatraman and through him filed a suit in O.S.No.73 of 2014 on the file of the District Court, Tiruchirapalli, for recovery of money and also a complaint in S.T.C.No.259 of 2013 for the offence under Section 138 of Negotiable Instruments Act on the file of the Court of the Judicial Magistrate No.II, Tiruchirapalli, that in order to prove the above, the accused have produced the certified copies of the plaint and written statement filed in O.S.No.104 of 2013 and certified copy of the deposition of P.W.1 recorded in O.S.No.104 of 2013 and that the same may be received as additional evidence so as to enable the accused to prove their defence.

10. The complainant has filed a counter statement, wherein, it has been stated that the above petition came to be filed in a belated stage and is unnecessary, that the accused have raised vexatious contentions, that if the petition is allowed, the same would amount to denial of justice to the complainant, that money transactions had taken place during 2015 and already 8 years had lapsed, that the matter was referred to mediation at the instance of the accused, that though they had agreed to settle the case by



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paying Rs.50,00,000/- (Rupees Fifty Lakhs only) in full and final settlement in connection with all pending cases between the parties, on the next date of hearing, they refused to do so and as such, the matter was returned back to this Court, that the accused as an afterthought filed the above petition with an intention to drag on the proceedings, that the documents sought to be received as additional evidence are irrelevant and are absolutely not necessary to decide the criminal revision and that therefore, the above petition is liable to be dismissed.

11. Chapter XXIX Cr.P.C. deals with Appeals from Sections 372 to 394 of the Code. Section 391 is a provision available under Chapter XXIX Appeals permits the appellate Court to take further evidence or direct the evidence to be taken. Section 391 Cr.P.C. empowers the appellate Court dealing with an appeal to take further evidence by itself or direct further evidence to be taken by a Court subordinate to it. Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice.



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12. The Hon'ble Supreme Court in ***Rambhau and another Vs. State of Maharashtra*** reported in ***AIR 2001 SC 2120 (Crl.A.No.636 of 1995)*** has specifically observed that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial and that it is not to fill up the lacuna but to sub-serve the ends of justice. The Hon'ble Supreme Court has further held that it is not a disguise for a re-trial or to change the nature of the case.

13. The discretion under 391 Cr.P.C. is controlled by two conditions, one is that the Court must come to a conclusion that the additional evidence is necessary and other one is that if the appellate Court admits the additional evidence, it shall record the reasons for the same.

14. In ***Ashok Tshering Bhutia Vs. State of Sikkim*** reported in ***(2011) 4 SCC 402***, the Hon'ble Apex Court has held that the additional evidence at appellate stage is permissible, in case of a failure of justice, however, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice.



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15. In the case on hand, the petition under Section 391 Cr.P.C. came to be filed in the criminal revision. As already pointed out, the Hon'ble Supreme Court has reiterated the settled legal position that the power under Section 391 has to be exercised sparingly and in exceptional cases and that too in appeals.

16. It is pertinent to note that the provision of an appeal is a legal right conferred on the parties, but whereas, revisionary power conferred on the criminal Courts is completely discretionary in nature and as such, no party can claim it as a matter of right. Generally, revision is the act of revising or reviewing something in order to locate and rectify the mistakes if any, present in it. Revisionary jurisdiction is the power of the higher Courts to call for records from the Courts below of the cases which are already decided by the Courts below, in order to keep a check on whether the legal principles, procedures and jurisdictions are duly complied with or not by the subordinate Courts and to keep the Courts below within the bounds of their authority and make them work in accordance with the Rule of law.



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17. Considering the above and also the nature of the revision proceedings, this Court has no hesitation to hold that the accused have not made out any case to exercise the discretionary power of this Court in their favour and to permit them for adducing additional evidence.

18. The learned counsel appearing for the accused would contend that the trial Court immediately, after the closure of the prosecution witnesses and questioning under Section 313 Cr.P.C., has straightaway posted the matter for arguments, despite the representation made by the accused that there are defence witnesses, the learned Magistrate has compelled both the sides to argue the matter and pronounced the judgment on 25.08.2018 itself, that the accused were not permitted to cross-examine the complainant, that the trial Court has also not afforded any opportunity to the accused to adduce their side evidence and that the appellate Court, without considering the above material aspects, has mechanically confirmed the conviction passed by the trial Court.

19. It is evident from the records as well as the judgments of the trial Court and the appellate Court that the complainant was examined in



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chief on 25.02.2016, that though the case was posted to 15.03.2016, 07.04.2016, 03.05.2016, 26.05.2016, 17.06.2016, 26.07.2016, 01.09.2016 and 06.09.2016, the complainant was not at all cross-examined by the defence, that since the defence have not utilized the sufficient opportunities granted to them to cross-examine the complainant, the same was closed and as the complainant has closed his side evidence, posted for proceedings under Section 313(1)(b) Cr.P.C., that thereafter, the Court has granted time and adjourned the matter to 16.02.2017, 09.03.2017, 13.04.2017, 04.05.2017, 08.06.2017, 24.06.2017, 06.07.2017, 27.07.2017, 03.08.2017, 17.08.2017, 31.08.2017 and 12.09.2017 for defence side evidence, but no evidence was adduced on the defence side, that subsequently, the accused have filed an application on 12.09.2017 seeking orders to recall the complainant-P.W.1 for cross-examination and the same was ordered to be allowed on that day itself and posted to 03.10.2017, 24.10.2017, 07.11.2017, 28.11.2017, 04.12.2017, 07.12.2017, 14.12.2017, 19.12.2017, 02.01.2018, 30.01.2018, 06.02.2018, 13.02.2018 and 23.02.2018, but the accused side have not chosen to cross-examine the complainant, that subsequently, the case was adjourned to 29.06.2018 for judgment and that the accused have again filed an application to recall



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P.W.1 for cross-examination and the said petition was ordered to be allowed on 10.07.2018 and posted the case to 17.07.2018 and then to 20.07.2018, but again the defence have failed to cross-examine the complainant.

20. It is further evident that the trial Court has then posted the case for judgment on 23.07.2018, that the accused for the third time have filed another application to recall P.W.1 for cross-examination and the trial Court has allowed the third petition and permitted the accused to cross-examine the complainant and posted the case to 11.08.2018, 21.08.2018 and 23.08.2018, but the accused have not utilized the said opportunity also and that thereafter, the case was adjourned to 25.08.2018 and on that day, the judgment was pronounced.

21. It is evident that the trial Court has granted lot of opportunities to the accused to cross-examine the complainant, initially, after recording the chief examination of the complainant and that the accused have filed petition under Section 311 Cr.P.C. to recall P.W.1 for cross-examination thrice and the petitions were ordered to be allowed and despite granting of



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more hearings, the accused have not chosen to utilize the opportunities granted to them. Moreover, after examining the accused under Section 313 Cr.P.C., the learned Magistrate has granted nearly 12 hearings for adducing the defence side evidence, but the same was also not utilized by the accused.

22. Considering the above, the very contention of the accused that they were not afforded sufficient opportunities to prove their defence is an utter falsehood and the same is liable to be rejected instantly.

23. A fair trial is to be fair both to the defence and the complainant. The concept of fair trial is not in the realm of abstraction and it is not a vague idea. The Hon'ble Supreme Court in ***State of Haryana Vs. Ram Mehar and others*** reported in ***(2016) 8 SCC 762***, after analysing its earlier decisions, has held that the concept of fair trial requires fairness to the accused, the victim and the collective at large and that neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other and the relevant passage is extracted hereunder:-



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“24. The decisions of this court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot be any strait-jacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognized, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognized principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The



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centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilized to build Castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such. From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so.”



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24. Considering the above, the concept of fair trial cannot be invoked by the accused, as the said concept is not only applicable to the defence, but also to the complainant. Moreover, it is pertinent to note that Section 143(3) of the Negotiable Instruments Act contemplates that every trial shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

25. On perusal of the records, this Court is of the clear view that the accused have purposely and wantonly failed to cross-examine the complainant and failed to adduce their side evidence, despite granting so much of opportunities and as such, they cannot be permitted to abuse the process of the Court in the name of fair trial concept.

26. Now turning to the merits of the case, it is necessary to refer Sections 118(a) and 139 of Negotiable Instruments Act, which deal with statutory presumptions,

*“Section 118 : Presumptions as to negotiable instruments,
- Until the contrary is proved, the following presumptions
shall be made:-*



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(a) of consideration – that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;”

“Section 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.”

27. The complainant as P.W.1 has given evidence reiterating the complaint contentions and he deposed about the liability of the accused, issuance of a cheque therefor, dishonour of cheque, issuance of statutory notice and failure of the accused to pay the amount within the stipulated time. It is pertinent to note that the accused, after the receipt of the statutory notice, have not chosen to send any reply notice. As already pointed out, since the complainant-P.W.1 was not at all cross-examined, the evidence of P.W.1 remains unchallenged. Moreover, the accused have also not adduced any evidence on their side to prove the alleged defence.



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28. It is pertinent to note that in the criminal revision grounds, the accused have taken a stand that the complainant approached the second accused and compelled him to join in the chit business conducted by the complainant, that since the complainant is a friend from college days, he had also joined in the chits and as usual in the chit business, the second accused has given blank cheques for security purpose and that one such cheque was misused by the complainant for preferring the above complaint. But in the affidavit filed in support of the petition filed under Section 391 Cr.P.C., the accused have taken a stand that the second accused has borrowed a sum of Rs.2,00,000/- (Rupees Two Lakhs only) for his business purpose, for which, he had executed blank promissory notes and blank cheques and handed over the same to the complainant, that though he had repaid the loan amount, the complainant did not return the blank cheques and blank promissory notes and that though the complainant had agreed to return the same, subsequently, with an intend to cheat and extract money he had misused the blank cheques and blank promissory notes and filed the present case as well as the original suit. The learned counsel appearing for the accused has not offered any reason or



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explanation for the material contradictions taken in their pleadings before this Court.

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29. Considering the evidence of P.W.1 and the above stand of the accused, it can be easily inferred that the second accused had admitted the signatures found in the cheques and issuance of the same, but for the different purpose.

30. As rightly contended by the learned counsel appearing for the complainant, both the Courts below have rightly drawn the presumption under Sections 118 and 139 of Negotiable Instruments Act in favour of the complainant.

31. No doubt, the presumption under Sections 118 and 139 of Negotiable Instruments Act is rebuttable in nature. It is pertinent to note that the statutory presumption is always rebuttable and once the acceptable rebuttal has come from the defence, then the burden shifts to the complainant to prove by definite evidence and that the rebuttal is liable to be brushed aside. It is also settled law that the accused, in order to rebut



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the presumption drawn in favour of the complainant under Sections 118 and 139 of Negotiable Instruments Act, is not required to adduce any evidence and he can prove his probable defence through the evidence adduced by the complainant and that the standard of proof required is of preponderance of probabilities.

32. In the case on hand, as already pointed out, despite the magnanimous and liberal attitude of the trial Court, the accused have miserably failed to cross-examine the complainant and failed to adduce any evidence. Hence, this Court has no other option, but to say that the accused have not rebutted the statutory presumption under Section 139 of Negotiable Instruments Act. Consequently, this Court concludes that the finding of the trial Court as well as the appellate Court that the accused are guilty for the offence under Section 138 of Negotiable Instruments Act cannot be found fault with and this Court is in entire agreement with the concurrent judgments of conviction passed by the Courts below.

33. Now turning to the punishment, as already pointed out, the learned Judicial Magistrate has convicted the accused and sentenced to



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undergo 1 year simple imprisonment and to pay a compensation of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) and the learned appellate Judge has also confirmed the sentence imposed by the trial Court. Considering the nature of the offence and also the quantum of cheque amount and the delaying tactics adopted by the accused from 2015 onwards, the sentence imposed by the trial Court, which was confirmed by the appellate Court is very much reasonable and cannot be said to be excessive. Hence, this Court is not inclined to interfere with the concurrent judgments passed by the Courts below and consequently, this Court concludes that the revision, which is devoid of merits, is liable to be dismissed.

34. In the result, the Criminal Revision case and the petition in Crl.M.P.(MD)No.3889 of 2023 are dismissed. The trial Court is directed to take necessary steps to secure the accused to undergo remaining period of sentence, if any.

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K.MURALI SHANKAR, J.

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Pre-Delivery order made in
Crl.R.C.(MD)No.11 of 2020
and
Crl.M.P.(MD)No.3889 of 2023

Dated : 17.07.2023