IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.09.2024
PRONOUNCED ON : 18.10.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.264 of 2024

S.P.Vijayakumar ... Appellant

Vs.

1.M/s.Jai Marketings,
A Partnership Firm rep. by its
Partners S.G.Sekar & E.Arokyasamy,
294, Purasawakkam High Road,
Kellys,
Chennai-600 010.

2.S.G.Sekar
3.E.Arokyasamy ... Respondents

PRAYER: Criminal Appeal filed under Section 378 of Criminal Procedure Code, to call for the records relating to order dated 05.01.2023 made in C.C.No.4586 of 2017 on the file of the Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai and set aside the same by allowing this Criminal Appeal.

For Appellant : Mr.N.Manoharan
For Respondent : Mr.B.Nedunchezhiyan

JUDGMENT

The appellant/complainant filed private complaint against the respondents for offence under Section 138 of the Negotiable Instruments Act, 1881 (In short 'The Act') in C.C.No.4586 of 2017 before the learned Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai (Trial Court) and the same was dismissed *vide* judgment dated 05.01.2023 acquitting the respondents. Against which the present criminal appeal is filed.

2.The case of the appellant/complainant is that during the month of August 2015, the respondents approached the appellant for loan of Rs.33,00,000/- for business development and they promised to repay the loan within six months. Believing such representation, the appellant agreed to lend the amount of Rs.33,00,000/-. By RTGS, the said amount was transferred on 19.09.2015. The respondents executed promissory notes (Exs.P1 & P2) confirming the receipt of loan amount on the same day. In bits and pieces till the month of June 2016, a sum of Rs.8,00,000/- paid by the respondents. After repeated demand, the respondents first agreed to repay the principal amount and thereafter to repay the interfest. Deducting the amount of Rs.8,00,000/- already paid in bits and pieces, for the balance amount of Rs.25,00,000/- the cheque (Ex.P3) dated 20.04.2017 issued. When the cheque (Ex.P3) was presented for encashment, the same was returned for the reason “funds insufficient” with bank advice memo (Ex.P4) and statutory notice (Ex.P5) issued on 03.05.2017. The respondents 1 and 2 received the statutory notice and postal acknowledgment cards marked as Exs.P6 & P7. The 3rd respondent refused the statutory notice and the returned cover marked as Ex.P8. Thereafter, with a delay the reply notice (Ex.P9), dated 25.05.2017 was sent by the respondents with false allegations. Hence, the complaint was filed.

3.During trial, the appellant/complainant examined himself as PW1 and marked nine documents as Exs.P1 to P9. On the side of the defence, the respondents neither examined any witness nor marked any document. The Trial Court admitted the issuance of the cheque (Ex.P3), its signature and presumption starring against the respondents, but giving credence to the reply notice (Ex.P9) and answer to questioning under Section 313 Cr.P.C, dismissed the complaint of the appellant.

4.The learned counsel for the appellant submitted that two loans were given to the respondents, one is for Rs.33,00,000/- on 19.09.2015 and another loan is for Rs.7,00,000/- on 21.09.2015, in total Rs.40,00,000/-. As regards the present transaction is concerned, it pertains only to Rs.33,00,000/-. Giving credence to Rs.8,00,000/- paid, for the balance Rs.25,00,000/- the cheque (Ex.P3) was given by the respondents. The issuance of the cheque (Ex.P3) and its signature not denied by the respondents. On the other hand, in reply notice (Ex.P9) the respondents shown 17 instances of payment of money on various dates starting from 12.11.2015 to 16.05.2016 and the respondents is only due to the tune of Rs.3,50,000/- and not Rs.25,00,000/-. It is projected that the respondents were being prosecuted on a security cheque. Of the 17 instances shown in the reply notice (Ex.P9), five instances are through RTGS. These five instances are accepted by the appellant, but not cash payments. The respondents not brought anything on record to show when and where the cash handed over to the appellant and no contemporary document produced more so when the respondents denied the receipt of such cash, hence the respondents are duty bound to prove the cash payment. The other contention of the respondents that four promissory notes executed for Rs.12,50,000/- of which only two produced and marked as Exs.P1 & P2 are without any material. Likewise four security cheques given and only one produced is also without any material. The contention of the respondents that the appellant is not a licensed moneylender, hence he cannot allege money lending for interest is not proper. The appellant admits that he is a licensed moneylender and it is a commercial transaction and the interest rate agreed and fixed at 18% per annum. While that being so, now the respondents cannot make a turn around and claim it is an exorbitant interest. The learned counsel further submitted that the cheque (Ex.P3) is for repayment of the principal amount and not for interest. The cross examination of the appellant was done on various dates on 27.11.2018. 07.03.2019, 08.07.2019 and finally on 21.01.2021. Each time the respondents came with a new defence depending upon the answers given during previous cross examinations.

5.The learned counsel further submitted that appellant filed a memo before the Trial Court on 08.04.2019 with Axis Bank Certificate, dated 09.11.2018 confirming the transfer of Rs.33,00,000/- and Rs.7,00,000/- to the respondents by RTGS from the account of the appellant. Likewise, the appellant received the repayment of the loan on five instances through RTGS. After cross examination of the appellant on 07.03.2019, the appellant produced the above said memo, on the subsequent cross examination on 08.07.2019 the appellant clearly stated about the loan of Rs.40,00,000/- by RTGS, by oversight the bank statement not marked as exhibit, later the same produced before the Trial Court. The learned counsel for the appellant produced the certified copy of bank certificate with memo before this Court in which the Court seal dated 08th April 2019 is available. The Trial Court in its judgment referred to cross examination of the appellant on 07.03.2019 and gave a finding that the appellant admitted the respondents paid Rs.13,00,000/- by way of RTGS but in the complaint only Rs.8,00,000/- shown as repaid for the loan amount. The remaining Rs.5,00,000/- accounted for another transaction. But the Trial Court considered the cross examination done on 07.03.2019, 08.07.2019 and

21.01.2021 and gave finding that through the reply notice (Ex.P9), the respondents probablized their defence that Rs.13,00,000/- repaid but in the complaint Rs.8,00,000/- shown as repaid is not proper. The Trial Court for the reasons best known after receipt of the said memo with bank certificate not referred to the same. It is equally a mistake on the appellant's counsel in the Trial Court for not bringing the Bank Certificate on record as exhibit. Had this certificate brought on record, it would have clearly proved that the respondents availed loan of Rs.40,00,000/- and the defence brought in the reply notice (Ex.P9) would fall as a pack of cards when there is no contemporary document to show the payment of amount in cash as brought in the reply notice (Ex.P9). The specific case of the appellant in the above case is that the loan amount is Rs.33,00,000/- and after deducting Rs.8,00,000/- payment, for the remaining Rs.25,00,000/- the cheque (Ex.P3) received, which got dishonoured and the complaint filed.

6.He further submitted that the respondents though in cross examination projected they handed over cheques 228631, 228619, 228620, 228622, 228621, 228625 and 228623, for what reason these cheques given, whether the cheques honoured or returned is not known. It is for the respondents to prove the same. Just by putting questions, the same would not probablize the contention of repayment made in defence. In support of his submissions, the learned counsel for the appellant relied on the following decisions:

- Uttam Ram v. Devinder Singh Hudan and another reported in (2019) 10 Supreme Court Cases 287.
- Bir Singh v. Mukesh Kumar reported in (2019) 4 Supreme Court Cases 197.
- B.M.Basavaraj v. Srinivas S.Datta reported in CDJ 2016 SC 1007.

For the principle that the statutory presumption in favour of the complainant that the money was due under the cheque unless there is defence to the effect that the cheques were not issued by the respondent or the cheques do no bear its signatures or they were not presented properly for encashment with some evidence. In the absence of the same, the respondents ought to have been convicted. Further for the principle that the statement of accused under Section 313 is not a substantive evidence of defence by the accused but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of accused. Further for the principle that the Hon'ble Apex Court time and again reiterated the object of Section 138 of the Act to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the Negotiable Instruments Act is intended to be a deterrent to callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same. The onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

7.Making the above submissions and relying upon the above decisions, the learned counsel for the appellant submitted that the Trial Court completely misread the evidence and dismissed the complaint which needs interference of this Court.

8.The learned counsel for the respondents filed written submission and submitted that the case projected by the appellant is that on 19.09.2015, the appellant gave loan of Rs.33,00,000/- which is the consistent case of the appellant in his complaint, statutory notice and in his evidence. The respondents sent a reply notice (Ex.P9) setting out Rs.33,00,000/- loan amount, how he repaid on various dates to the tune of Rs.29,50,000/- by RTGS and cash. After receipt of reply notice (Ex.P9), there was no denial of rejoinder by the appellant. The appellant's contention that he is a financier and received the cheque (Ex.P3) for Rs.25,00,000/- for repayment of principal amount, not calculating the interest is highly improbable. Later, the appellant improved his case as though Rs.40,00,000/- paid for which no material produced. In the reply notice (Ex.P9), it is clearly stated that the respondents repaid Rs.13,00,000/- by RTGS but the appellant gives credit to Rs.8,00,000/- only and gives an explanation as though Rs.5,00,000/- for another loan repayment. What is the other loan and what was the repayment and how it has been made, nothing explained by the appellant. For the principle amount of Rs.33,00,000/-, Rs.13,00,000/- repaid and balance is only Rs.20,00,000/-, hence the cheque cannot be for Rs.25,00,000/-. As per the reply notice (Ex.P9), by RTGS it is Rs.13,00,000/- and by cash paid Rs.16,50,000/-, in total Rs.29,50,000/-

paid. In such circumstances, there cannot be any due of Rs.25,00,000/- as projected by the appellant. The appellant is a licensed moneylender but not produced any document to prove the same. Further, the appellant not produced his income tax returns to show this amount is due from the appellant. Added to it, the appellant not specifically denied the cash payments by the respondents.

9.He further submitted that the Trial Court by a well reasoned judgment considered the contradictions of the appellant at each stage of cross examination and the appellant unable to give any answer to the various cheques received from the respondents. Finding that the respondents probablized his defence by reply notice (Ex.P9) and answering 313 Cr.P.C questioning, the Trial Court dismissed the complaint. In support of his submissions, the learned counsel for the respondents relied on the decisions of this Court in "***Saravana Prabhu v. P.Krishnakumar in Crl.R.C.No.14 of 2016, dated 24.04.2017*** and ***S.Veerappan v. K.Sundar in Crl.R.C.No.848 of 2016, dated 02.04.2018*** and ***Pandurangan v. Sivakami*** reported in ***2017-2-L.W (Crl.) 746***" wherein the consistent view of this Court is that eventhough there is a initial presumption on the complainant, once the same has been denied and rebutted by the respondents, thereafter it is imperative on the complainant to prove his case. Further, the respondent to rebut the presumption under Section 139 of the Act, the standard of proof for doing so is that by preponderance of probability. This Court held that it is for the complainant to prove that the cheque was issued in lieu of the legally enforceable debt and thereafter only the burden shifts upon the respondent to rebut the presumption against him as contemplated under Sections 118 and 139 of the Act. This Court had also held that 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 accused can rely on the materials submitted by the complainant in order to raise such a defence and it is not necessary in all cases the accused need to adduce evidence of his own. Thus, from by cross examination and reply notice (Ex.P9), the respondents clearly probabilized his defence and the appellant miserably failed to prove the case. Hence, he prays for dismissal of the appeal.

10.This Court considered the rival submissions and perused the materials available on record.

11.It is seen that the Trial Court in its judgment in paragraph No.5 formulated the following four questions:

> "*(v)*.............
>
> *a) Whether the accused issued the cheque for discharge of any legally enforceable debt or liability?*
>
> *b) Whether the cheque was dishonoured for insufficient funds in the account of the accused?*
>
> *c) Whether a valid statutory notice issued was served upon accused regarding the dishonour of cheque?*
>
> *d) Whether the accused committed offence under Section 138 of the Negotiable Instruments Act, 1881?*"

12.The Trial Court in paragraph No.VI came to a conclusion that the cheque (Ex.P3) was issued in discharge of loan received by the respondents and the respondents not disputed the signature in the cheque (Ex.P3) and the initial presumption under Section 139 of the Act arises in favour of the appellant. Further, the Trial Court also held the cheque (Ex.P3) was issued to the appellant in discharge of the legally enforceable debt. The Trial Court held that the appellant discharged the initial burden of proof against the respondents under Section 138 of the Act and gave a finding that onus of disproving the case shifts to the accused whether the cheque was issued for discharge of legally enforceable debt or not.

13.The Trial Court in paragraph No.VII discussed with regard to the reply notice (Ex.P9) and held that as per Ex.P9, the respondents proved that they repaid Rs.29,50,000/- and there was a due to the tune of Rs.3,50,000/- and the cheque (Ex.P3) for Rs.25,00,000/- cannot be said to be issued in discharge of loan liability. This is not proper. Merely relying upon the reply notice (Ex.P9) without any further proof is not acceptable. The reply notice (Ex.P9) utmost can be the contention of the respondents, it is for the respondents to prove in what way the amount of Rs.29,50,000/- as per the tabulation in Ex.P9 paid, either he could have got into the box, gave explanation or produced any contemporary documents to show that the money was paid in cash. As regards RTGS payment, the appellant admitted the receipt of RTGS payment, but gives explanation that there was two loans, one is Rs.33,00,000/- on 19.09.2019 and another is Rs.7,00,000/- on 21.09.2015. As far as this case is concerned, the amount of Rs.8,00,000/- has been given credit and the balance amount of Rs.25,00,000/- not paid. The appellant in his cross examination on 07.03.2019 clearly stated that only for the principal amount, the cheque was issued and the appellant was also questioned with regard to non production of document to prove that the loan of Rs.33,00,000/- and Rs.7,00,000/- were paid to the respondents. On 08.04.2019, the appellant produced the Axis Bank Certificate, dated 09.11.2018 before the Trial Court along with memo confirming the transfer of Rs.33,00,000/- and Rs.7,00,000/- on 09.09.2015 and 21.09.2015, but strangely the same not marked as exhibit. Though it forms a part of the Court record, the Trial Court not considered the same. In the subsequent cross examination on 08.07.2019, the payment of Rs.40,00,000/- by way of RTGS reaffirmed by the appellant, but the same not specifically denied or questioned by the respondents. Strangely the respondents took a stand that the cheques 228631, 228619, 228620, 228622, 228621, 228625 and 228623 which according to the respondents are cheques drawn on Tamil

Nadu Merchantile Bank. In the reply notice (Ex.P9), it has been shown as paid by way of cash. To whom the cheques were given and who had withdrawn the amount, there is no clarity. But the Trial Court gave a finding that the appellant received these cheques and payments made. The Trial Court giving credence to these cheques without any details, is not proper.

14.The Trial Court giving credence to the reply notice (Ex.P9) and questioning under Section 313 Cr.P.C and coming to a finding that the respondents probablized his defence is not proper which is an erroneous finding. It is clear that the respondents admitted their signature in the cheque (Ex.P3) and merely by sending reply notice (Ex.P9) and making claim of repayment without any materials cannot be straight away construed as discharge of liability. The Axis Bank Certificate, dated 09.11.2018 produced by the appellant along with memo, dated 08.04.2019 would conclusively prove the respondents received Rs.40,00,000/- as loan. On the contrary, except the reply notice (Ex.P9) there is no material to prove that this amount was repaid by the respondents.

15.The Hon'ble Apex Court in the case of "***Uttam Ram vs. Devinder Singh Hudan and another*** reported in ***(2019) 10 Supreme Court Cases 287***" referring to its earlier judgments held the statutory provisions to be proved when the respondent has not led any evidence to rebut the presumption of consideration. Cross examination on the prosecution witness is not sufficient to rebut the presumption of consideration. When the witness denies the same and in the absence of any materials to probablize the defence of the accused, it is to be taken as statutory provisions proved.

16.In view of the above, this Court finds that the judgment of the Trial Court is on a misreading of evidence, perverse and not sustainable. Accordingly, the impugned judgment dated 05.01.2023 in C.C.No.4586 of 2017 passed by the learned Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai is set aside and this criminal appeal stands allowed.

17.The Trial Court is directed to take the Axis Bank Certificate, dated 09.11.2018 produced before the Trial Court on 08.04.2019 on record, mark the same as exhibit, give opportunity to the respondents for their explanation and thereafter reconsider the entire evidence afresh and to give a logical finding as per the guidelines issued by this Court as well as the Hon'ble Apex Court, within a period of two months from the date of receipt of a copy of this judgment.

18.It is made clear that for the limited purpose of marking the Axis Bank Certificate, dated 09.11.2018, give opportunity to the respondents to explain and question the respondents with regard to the same, the impugned judgment is set aside and the case is sent back.

18.10.2024

Index : Yes/No
Internet: Yes/No
Speaking Order/Non-Speaking Order

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To

The Metropolitan Magistrate,
Fast Track Court-III,
Saidapet, Chennai.

M.NIRMAL KUMAR, J.

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PRE-DELIVERY JUDGMENT MADE IN
Crl.A.No.264 of 2024

18.10.2024