IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

CORAM:

THE HONOURABLE Mrs. JUSTICE R.KALAIMATHI

Crl.R.C.No.1183 of 2017

G.Saravanan ... Petitioner/Appellant/Accused

vs

R.Murugesan ... Respondent/Respondent/Complainant

PRAYER: Criminal Revision Petition is filed under Sections 397 and 401 of Criminal Procedure Code in Crl.A.No.6 of 2016 on the file of the Principal Sessions Court, Dharmapuri and C.C.No.5 of 2007 on the file of the Judicial Magistrate Court, Palacode, to set aside the judgments dated 25.04.2017 and 30.03.2016 respectively and acquit the petitioner/Appellant for the alleged offence under 138 of the Negotiable Instruments Act, 1882.

For Petitioner : Mr.S.Ayyathurai
For Respondent : Mr.D.Gopal

ORDER

The accused herein has preferred this criminal revision case against the concurrent findings of conviction passed under Section 138 of the

Negotiable Instruments Act, 1881 by the Judicial Magistrate Court, Palacode in C.C.No.5 of 2007 and by the Principal Sessions Court, Dharmapuri in Crl.A.No.6 of 2016.

2. The case of the complainant is that he knows the accused and they are business partners. On 09.11.2006, the accused borrowed Rs.7 lakhs from the complainant and issued a cheque drawn on Bharat Overseas Bank, Hosur branch. As per the request of the accused, the complainant presented the cheque on 06.12.2006 for encashment. It was returned for the reason "funds insufficient". The complainant caused to issue a legal notice on 23.12.2006 to the accused was received by him. He in turn issued a reply notice on 10.01.2007 with false details. As the accused did not choose to return the above said amount, he presented a complaint before the Judicial Magistrate Court, Palacode under Section 138 of the Negotiable Instrument Act.

3. At trial, complainant has examined himself as C.W.1. Ex.C1 to C4 were marked. Ex.C1 is the Cheque dated 09.11.2006. The accused has examined himself as D.W.1 and other six witnesses were examined and Ex.D1 to Ex.D17 were marked.

4. Whereas, the accused would contend that he did not issue any cheque to the complainant. On receipt of legal notice only, he came to know that his cheque was dishonoured by his banker. His father and the complainant are partners in Dhanalakshmi Auto Finance. The business was commenced in the year 2000 and no share was given to the accused's father so far. His further defence is that during the year 2000 and 2001, he was employed at TVS Company, Mysore on contract basis and he had given five signed blank cheques to his father in order to give salary and for payment of rent and for EB payment of his company. The said five cheques were given to the complainant, he encashed four cheques as evident through the statement of account of complainant and remaining one cheque was retained by the complainant. This was not at all known to him. Only on the receipt of legal notice, he came to know that his signed blank cheque was misused and case has been foisted against him.

5. The trial Court after evaluating the evidence held that when the complainant retains cheque of the accused, then without taking any steps to get back the cheque or without taking any legal action, the defence set up by the accused to the effect that among the five cheques, four cheques

were encashed by the complainant and the remaining one signed blank cheque was misused and case is foisted against him is totally unbelievable. The defence put forth was only for the purpose of this case and the charge against the accused under Section 138 of the Negotiable Instrument Act was held to have been proved and he was convicted for one year simple imprisonment and within a month, he has to pay compensation of Rs.7 lakhs under Section 357 of Cr.P.C.

6. This was challenged by the accused in Crl.A.No.06 of 2016 by the judgment dated 25.04.2017 before the learned Principal District Court, Dharmapuri. The First Appellate Court having heard the arguments on both sides, concluded that as both are business partners and the accused having accepted that he gave five cheques to the complainant and the complainant encashed the four cheques, which was not mentioned in the reply notice. Without taking any legal action after receipt of legal notice, the accused's contention that one signed blank cheque of the accused was misused by the complainant is totally rejected and the appeal was dismissed.

7. The learned counsel Mr.S.Ayyathurai appearing for the appellant/accused would vehemently argue that out of the five cheques he had given to the complainant, money was encashed through four cheques and one blank cheque was retained by the complainant and in fact, he misused the cheque and falsely foisted this case. He also drew the attention of this Court that after issuance of complaint against the complainant to the Kaveripattinam Police Station in connection with the Dhanalakshmi Auto Finance, the fifth cheque which was retained by the complainant was misused and the present case was falsely filed against him. It is further argued that in order to rebut the presumption arisen in favour of the complainant, he has suitably rebutted by way of examining D.W.2 to D.W.7 and Ex.D1 to Ex.D.17. He would further strongly contend that in order to rebut presumption, even the cross examination of P.W.1 can be relied upon. However, the accused has taken points to rebut the presumption arisen against him, he has examined his bankers, bankers of the complainant, his wife and other relevant witnesses. He would go to show that his defence put forth is reasonable and the concurrent findings of both the Courts below finding him guilty under Section 138 of the Negotiable and Instrument Act is not sustainable in law.

8. In order to buttress his argument, the following judgments were referred to:-

1) The judgment in ***Rajaram (since deceased) through L.Rs. vs. Maruthachalam (since deceased) through L.Rs.*** [**CDJ 2023 SC 043]** was referred to, in order to contend that once the execution of cheque is admitted, Section 139 of the N.I.Act mandates a presumption that the cheque was for the discharge of any debt or other liability. It has however been held that the presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. It has further been held that to rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. It has been held that inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstance upon which they rely.

2) The judgment in ***Basalingappa vs. Mudibasappa*** [**CDJ 2019 SC 471]** was referred to in order to contend that the point to be looked

into, is as to whether any probable defence was raised by the accused.

9. Therefore, as per the arguments of the learned counsel for the appellant, the defence raised by the accused before the Court whether satisfies the standard of preponderance of probability is the candid issue in this appeal.

10. From the evidence of D.W.1/accused, he is known to the complainant for the past 15 years. The Accused's father (D.W.4) and the complainant along with the other partners started a partnership firm in the name and style of Dhanalakshmi Auto Finance. It is discernible from the evidence of accused that even the complainant and the accused were running a partnership firm.

11. As the signature found in the Ex.P1 pronote was admitted by the accused, then the presumption under Section 118 read with Section 139 of the Act arise in favour of the complainant. Of course, the accused is at liberty to rebut the said presumption by way of an oral or documentary evidence or even through the cross examination of complainant.

12. In order to rebut legal presumption, the accused has taken points by examining D.W.2 to D.W.7 and marked Ex.D1 to Ex.D17. To put it in nutshell, the defence of the accused is that he had given five signed blank cheques to the complainant through his father D.W.4 in the year 2001 itself, four cheques were encashed by the complainant in order to meet out the expenses of his company, as the accused was working as a contract labour in the TVS Company at Mysore. The remaining one signed blank cheque was misused by the complainant by filing this complaint. The other defence is that the complainant did not choose to give share to his father as is a partner and his father sent a complaint to Kaveripattinam Police Station against the complainant. Enraged by the act of his father, the complainant falsely foisted this case.

13. It is relevant to refer to the observation made by the Hon'ble Supreme Court in ***Basalingappa vs Mudibasappa [2019 (5) SCC 418]***, it has been observed that as to the principles under Section 118(a) and 139 of the Negotiable Instrument Act. The Principles are mentioned hereunder:-

> 1.Once the execution of cheque is admitted, Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

2.The presumption under Section 139 is a rebuttable presumption and onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

3.To rebut the presumption, it is open for the accused to rely on evidence let by him or the accused can also rely on the materials submitted by the complainant in order to raise probable defence inference preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

14. The Full Bench of the Hon'ble Supreme Court in ***Rangappa vs Sri Mohan (2010) 11 SCC 441 FB*** has elaborately considered the provisions of Section 138 and 139. The High Court in the said case reversed the order of acquittal. The accused had admitted signatures on the cheque. The Hon’ble Supreme Court held that where the fact of signature of the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In the event if the accused is able to

raise a probable defence which creates doubt with regard to the existence of debtor liability, the presumption may fail.

15. It is pertinent to note that the accused admitted the signatures on the Ex.Ps., cheque. It was held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence.

16. Therefore, whether the defence raised by the accused satisfies the test of preponderance of probabilities has to be analysed. The banker's of the complainant have been examined as D.W.2, D.W.3 and D.W.4. The statements of account of the complainant and his wife are Ex.D.14 and Ex.D.17, would go to show that the complainant has done business to tune of Rs.11 lakhs. The account statement of his wife shows that she had Rs.4 lakhs to her credit.

17. The complainant and the accused father are business partners. That apart, the complainant and the accused were also business partners. When the accused was employed at Mysore, the complainant was taking

care of the payment of rent and the E.B. Charges of the accused company. Through the examination of the complainant banker, the accused has explained that his four cheques were encashed by the complainant for an amounts of Rs.25,000, Rs.18,000, Rs.30,000 and Rs.5,500 all in the year 2001. The fifth cheque namely the signed black cheque, which was given to the complainant was misused namely Ex.P1-cheque for the reason that the accused father sent a complaint to the Kaveripattinam Police Station, complaining that the complainant Murugasan did not give him the profit share in the partnership firm Dhanalakshmi Auto Finance. The defence put forth is so illogical. He has got purpose in parting with the first four cheques namely Ex.D4 to D7. They were encashed by the complainant was admitted by the accused. Though several years have gone by, the accused has not taken any steps to get back the cheque from the complainant is unbelievable. The accused being a business men running company and also being a partner in other company along with the complainant, it should not be lie in the mouth of the accused that the signed bank cheque, which was given to the complainant was misused and the complaint was filed against him under Section 138 of the NI Act. Therefore, the defence theory put forth by the accused is highly improbable. Undoubtedly, it has to be held that through the evidence let in by the accused, the accused has utterly failed to raise probable defence and it had further demolished the accused case.

18. Therefore, I am of the considered view that the defence raised by the accused is highly improbable and the findings of both the trial and the First Appellate Court are based on sound reasons. In the light of the above discussion, this Criminal Revision Case stands dismissed and the judgment of the Trial Court is confirmed.

29.01.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
mac

R.KALAIMATHI, J.,

mac

To

1. The Principle Sessions Court, Dharmapuri
2. The Judicial Magistrate Court, Palacode

Crl.R.C.No.1183 of 2017

29.01.2024