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CRL RC. No.381 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.12.2024

PRONOUNCED ON : 11.12.2024

CORAM

THE HONOURABLE MR JUSTICE SUNDER MOHAN

CRL RC. No.381 of 2023

Nandakumar

... Petitioner

Vs

1. M.Munirathnam

2. State rep. By
The Inspector of Police,
Tiruvallur.

... Respondents

PRAYER: Criminal Revision Case filed under Sections 397 r/w 401 of Cr.P.C., to set aside the concurrent judgment of the I Additional District and Sessions Judge, Tiruvallur in C.A.No.36 of 2019 confirming the order in S.T.C.No.3 of 2018 on the file of the learned Judicial Magistrate, Fast Track Court, Tiruvallur.

For Petitioner : Mr.K.Pattabhi
For Respondent : Mr.G.Balamanikandan (for R1)
Mr.S.Udaya Kumar (for R2)
Government Advocate (Crl.Side)

ORDER



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This Criminal Revision Case is filed challenging the judgment made in C.A.No.36 of 2019 dated 27.09.2022 on the file of the learned I Additional District and Sessions Judge, Tiruvallur, confirming the conviction and sentence passed in S.T.C.No.3 of 2018 dated 01.02.2019 on the file of the learned Judicial Magistrate, FTC, Tiruvallur.

2. The case of the 1st respondent is that the petitioner had borrowed a hand loan of Rs.3,00,000/- in the month of September 2017 and towards repayment of the said loan, issued a cheque dated 09.11.2017 for a sum of Rs.3 Lakhs; that when the said cheque was presented for collection, it was returned unpaid with an endorsement, 'Funds Insufficient'; that inspite of statutory notice, the petitioner did not make the payment, but sent a reply making untenable averments.

3. The 1st respondent had filed a complaint before the learned Judicial Magistrate, FTC, Tiruvallur, in S.T.C.No.3 of 2018 and had examined three witnesses as PW1 to PW3 and marked Ex.P1 to Ex.P7. The petitioner neither examined any witnesses nor marked any documents.



4. The trial Court held that the 1st respondent had established that the cheque was issued by the petitioner for a legally enforceable debt. Hence, it convicted the petitioner and sentenced him to undergo four months simple imprisonment and to pay a fine of Rs.3 Lakhs. The appellate Court confirmed the finding of guilt rendered by the trial Court. However, the appellate Court had enhanced the punishment to one year simple imprisonment and directed the complainant to pay a sum of Rs.3 Lakhs with interest at the rate of 18% per annum from 09.11.2017 till the realisation of the amount and in default to undergo three months simple imprisonment. Hence, the revision.

5. Heard Mr.K.Pattabhi, learned counsel for the petitioner; Mr.G.Balamanikandan, learned counsel for the 1st respondent; and Mr.S.Udaya Kumar, learned Government Advocate (Crl.Side) appearing for the 2nd respondent/State.

6. The learned counsel for the petitioner submitted that the judgments of the Courts below are liable to be set aside for the following reasons:

(a) that the respondent had not established his capacity



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or the source of income to lend a huge sum of Rs.3 Lakhs as a hand loan; that therefore the statutory presumption cannot be drawn in favour of the respondent and relied upon the judgment of the Hon'ble Supreme Court in ***John K.Abraham v. Simon C. Abraham and another***, reported in (2014) 2 SCC 236.

(b) that in the reply notice, the defence of the petitioner has been clearly spelt out and the complainant has not let in any evidence to counter the case of the petitioner that the cheque was given to one Panchatcharam as security for the loan obtained by the petitioner from the said Panchatcharam; and that the petitioner has issued a notice to the said Panchatharam for return of the said cheque along with other cheques after repayment of the loan to Panchatcharam.

(c) that the trial Court having tried the case summarily had erroneously sentenced the petitioner under Section 255(2) of the Cr.P.C., and therefore, the impugned judgments are liable to be set aside.

(d) that though the trial Court had sentenced the



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petitioner to four months simple imprisonment and directed to pay a compensation of Rs.3 Lakhs, the appellate Court had enhanced the sentence to one year simple imprisonment, which is contrary to the provisions of Cr.P.C., as enunciated by the Bombay High Court in ***Kesav son of Shantaram Kaole v. State of Maharastra***, reported in 1990 Cri LJ 152.

7. The learned counsel for the 1st respondent *per contra* submitted that PW1 had clearly deposed that during the month of September 2017, the 1st respondent had obtained the hand loan of Rs.3 Lakhs; that the cheque was issued by the petitioner/accused which has not been disputed and therefore the statutory presumption was correctly drawn in favour of the 1st respondent; that the petitioner had neither cross-examined the witnesses PW1 to PW3 nor let in any evidence to rebut the statutory presumption and therefore, prayed for dismissal of the revision.

8. I have considered the rival submissions made by the learned counsel on either side and perused the materials available on record.



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9. On perusal of the records, it is seen that the 1st respondent had examined PW1 to PW3 to prove his case. The 1st respondent examined himself as PW1 and in his proof affidavit had stated that the petitioner had borrowed a sum of Rs.3 lakhs as hand loan in September 2017. The 1st respondent had also established that the cheque was issued by the petitioner and when the cheque was presented for collection, it was returned with endorsement 'Funds Insufficient', by marking the cheque [Ex.P1], the return memo from Indian Bank [Ex.P2], the legal notice and the reply notice viz., Ex.P3 and Ex.P5, respectively. The acknowledgment card was marked as Ex.P4. The Manager of Indian Bank, in which the 1st respondent had maintained the account, was examined as PW2 and the Manager of State Bank of India, in which the petitioner/accused had maintained the account, was examined as PW3. Thus, the 1st respondent had established that the cheque was in fact issued and was returned with the endorsement 'Funds Insufficient' and that inspite of statutory notice, the petitioner did not make any payment.

10. In the judgment relied upon by the learned counsel for the



petitioner reported in *John Abraham's* case [cited supra], the Hon'ble Supreme Court, had held as follows:

“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.”

11. In the facts of that case, the Hon'ble Supreme Court found that the accused during the cross-examination of the complainant elicited certain facts including the fact that the complainant was not aware of the date on which, he had lent the amount and the complainant had made contradictory statements with regard to the fact as to who filled up the contents of the cheque. However, in this case, it is seen that the petitioner had not cross-examined PW1 or the other witnesses. In the absence of cross-examination, the evidence of PW1 has to be accepted and the statutory presumption has to be drawn. Hence the judgment of the Hon'ble Supreme Court referred above is not applicable to the facts of this case.



12. As regards the submission that though the case was tried summarily, the learned Magistrate had sentenced the petitioner under Section 255(2) Cr.P.C., this Court is of the view that it is an irregularity which would not vitiate the conviction. In any case, it can be rectified by this Court in exercise of its revisional powers.

13. It is also seen that though the learned Magistrate had sentenced the petitioner to four months simple imprisonment, the appellate Court had enhanced the sentence, which is impermissible. Section 386(b) of the Cr.P.C., which deals with the powers of the appellate Court in an appeal from a conviction reads as follows:

(b) in an appeal from a conviction

- a) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
- b) alter the finding, maintaining the sentence, or
- c) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

14. Section 386 (b)(iii) of the Cr.P.C., would make it clear that the



appellate Court can alter the sentence but cannot enhance the same, in the absence of any appeal for enhancement.

15. The only other submission made by the learned counsel for the petitioner is that the 1st respondent had not established that the facts stated by the petitioner in his reply notice were false. Though the petitioner had stated in the reply notice that the cheque was issued to one Panchatcharam and after repayment of loan to the said Panchatcharam, the petitioner had issued notice to him for return of cheque, he had not established those averments in the reply before the trial Court. The averments in the reply notice is the plea of the accused and it would not amount to rebuttal of the statutory presumption. Therefore, this Court is of the view that the 1st respondent had established that the petitioner has committed the offence under Section 138 of the Negotiable Instruments Act as the petitioner had not rebutted the statutory presumption.

16. However, considering the fact that the trial Court had sentenced the petitioner to simple imprisonment of four months and ought not to have sentenced the petitioner beyond a period of three months in terms of Section 262 (2) of the Cr.P.C., and the appellate



Court ought not to have enhanced the sentence, as per Section 386(b)(iii) of the Cr.P.C., this Court while confirming the finding of guilt, is of the view that the sentence can be modified.

17. Therefore, considering the facts and circumstances of this case, the sentence of imprisonment imposed by the appellate Court is set aside and the petitioner is sentenced to pay a fine of Rs.3,75,000/- and in default to undergo simple imprisonment for a period of three months. The petitioner is granted four weeks time from the date of receipt of a copy of this order, to pay the fine amount, failing which, he can be secured to undergo the default sentence. Out of the said amount, a sum of Rs.3,60,000/- shall be paid as compensation to the respondent. The sum of Rs.60,000/- deposited by the petitioner before the appellate Court can be treated as payment towards the fine and the same can be paid to the complainant forthwith. The remaining sum of Rs.3 Lakhs can be paid on deposit of the fine amount by the petitioner.

18. With the above modification, the Criminal Revision Case stands partly allowed.



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Index: Yes/No
Speaking/Non-speaking order
Neutral citation: Yes/No.
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To
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1. The I Additional District and Sessions Judge,
Tiruvallur.
2. The Judicial Magistrate,
FTC, Tiruvallur.
3. The Inspector of Police,
Tiruvallur.
4. The Public Prosecutor,
High Court, Madras.



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SUNDER MOHAN, J.

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Pre-delivery order in
Crl.R.C.No.381 of 2023

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