(2009) 07 MAD CK 0283

Madras High Court

Case No: Criminal R.C. No. 438 of 2007 and M.P. No''s. 1 and 2 of 2007

K. Mathivanan		APPELLANT
	Vs	
Suriyakumar		RESPONDENT

Date of Decision: July 24, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 357(3)
- Evidence Act, 1872 - Section 114, 4
- Income Tax Act, 1961 - Section 271D
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 139

Citation: (2010) CriLJ 814

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: G.K. Ilanthirayan, for Sai, Bharath and Ilan, for the Appellant; Sathyanarayanan, for C. Rajan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

G. Rajasuria, J.
Animadverting upon the judgment dated 13-3-2007 passed by the learned Principal Sessions Judge, Villupuram in Criminal Appeal No. 47 of 2005 confirming the judgment dated 17-5-2005 passed by the learned Judicial Magistrate No. 1, Villupuram in C. C. No. 114 of 2003, this criminal revision petition is focussed.

2. A ''resume'' of facts, which are absolutely necessary and germane for the disposal of this Criminal Revision petition would run thus:

(i) The police laid the police report in terms of Section 173 of Cr. P.C. as against the accused for the offence u/s 138 of the Negotiable Instruments Act. Inasmuch as the accused pleaded not guilty, trial was conducted.

(ii) On the side of the prosecution, P. Ws. land 2 were examined and Exs. P1 to P5 were marked. On defence side, R. W. 1 was examined and Ex. R1 was marked. Ultimately, the trial Court convicted the accused and imposed the sentences as under:

Offences	Sentence imposed	Fine amount
138 Negotiable Instruments Act	Six months rigorous imprisonment	Compensation of Rs. 25,000/- payable to the complainant (in default, to undergo three months imprisonment)

(iii) Challenging and impugning the judgment of the lower Court, the accused preferred appeal in C. A. No. 47 of 2005 before the learned Principal Sessions Judge, Villupuram, which Court confirmed the judgment of the lower Court in all aspects.

(iv) Being aggrieved by and dissatisfied with the judgments of both the Courts below, this revision is focussed on various grounds, the gist and kernel, the nitty gritty, the pith and marrow of them would run thus:

(i) Both the Courts below failed to take into account the fact that the pre-statutory notice does not contain the proper cheque number as the cheque number referred to in the said notice was only 07053 whereas in the complaint, the cheque Number is referred to as 072053 and as such, the statutory notice is bad for want of correct particulars. But, both the courts below ignored the said fact.

(ii) Even though the transactions between the complainant and the accused was only to the tune of Rs. 85,000/- the cheque was filled up for a sum of Rs. 1.5 lakhs. The factum of even the said sum of Rs. 85,000/- having been discharged also was not upheld by both the courts below.

(iii) Accordingly, he prayed for setting aside the judgment of both the courts below and for acquitting the accused.

3. Heard both sides.

4. The point for consideration is as to:

Whether there is any perversity or non-application of law in holding the accused guilty and imposing the sentences and also awarding the compensation amount?

5. The learned Counsel for the revision petitioner would by way of reiterating the grounds of revision would develop his argument highlighting that in referring the cheque number differently in the pre-statutory notice, the complaint, is fatal. The

presumption as contemplated u/s 139 of the Negotiable Instruments Act was rebutted by the accused by pointing out that the cheque bearing No. 072069 for Rs. 10,000/- was encashed even as early as on 27-4-2002. However, the earlier cheque bearing No. 072053 is bearing date as 17-2-2003 and that itself would be indicative of the fact that the complainant himself filled up the blank cheque, which was issued by the accused by way of security.

6. Whereas the learned Counsel for the respondent/complainant would by way of torpedoing and pulversing the argument as put forth on the side of the revision petitioner, develop his argument projecting that had really the debt was discharged by the accused, he would have certainly demanded back the cheques issued by him, but he did not do so; without obtaining any receipt, the accused would not have paid every month a sum of Rs. 4,250/- as claimed by him; simply because, there is one figure, viz., "2" is missing in specifying the cheque number in the pre-statutory notice, the entire complaint cannot be held to be vitiated. Accordingly, he prayed for the dismissal of the revision.

7. A plain reading of the pre-statutory notice Ex. P3 would reveal that in the second para of it, the cheque number was mentioned as 0.7053 instead of mentioning it as 072053 as mentioned in the complaint. Ex. P1, the original cheque itself bears the cheque number 072053 and in such a case, it is quite obvious that out of mere typographical error, such mistake crept it. However, there is nothing to indicate or exemplify that such failure to specify the full number of the cheque resulted in misleading the revision petitioner in his reply as Ex. P5 in the reply notice at para No. 3, the revision petitioner himself categorically stated that he issued blank cheque bearing Nos. 072053 along with one other cheque No. 072096. In fact, the said second cheque No. 072096 was encashed even as early as on 27-4-2002. Whereas the first cheque No. 0.72053 bears the date as 17-2-2003. As such, it is clear that owing to typographical error, such mistake had crept in, which cannot be taken as sufficient evidence and to cut at the very root of the genuineness of the complaint itself.

8. It is an admitted case of the revision petitioner himself in Ex. P5, the reply notice that he issued blank cheques by way of security for the prompt repayment of the sum of Rs. 85,000/- which, he actually borrowed by way of cheque from the complainant. As such, it is an admission by the accused himself.

9. The core question arises as to whether admission of the receipt of a part of the cheque amount would amount to admission of a pre existing debt?

10. It is a trite proposition of law that partial failure of consideration normally cannot be entertained relating to Negotiable Instruments Act. Even otherwise, the burden is on the accused to prove it and Section 139 of the Act, is in favour of the complainant''s case. Over and above that Section 118 of the Negotiable Instruments Act also supports the contention of the complainant that the cheque emerged for

proper consideration,

11. The learned Counsel for the revision petitioner cited the decision of the Hon''ble Apex Court reported in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . An excerpt from it would run thus: (Sinha judgment)

23. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a Criminal Case is different.

I would like to point out that in the cited case, the accused specifically challenged the financial wherewithal of the complainant to lend that much large amount, for which absolutely, there was no satisfactory evidence forthcoming from the side of the complainant. Further more, the Hon''ble Apex Court cited Section 271-D of the Income Tax Act and also observed that any loan lent for more than Rs. 20,000/- not by way of cheque is punishable under the said provision of law.

12. As such, in that factual matrix, the said decision emerged by holding that the complainant even though had the presumption u/s 139 of the Negotiable Instruments Act, failed to prove his case.

13. I would like to refer fruitfully to the very recent judgment of the Hon''ble Apex Court reported in Kumar Exports Vs. Sharma Carpets, . Certain excerpts from it would run thus:

17. Section 118 of the Act, inter alia, directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of whole or part of any debt or liability.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

20. The accused in a trial u/s 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the

statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant''s rescue.

14. Here, the accused pleaded discharge of the loan of Rs. 85,000/- which he obtained, but absolutely, there is no plausible evidence to fortify and buttress his plea. Had really every month for a period of 20 months, a sum of Rs. 4,250/- was paid by the revision petitioner, certainly, he would have obtained receipt or endorsements in a small note book and it is also quite obvious that he had not repaid those amounts by issuing cheques.

15. Hence, I am of the considered opinion that the burden cast upon him did not get fobbed off on the complainant''s side. As such I am of the considered opinion that the findings of both the Courts below, based on facts cannot be interfered with.

16. Regarding the sentence is concerned, the learned Counsel for the revision petitioner would submit that the revision petitioner is bedridden and he would not

be able to undergo imprisonment as his health would not permit him to do so. He would cite the decision of this Court reported in 2008 (1) CTC 195 : 2008 Cri LJ 566 (R. Sridher v. T.K. Rajendra Sha) in support of his case. In the cited decision, the learned Judge, taking into account the fact that the accused was a septuagenarian, so to say, 77 years old, felt that minor imprisonment would be sufficient. But here, the accused is a quadragenarian, so to say in his 40''s. Hence, this accused cannot be equated with that of the accused in the cited case.

17. Whereas the learned Counsel for the respondent/complainant would submit that here, despite the complainant having taken enormous and herculean task to prosecute the matter, the accused dragged it on and till date, he could not recover any amount from the accused and that no leniency could be shown towards him.

18. Taking into consideration the fact that the quantum involved is only Rs. 85,000/-, I am of the considered opinion that imposing of two months simple imprisonment would meet the ends of justice. Incidentally, I would also like to point out that the lower Court also imposed, in default, sentence after awarding compensation of Rs. 25,000/- u/s 357(3) of the Code of Criminal Procedure. It is obvious that no sentence of fine was imposed, but separately compensation was awarded. In such a case, in the facts and circumstances of the case, in default, sentence is not warranted as he has been ordered to undergo two months simple imprisonment.

19. Accordingly, this criminal revision is partly allowed by modifying the sentence alone by reducing it from six months rigorous imprisonment to two months simple imprisonment. The learned trial Judge is directed to take steps to commit the revision petitioner/accused to jail to undergo the period of two months simple imprisonment, if not already undergone by him. Consequently, the connected miscellaneous petitions are closed.