courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 18/12/2025

(2010) 02 MAD CK 0199

Madras High Court

Case No: Criminal Revision Case No''s. 236 and 264 of 2008

K.N. Subramaniam		APPELLANT
	Vs	
Ezhilarasi rep. by Power of Attorney, Y.S. Mathivanan and Mathivanan		RESPONDENT

Date of Decision: Feb. 3, 2010

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 118(b), 13(1), 138, 139

Citation: (2010) 4 CTC 716

Hon'ble Judges: K. Mohan Ram, J

Bench: Single Bench

Advocate: N. Manokaran, for the Appellant; T. Muruqanantham, Legal Aid Counsel, for the Respondent

Final Decision: Dismissed

Judgement

K. Mohan Ram, J.

Since the Petitioner in both the above Criminal Revision Cases are same and the Respondent in Crl. R.C. No. 264 of 2008 is the husband of the Respondent in C.C. No. 236 of 2008 and the issues that arise for consideration in both the above Criminal Revision Cases are one and the same, both the Criminal Revision Cases are being disposed of by this common order. The Petitioner in the above Criminal Revision Cases is the accused in C.C. Nos. 190 and 191 of 2001 on the file of the learned Judicial Magistrate No. II, Erode, wherein, he faced trial for the offence u/s 138 of the Negotiable Instruments Act. After trial, the Trial Court convicted the Petitioner in each case for the said offence and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs. 5,000/-, with a default clause. Being aggrieved by that, the Petitioner preferred Appeals in C.A. Nos. 186 and 187 of 2003 before the Additional District Sessions Judge cum Fast Track Court No. 1, Erode. The Lower Appellate Court, on an independent consideration of the evidence, confirmed the

conviction and sentence imposed on the Petitioner. Being aggrieved by that, the Petitioner is before this Court.

2. The brief facts which are necessary for the disposal of Crl.R.C. No. 236 of 2008 are set out below:

(i) It is the case of the Respondent that the accused/Petitioner herein is a close friend of her and her family and is doing textile business at Kumarapalayam. On 12.01.2001, the accused approached Y.S. Mathivanan, the husband of the Respondent, for obtaining loan of Rs. 15 lakhs and since the Complainant was ready and having only Rs. 5 lakhs, the same was lent to the Petitioner and to repay the said loan amount, the Petitioner issued a cheque dated 13.03.2001 for a sum of Rs. 5 lakhs. The accused paid advance interest. When Ex. P-2-cheque was presented for encashment, the same was returned with an endorsement ''insufficient funds''. The Respondent sent a legal notice for which the Petitioner sent a reply rebutting the averments contained in the notice. Thereafter, the Complaint was filed through the Respondent and the same was taken on file.

(ii) To prove the case of the Complainant in C.C. No. 190 of 2001, two witnesses were examined. P.W. 1 is the husband of the Respondent and P.W. 2 is the Bank Manager and Exs. P-1 to P-10 have been marked. On the side of the accused, no oral evidence was adduced, but Exs. D-1 to D-5 have been marked. Since the Petitioner had admitted his signature in Ex. P-2-cheque, the Trial Court, rightly raised a legal presumption available u/s 139 of the Negotiable Instruments Act and further holding that the legal presumption raised u/s 139 of the Act has not been rebutted by the accused and also on the basis of the other evidence available on record, came to the conclusion that the Complainant has proved his case and the offence u/s 138 of the Act has been established, convicted the Petitioner u/s 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs. 5,000/- in default to undergo simple imprisonment for three months.

3. The brief facts which are necessary for the disposal of Crl.R.C. No. 264 of 2008 are set out below:

(i) It is the case of the Respondent that the accused/Petitioner herein is a close friend of him and is doing textile business at Kumarapalayam. On 12.01.2001, the accused approached the Complainant/Respondent, for obtaining loan of Rs. 10 lakhs and also borrowed the said sum from the Complainant and to repay the said loan amount, the Petitioner issued a cheque dated 13.03.2001 for a sum of Rs. 10 lakhs. The accused paid advance interest. When Ex. P-1 cheque was presented for encashment, the same was returned with an endorsement ''insufficient funds''. The Respondent sent a legal notice for which the Petitioner sent a reply rebutting the averments contained in the notice. Thereafter, the Complaint was filed through the Respondent and the same was taken on file.

(ii) To prove the case of the Complainant in C.C. No. 191 of 2001, two witnesses were examined. P.W. 1 is the Respondent and P.W. 2 is the Bank Manager and Exs. P-1 to P-9 have been marked. On the side of the accused, no oral evidence was adduced, but Exs. D-1 to D-5 have been marked. Since the Petitioner had admitted his signature in Ex. P-1 cheque, the Trial Court, rightly raised a legal presumption available u/s 139 of the Negotiable Instruments Act and further holding that the legal presumption raised u/s 139 of the Act has not been rebutted by the accused and also on the basis of the other evidence available on record, came to the conclusion that, the Complainant has proved his case and the offence u/s 138 of the Act has been established, convicted the Petitioner u/s 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs. 5,000/- in default to undergo simple imprisonment for three months.

4. The Lower Appellate Court has also considered the entire evidence and confirmed the conviction and sentence imposed on the Petitioner in C.C. Nos. 190 and 191 of 2001. Being aggrieved by that, the Petitioner is before this Court.

5. Heard the learned Counsel on either side.

6. Learned Counsel for the Petitioner submitted that, the defence taken by the Petitioner was that he was a subscriber to a chit, conducted by the Respondents and that fact has been established by Ex. D-1 and the fact that the Petitioner is a subscriber to the chit conducted by the Respondents is also not disputed by the Respondent. It has also been admitted that the Petitioner became a successful bidder in the chit. Only towards the receipt, of the price amount and as security for due repayment of the future instalments, the Petitioner had issued two signed blank cheques with the Complainant, but the same had been misused. Learned Counsel for the Petitioner further submitted that simply because the Petitioner had admitted his signatures in the cheques, no legal presumption is raised that the cheques have been issued towards discharge of an existing liability. He further submitted that no oral or documentary evidence has been adduced on the side of the Complainant to prove the payment of a sum of Rs. 15 lakhs by the Respondents ? No Account Books have been produced and the payment of this huge amount has not been reflected in the Income Tax Returns, though it is admitted that the Respondents are Income Tax assessees. It is contended that though the Petitioner and the Respondents are said to be friends, it is highly improbable that the Respondents would have parted with such a huge amount without getting any promissory note or security merely after obtaining cheques from the Petitioner. In support of his said contention, the learned Counsel based reliance on a decision of the Apex Court reported in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . In the said decision, in paragraphs 20 to 23, the Apex Court has laid down as under:

20. Indisputably, a mandatory presumption is required to be raised in terms of Section 118(b) and Section 139 of the Act, Section 13(1) of the Act defines negotiable

instrument to mean a promissory note, bill of exchange or cheque payable either to order or to bearer. Section 138 of the Act has three ingredients, viz.:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of Bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

21. The Proviso appended to the said Section provides for compliance of legal requirements before a Complaint Petition can be acted upon by a Court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption u/s 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

22. The Courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The Courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the Courts, we fell, is not correct.

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.

7. Learned Counsel for the Petitioner further submitted that in the case before the Supreme Court also, the Complainant had not produced any Books of Accounts or any other proof to show that the Complainant had so much money in the Bank and did not obtain any written documents from the accused; there was no witnesses to the loan transaction, in such circumstances, the learned Counsel submitted that it should be held that the initial, legal presumption raised u/s 139 of the Act has been rebutted by the Petitioner. If it is so held, then, it could be seen that there is no other evidence adduced by the Respondents to prove the payment of sums of Rs. 15 lakhs. He further submitted that though at the relevant point of time when the cause of action arose, in these cases, the maximum sentence that could be imposed is only one year imprisonment, but the Courts below basing reliance on the subsequent amendment to Section 138 of the Act, which came into force on 6.2.2003, has imposed the maximum sentence of two years and therefore submitted that the sentence of two years imposed is illegal. He further submitted that the sentence of imprisonment may be reduced.

8. On the aforesaid submissions, the learned Counsel for Respondents was heard. Learned Counsel for the Respondents submitted that the Petitioner had taken several inconsistent defences. He further submitted that in the Reply Notice-Ex. P-7, it is stated follows:

4. My client is one of the members of Lion Club and your client''s husband, Mathivanan also a member of the same. My client, states that he took part in Lion''s Club Meeting in the same day your client''s husband also took part in the meeting. My client possessed cheques leaf book in his hand bag which all are misplaced with bag and even after searching the same was not found by my client. In the misplaced cheques leaf were only lying as blank and not made signature by my client. So far the misplaced cheques leaf with bag were not traced out by my client. Meanwhile, my client shock and surprise when received your notice alleging my client issued the cheque in favour of your client for Rs. 5 lakhs. My client understands the misplaced cheques leaf were took your client''s husband and signed and also filled up amount by your client and her husband by their shims and fancies. Hence your client and her husband colluded together and fabricated the cheques as signed by my client with intend to get wrongful if possible from my client and issued this legal notice through you. Under the said circumstances, your client''s husband fabricated the cheque and made signature as like as my client''s signature.

During the course of cross-examination it has not been suggested to P.W. 1 that the signatures found in the cheques in question were either fabricated or forged, but it was suggested that at the time of obtaining the price amount from the Chit Fund Company run by the Respondents, as security for the due repayment of the future instalments the Petitioner had issued two signed blank cheques and the same have been misused by them by filing the present Complaints. It has also been suggested to P.W. 1 during his cross-examination that since the interest amounts of Rs. 12,000/- and Rs. 24,000/- Respectively paid by the Petitioner had not been reflected in the income tax returns of the Respondents and thinking that the Petitioner had sent a Petition to the income tax Department which resulted in a raid in the premises of the Respondents, a false Complaint has been filed. Thus, according to the learned Counsel, all possible contradictory defences have been taken and from this it cannot, be said that the Petitioner had rebutted the legal presumption raised u/s 139 of the Act. He further submitted that it has not even been suggested to P.W. 1 that either P.W. 1 or his wife are not possessed of sufficient means to advance the total loan amount of Rs. 15 lakhs to the Petitioner and when the Petitioner himself had not questioned the means of the Petitioner, the question of producing the Account Books does not arise. He further submitted that since the Petitioner and the Respondent happened to be friends and they had earlier money transactions and the Petitioner is running a textile business, on the basis of the cheques in question issued by the Petitioner the loan amounts, have been advanced to him. He further submitted that in all cases it is not necessary that all loan transactions should be supported by some documents.

9. I have considered the aforesaid submissions made by the learned Counsel on either side and perused the materials available on record.

10. Since the Petitioner had not disputed his signatures in the cheques in question but had admitted his signatures, the Courts below are right in raising a legal presumption u/s 139 of the Act. As has been laid down in the decision reported in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, once the execution of the cheque is admitted a presumption is raised that the cheque was drawn for discharge in whole or any part of any debt or liability which pre-supposes the legal enforceable debt. But in the said decision it has been laid down that the existence of legally recoverable debt is not a matter of presumption u/s 139 of the Act. It merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of debt or any other liability. Thus, it could be seen that once the execution of the cheque is admitted a presumption is raised that the same has been issued towards the discharge of any debt or other liability, but no presumption is raised that the cheque has been issued to discharge a legally enforceable liability. A liability and its legal enforceability are two distinct aspects. A cheque might have been issued for discharge of a liability, but whether such liability is legally enforceable or not is not a matter of presumption but it is a matter of proof.

11. Here, it is not the contention of the Petitioner that the debt is barred by limitation or for any other reason it is unenforceable. Therefore, a presumption is rightly raised by the Courts below that the cheques in question have been issued towards the discharge of the existing liability. Once such a legal presumption is raised, it is for the drawer/Petitioner herein to rebut the same. As has been laid down in the aforesaid decision to rebut such presumption it is not always necessary that the Petitioner should enter into the witness box or should examine other witnesses, but he can rebut such presumption by the other circumstances established from the evidence available on record.

12. In these cases, admittedly, the Petitioner had not gone into the witness box and he has not adduced any other oral evidence, but he has produced Ex. D-1, copy of the chit payment voucher, to show that the Petitioner was a subscriber to the chit conducted by the Respondents and this fact has also not been disputed by the Respondents. It has also been in evidence that the Petitioner became a successful bidder in the auction and according to the Complainant, the prize chit amount was paid to the Petitioner herein, as evidenced from Ex. D-1. But it has been suggested to P.W. 1 during his cross-examination that the sum of Rs. 2,10,000/- namely, the prize amount has not been paid to the Petitioner. As suggested by the Petitioner himself, if the price amount of Rs. 2,10,000/- has not been paid to the Petitioner, then, it is un-understandable as to why the Petitioner had parted with two blank signed cheques. Therefore, the defence taken is mutually contradictory and unbelievable. Further, such a defence has not been taken in the Reply Notice Ex. P-7. In the reply notice it has been stated, as has been extracted above, namely, that the

cheques in question were taken away by the Respondents and have been misused. Further, as pointed out by the learned Counsel for the Respondents, a suggestion has been put to P.W. 1 that since the interest amounts of Rs. 12,000/- and Rs. 24,000/-, respectively, paid by the Petitioner had not been reflected in the income tax returns and the Respondents felt that only on a Petition sent by the Petitioner to the income tax department a raid was conducted in the premises of the Respondents and that suggestion will show as if the Petitioner had paid interest for the loan amounts borrowed from the Respondents. Thus it could be seen that all possible contradictory defences have been taken by the Petitioner, but none of these defences have been established.

13. When the legal presumption raised u/s 139 of the Act is not rebutted by the drawer/Petitioner herein and when it is not shown that the liability is not enforceable, naturally, the Courts below are right in holding that the Respondents had proved the commission of an offence u/s 138 of the Act. The reasons assigned by the Courts below on the basis of the legal evidence available on record cannot be said to be erroneous. Therefore, this Court is not inclined to interfere with the conviction awarded by the Courts below. But, however, as contended by the learned Counsel for the Petitioner, since the Amendment to Section 138 of the Act has come into force only with effect from 06.02.2003, the sentence of two years imprisonment cannot be imposed in respect of the offence committed prior to the coming into force of the Amendment. Therefore, the maximum sentence that could have been imposed on the Petitioner is only one year. But, however, considering the facts and circumstances of the cases, ends of justice would be met, if the sentence of imprisonment is reduced to nine months imprisonment in each cases. The fine of Rs. 5,000/- in each cases imposed by the Counts below on the Petitioner is confirmed. With the above said modification in sentence, the Criminal Revision Cases are dismissed.