

R.Tamilarasa vs T.P.Rameshkumar on 13 December, 2022

Author: G.K.Ilanthiraiyan

Bench: G.K.Ilanthiraiyan

Crl.R.C.N

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.11.2022

Pronounced on : 13.12.2022

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C.No.1332 of 2018
and Crl.M.P.Nos.1026 & 1027 of 2019

R.Tamilarasa

...Pe

-Vs-

T.P.Rameshkumar

... R

Prayer: Criminal Revision case filed under Section 397 r/w Section 401 of Code of Criminal Procedure, to set aside the order dated 16.08.2018 made by the Fast Track Mahila Judge, Namakkal, in C.A.No.22 of 2018, reversing the order dated 13.02.2018, passed by learned Judicial Magistrate (Fast Track) Tiruchengode, in STC.No.22 of 2017.

For Petitioner : Mr.S.P.Chokalingam

For Respondent : Mr.B.Subramanian
for M/S.Dass & Viswa Associates

ORDER

This criminal revision is directed as against the judgment passed in C.A.No.22 of 2018 dated 16.08.2018 on the file of the Fast Track Mahila Judge, Namakkal, thereby reversed the findings in S.T.C.No.22 of 2017 dated 13.02.2018 on the file of the Judicial Magistrate (Fast Track), Tiruchengode, thereby acquitted the petitioner for the offence under Section 138 of Negotiable Instruments Act.

2. The petitioner is an accused in the complaint lodged by the respondent for the offence under Section 138 of Negotiable Instruments Act.

3. According to the respondent, on 17.03.2015, the petitioner borrowed a sum of Rs.7 Lakhs for his urgent need and agreed to repay the same with interest at the rate of Rs.1.50 per month per hundred

and he also executed a promissory note in favour of the respondent. The petitioner had been paying the interest regularly to the respondent. When the respondent asked for principal payment, the petitioner issued a post dated cheque on 15.07.2016 in order to discharge the principal amount of Rs.7 lakhs and thereafter, the petitioner received back the promissory note which was already executed by him. When the said cheque was presented for collection and the same has been returned for the reason "Payment Stopped by the Drawer". After causing statutory notice to the petitioner the respondent lodged a complaint. <https://www.mhc.tn.gov.in/judis>

4. On the side of the respondent PW1 was examined and Exs.P1 to 6 were marked and on the side of the petitioner no one was examined and no document was marked.

5. On perusal of oral and documentary evidence, the trial Court found the petitioner not guilty for the offence under Section 138 of NI Act and acquitted the petitioner. Aggrieved by the same the respondent preferred an appeal and the first Appellate Court reversed the findings of the trial Court and found the petitioner guilty for the offence under Section 138 of NI Act and sentenced him to undergo one year simple imprisonment and imposed fine of Rs.5,000/- in default to undergo three more months simple imprisonment along with compensation of Rs.1 lakh. Hence the revision.

6. The learned counsel for the petitioner would submit that there was no legally enforceable debt. The alleged cheque was issued to one Ramesh Kumar, while borrowing loan from him, as security and after discharging the loan the said Ramesh Kumar failed to return the same. Subsequently, the said cheque was misused by the respondent to initiate proceedings under Section 138 of NI <https://www.mhc.tn.gov.in/judis> Act. No prudent man would return the promissory note which was executed in favour of the creditor on receipt of the cheque. The alleged cheque was signed by the petitioner and filled by the respondent. The trial Court rightly found that both were in different inks and hence not filled by the petitioner. It shows that the cheque was issued for security purpose that too to another person and it amounts to material alteration and as such, the offence under Section 138 of NI Act would not at all be attracted and the respondent failed to discharge his initial burden as required under Section 138 of NI Act.

7. He would further submit that on receipt of the statutory notice, the petitioner categorically denied the issuance of cheque by reply notice dated 16.08.2016 which was marked as Ex.P6. In the said reply notice, he categorically stated that he had no acquaintance with the respondent and he never borrowed any loan from the respondent. Therefore, the petitioner clearly rebutted the presumption arising out of Section 139 of NI Act. Therefore, the trial Court rightly acquitted the petitioner and unfortunately, the first Appellate Court reversed the findings of the trial Court for the reason that the petitioner never denied the signature found in the alleged cheque and issuance of cheque itself and presumed that it was issued for a legally enforceable debt. <https://www.mhc.tn.gov.in/judis>

8. Further, the respondent had no source of income to lend such a huge amount. Admittedly, the respondent is living in a rental house. Therefore, he would not have that much funds to lend money to the petitioner. During cross examination, the respondent, categorically admitted that he is living in a rental house and as such, the trial Court rightly acquitted the petitioner.

9. In support of his contention, he relied upon the judgment reported in Manu/SC/0968/2022 in the case of C.Antony Vs. K.G.Raghavan Nair, wherein the Hon'ble Supreme Court of India held that the cheque in question was given in a blank state to the complainant and he being a close friend of the accused in collusion with each other misused the said cheque to defraud the accused. With regards to difference in ink, the trial Court rightly found that the cheque was different from the ink used for signature on the cheque. Therefore, he drew an inference that the case put forth by the complainant was doubtful. It further stated that when there is two views are possible, failed to render judgment in favour of the accused.

10. He also relied upon the judgment reported in Manu/SC/0502/2019 in the case of Basalingappa Vs. Mudibasappa, wherein the Hon'ble Supreme <https://www.mhc.tn.gov.in/judis> Court of India held that the presumption under Section 139 of NI Act 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. To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. 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 circumstances upon which they rely. In order to rebut the presumption, the accused need not enter into the box.

11. He also relied upon the judgment reported in Manu/SC/0503/2008 in the case of Krishna Janardhan Bhat Vs. Dattatraya G.Hegde, wherein the Hon'ble Supreme Court of India held that 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 record. The 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. <https://www.mhc.tn.gov.in/judis>

12. In so far as, the source of income is concerned, the petitioner relied upon the judgment reported in Manu/SC/1031/2014 in the case of K.Subramani Vs. K.Damodara Naidu. The relevant portion of the abovesaid judgment is extracted hereunder;-

“9. In the present case the complainant and the accused were working as Lecturers in a Government college at the relevant time and the alleged loan of Rs.14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs.5 lakhs derived by him from sale of site No.45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, there is any averment with regard to the sale price of site No.45. The concerned sale deed was also not produced. Though the complainant was an income-tax assessee he had admitted in his evidence that he had not shown the sale of site No.45 in his income-tax return. On the contrary the <https://www.mhc.tn.gov.in/judis> complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs.1,49,205/-

from L.I.C. It is pertinent to note that the alleged loan of Rs.14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement

to substantiate his claim. The trial court took into account the testimony of the wife of the complaint in another criminal case arising under Section 138 of the N.I. Act in which she has stated that the present appellant/accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him.”

13. Per contra, the learned counsel for the respondent would submit that though the petitioner issued reply notice which was marked as Ex.P6, he simply denied the averments made in the statutory notice and he did not even whisper about his defence that he issued cheque to one Ramesh Kumar at the time of borrowal of loan. After repaying the said loan he failed to return the cheque and the same was misused by the respondent herein.

<https://www.mhc.tn.gov.in/judis>

14. In fact, the petitioner issued stop payment to his banker not to release the sum. That being so, he ought to have proved that at the time of presentation of the cheque he had enough funds to honour the cheque. The petitioner failed to prove the same. The difference in inks would not amount to material alteration. Section 20 of NI Act envisages the complainant to fill the cheque at the time of presentation. There was a legally enforceable debt and as such, the complainant can very well fill the cheque and presented for collection.

15. In so far as, the source of income is concerned, the petitioner ought to have rebut the same in his reply notice itself and at least while making statement under Section 313 Cr.P.C.

16. He relied upon the judgment reported in 2022 LiveLaw (SC) 275 in the case of Tedhi Singh Vs. Narayan Dass Mahant, wherein the Hon'ble Supreme Court of India held that the accused ought to have rebutted in respect of the source of income in the beginning itself namely reply notice and the statement under Section 313 Cr.P.C. Therefore, the first Appellate Court rightly found him guilty and convicted him.

<https://www.mhc.tn.gov.in/judis>

17. Heard the learned counsel and perused the materials available on record.

18. According to the respondent, the petitioner borrowed a sum of Rs.7 Lakhs for his urgent needs and he also executed a promissory note. Thereafter, he had been regularly paying interest and in order to repay the principal amount, he issued a cheque. On the date of issuance of cheque, the respondent returned back the promissory note since he promised to honour the cheque. On instruction, when the respondent presented the cheque for collection the same was returned for the reason “Stop Payment by the Drawer”. Though, the petitioner stopped the payment, he did not even whisper for what reason it was stopped to honour. The respondent, while causing statutory notice which was marked as Ex.P4, had categorically stated that;

“ 1. That you are very well known person to our client. That on 17.03.2015 you have borrowed a sum of Rs.7,00,000/- from our client for your urgent needs and agreed to pay the same with interest at Rs.1.50 per month per hundred on demands either to our client or his order and also executed a promissory note in favour of our client.

<https://www.mhc.tn.gov.in/judis>

2. You used to pay the said interest amount every month to our client. Then on 14.07.2016 you approached our client and you have issued a post dated cheque bearing No.000097, dated 15.07.2016 drawn from Lakshmi Vilas Bank, Tiruchengode Branch in favour of our client in order to discharge the principal loan amount of Rs.7,00,000/- and received back the promissory note executed by you in favour of our client.

3. As per you instruction our client presented the cheque for Collection on 15.07.2016 though Indian Overseas Bank, Tiruchengode Branch, in which he is having account. To our client surprise the cheque was returned on 18.07.2016 as “Payment Stopped by Drawer” in you account. Thought you are well aware that you have already stopped the payment, just to cheat and defraud our client you instructed our client to present the cheque for collection. Hence your act amounts to commit fraud on our client and indulge in cheating which is a crime punishable under Negotiable Instruments Act.”

19. Though, the petitioner issued reply notice which was marked as Ex.P6, he failed to whisper anything about the payment stopped by him and about his defence. He simply denied the allegation and issued reply notice. In <https://www.mhc.tn.gov.in/judis> support of his contention, he failed to examine any witness and failed to produce any material evidence to that effect. In so far as, the source of income is concerned, the petitioner failed to rebut the same by probable defence.

20. In respect of source of income, it is relevant to rely upon the judgment reported in 2022 SCC OnLine SC 302 in the case of Tedhi Singh Vs. Narayan Dass Mehant, in which the Hon'ble Supreme Court of India held that in the case under Section 138 of the NI Act, the complainant need not show in the first instance that he had capacity to lend loan, unless a case is set up in the reply notice to the statutory notice, that the complainant did not have the wherewithal, it cannot be expected the complainant to initially lead evidence to show that he had the financial capacity. However, the accused had the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing out the materials produced by the complainant himself. Further he must establish the case that the complainant has no source of income even in the statement given under Section 313 of Cr.P.C.

<https://www.mhc.tn.gov.in/judis>

21. It is settled law that in the case under Section 138 of NI Act, Section 139 of NI Act provides that the Court shall presume that the holder of a cheque received the cheque of the nature referred into

Section 138 of NI Act, for the discharge, in whole or in part or any debt or other liability. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of probable defence has grown.

22. Thus, it is clear that it is only an after thought that the petitioner raised so many grounds in the present petition without any substance. Further, the Hon'ble Supreme Court of India, had repeatedly held that once the execution of cheque is admitted, Section 139 of NI Act mandates a presumption that the cheque was for the discharge of any debt or other liability. Further, the said presumption is rebuttable in nature 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. In order to rebut the presumption, it is open for the accused to rely on evidence let by him or he can also rely on the <https://www.mhc.tn.gov.in/judis> materials submitted by the complainant in order to raise a probable defence. 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 circumstances upon which they rely.

23. In the case on hand, admittedly, the petitioner failed to rebut the same by any oral or material evidence. Mere denial of issuance of cheque would not amount to probable defence and the standard of proof for rebutting the presumption is that of preponderance of probabilities.

24. In so far as, the difference in ink is concerned, the first Appellate Court categorically dealt with and found that the the hand writing are one and the same. Further, held that there is no any such difference of ink in the cheque. Further, when the petitioner had taken specific stand that the alleged cheque was issued to one Ramesh Kumar, and not to the respondent, he ought to have examined atleast the said Ramesh Kumar to whom the alleged cheque was issued to rebut the presumption. Therefore, the judgments cited by the learned counsel for the petitioner are not helpful to the case on hand and this Court finds no infirmity or illegality in the order passed by the Court below. <https://www.mhc.tn.gov.in/judis>

25. Accordingly, the criminal revision case stands dismissed. Consequently, connected miscellaneous petitions are closed.

13.12.2022 Index : Yes/No Speaking/Non Speaking order ata To

1. The Fast Track Mahila Judge, Namakkal.

2. The Judicial Magistrate (Fast Track), Tiruchengode.

<https://www.mhc.tn.gov.in/judis> G.K.ILANTHIRAIYAN. J, ata Pre-delivery order made in 13.12.2022 <https://www.mhc.tn.gov.in/judis>