
(2009) 08 MAD CK 0212

In the Madras High Court

Case No : Criminal R.C. No's. 1454 to 1456 of 2006

Laxmi Khadi Niketan

APPELLANT

Vs

T.K. Palanisamy rep. by his Power Agent Mr. P. Jaganathan

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401

Evidence Act, 1872 — Section 114, 4

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2009) 08 MAD CK 0212

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : V. Ayyadurai, for the Appellant; T. Parthasarathy, for K. Selvaraj, for the Respondent

Judgement

G. Rajasuria, J.—Animadverting upon the judgement dated 26.9.2006 passed by the Additional District Judge (Fast Track Court No. II), Salem, in C.A. Nos. 15 to 17 of 2005 confirming the order dated 30.12.2004 passed by the Judicial Magistrate No. I, Salem, in C.C. Nos. 307 to 309 of 2002, these criminal revision cases are focussed.

2. All these three criminal revision cases are interconnected and it is quite obvious and axiomatic from the factual position found detailed in the record. Compendiously and precisely, the facts absolutely necessary and germane for the disposal of these criminal revision cases would run thus:

(a) The respondent herein filed the three complaints as against the revision petitioners/accused for the offence u/s 138 of the Negotiable Instruments Act. Inasmuch as the accused pleaded not guilty, the trials were conducted in those three matters.

(b) During trial, in C.C. No. 307 of 2002(Crl.R.C. No. 1454 of 2006) the power agent of the complainant was examined as P.W.1 and Exs.P1 to P8 were marked. On the accuseds" side D.Ws.1 and 2 were examined and Exs.R1 to R7 were

marked. Ex.C1 to C4 were marked as Court documents.

(c) In C.C. No. 308 of 2002(Crl.R.C. No. 1455 of 2006) the power agent of the complainant was examined as P.W.1 and Exs.P1 to P12 were marked. On the accuseds" side D.Ws.1 and 2 were examined and Exs.R1 to R7 were marked. Ex.C1 to C4 were marked as Court documents.

(d) In C.C. No. 309 of 2002(Crl.R.C. No. 1456 of 2006) the power agent of the complainant was examined as P.W.1 and Exs.P1 to P10 were marked. On the accuseds" side D.Ws.1 and 2 were examined and Exs.R1 to R7 were marked. Ex.C1 to C4 were marked as Court documents.

(e) Ultimately, the trial Court recorded the convictions and imposed the sentences as under:

-----	Case No
Offence	Punishment
-----	C.C. No.
307 of 2002 Section 138 of Negotiable Instruments Act - A1&A2 one year as against A1	Rigorous imprisonment for one year
Compensation of Rs. 25,000/- each as against A1 and A2.	
-----	C.C. No.
308 of 2002 Section 138 of Negotiable Instruments Act - A1&A2 one year as against A1	Rigorous imprisonment for one year
Compensation of Rs. 33,462/- each as against A1 and A2.	
-----	C.C. No.
309 of 2002 Section 138 of Negotiable Instruments Act - A1&A2 one year as against A1	Rigorous imprisonment for one year
Compensation of Rs. 40,000/- each as against A1 and A2.	

(f) Challenging and impugning the orders of the lower Court, the appeals in C.A. Nos. 15 to 17 of 2005 were filed before the Additional District Judge, Salem, for nothing but to be dismissed by the appellate Court, confirming the convictions and sentences imposed by the lower Court.

3. Being dissatisfied and disconcerted with the judgements of both the Courts below, these revisions have been filed on almost similar grounds, the gist and kernel of them would run thus:

Both the Courts below failed to take into consideration the materials on record relating to the business transaction. The presumptions as contemplated under Sections 118 and 139 of Negotiable Instruments Act were wrongly understood by both the Courts below and expected the accused to prove his innocence, which is not contemplated in law. The statutory presumption u/s 139 of N.I Act is not a matter of course, but there should have been evidence on the complainant's side attracting the presumption. Simply because the Bank official committed mistake

in returning the cheques on the ground of "exceeds arrangements" instead of returning them on the ground that the cheques were not signed by two partners, but by only one partner, the accused cannot be mulcted with criminal liability. Accordingly, the revision petitioners prayed for setting aside the judgements of both the Courts below and for dismissing the complaints.

4. The point for consideration is as to whether there is any perversity or non-application of law on the part of both the Courts below in finding the accused guilty placing reliance on the presumptions as contemplated under Sections 118 and 139 of N.I. Act.

5. The learned Counsel for the revision petitioners, inviting the attention of this Court to the various portions of the evidence, would develop and advance his argument to the effect that the real transaction is not based on promissory notes and subsequently on cheques, as alleged in the complaints, but the cheques were issued by A2, only for securing the prompt payment of dues towards the future supply of goods by the complainant to the accused; however, the goods were not supplied and hence the complaints are baseless.

6. The learned Counsel for the respondent would implore and entreat that the contention on the side of the revision petitioners is only an after thought, as after signing the cheques consciously, A2 cannot try to take shelter or camouflage or conceal his own fault by dishing out one plea or other as though goods were not supplied. Both the Courts below on facts gave findings, warranting no interference in the revision, as it is a trite proposition of law that revisional jurisdiction cannot be exercised by the High Court simply because there are two views are possible or that different view can be taken in the set of facts available. Absolutely there is no perversity or non-application of law in understanding and interpreting the evidence by both the Courts below and accordingly, the learned Counsel prays for dismissal of the revisions.

7. At this juncture, I would like to point out that there is a supine submission on the part of A2 that it was he who signed all the five cheques involved in these three complaints. However, he would take a plea that to be a valid cheque, on behalf of A1-the Partnership firm, two of its partners should sign, but only A2 partner signed them; and hence, there are no valid cheques and consequently there is no question of dishonouring of those cheques, attracting the penal provision i.e. Section 138 of N.I. Act would arise.

8. I cannot countenance such an argument for the reason that no one can capitalize his own mistake or fraud. At this juncture, my mind is reminiscent and redolent of the following maxims:

(i) Nul prendra advantage de son tort demesne

(ii) Nemo allegans suam turpitudinem audiendus est.

(iii) Nullus commodum capere potest de injuria sua propria

The sum and substance of the above maxims are that no one can be allowed to capitalise his own fraud or mistake.

9. Here, at the time of issuance of the very cheques, A2 was fully aware of the fact now he pleads. But he did choose to issue those cheques by only signing it, which indicates and evinces the criminal intention on his part to even hood-wink and bamboozle, flummox and confuse, obfuscate and perplex, non-plus and floor the complainant and as such, he cannot be allowed to make such a plea now.

10. Over and above that, I could see considerable force in the submission made by the learned Counsel for the respondent/complainant that the cheques were returned by the Bank not on the ground that two partners have not signed them, but on the ground, viz., "exceeds arrangements". No doubt D.W.1 the Bank Manager would come and speak about the illegality of a cheque etc. However, for the reasons already set out supra, this Court cannot countenance the very plea put forth by A2. It is an arrangement between A1-the Partnership firm and the Banker with which the respondent company is not concerned with. The respondent/complainant is concerned only with the cheque. Law contemplated u/s 138 of the N.I. Act is a dishonour of cheque and nothing more.

11. Here, there were cheques issued by A2 and they were dishonoured on the ground that there were no funds to that much extent contemplated in the cheques. Whereupon pre-litigation notice was sent and thereafter also, the amounts were not paid. As such, the offence can rightly be held to have been committed by the accused, as rightly held by both the Courts below, warranting no interference by this Court.

12. The learned Counsel for the revision petitioners would submit that the law relating to presumption has not been properly applied by both the Courts below.

13. Here, I recollect and call up the following decision of the Honourable Apex Court. (2009) 1 Scc (Cri) 823 Kumar Exports v. Sharma Carpets, certain excerpts from it would run thus:

12. Section 138 of the Act is made out against the appellant, it will be necessary to examine the scope and ambit of presumptions to be raised as envisaged by the provisions of Sections 118 and 139 of the Act. In a suit to enforce a simple contract, the plaintiff has to aver in his pleading that it was made for good consideration and must substantiate it by evidence. But to this rule, the negotiable instruments are an exception.

13. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade.

Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp, and (vii) as to holder being a holder in due course.

14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

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. A plain reading of the above excerpts including the entire judgements would clearly highlight and spotlight as to what is the current law governing matters of this nature.

15. Here the very fact that the complainant examined himself as P.W.1 and marked the documents would clearly attract the presumption as contemplated u/s 139 of the N.I. Act. Over and above that there is a supine admission on the part of the second revision petitioners himself that it was he who signed all the five cheques. Hence, in such a case even by phantasmegorical thoughts it cannot be held that the burden of proof did not get fob off on the accused and at least by preponderance of probabilities he should have pushed back the burden of proof on the complainant's side, as contemplated in the Apex Court's judgement cited supra. But, absolutely there is no evidence in that regard.

16. In paragraph 23 of the lower Court's judgement, the lower Court clearly understood that after six months, the accused realising that he would be put to trouble in view of the bouncing of the cheques, did choose to send a notice as though goods were not supplied by the complainant to the A1-the partnership firm etc. The reasonings given by the trial Court is quite convincing and purely for the purpose of camouflaging and concealing the fault on the part of the accused, such a plea was dished out.

17. At this juncture, I would like to fruitfully refer to the following decisions of the Honourable Apex Court:

(i) 2002 Scc (crl) 1448 Bindeshwari Prasad Singh alias B.P. Singh and Ors. v. State of Bihar (now Jharkhand) and Anr. an excerpt from it would run thus:

13. The instant case is not one where any such illegality was committed by the trial court. In the absence of any legal infirmity either in the procedure or in the conduct of the trial, there was no justification for the High Court to interfere in exercise of its revisional jurisdiction. It has repeatedly been held that the High

Court should not reappreciate the evidence to reach a finding different from the trial court. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction in such cases is not warranted.

14. We are, therefore, satisfied that the High Court was not justified in interfering with the order of acquittal in exercise of its revisional jurisdiction at the instance of the informant. It may be that the High Court on appreciation of the evidence on record may reach a conclusion different from that of the trial court. But that by itself is no justification for exercise of revisional jurisdiction u/s 401 of the Code of Criminal Procedure against a judgment of acquittal. We cannot say that the judgment of the trial court in the instant case was perverse. No defect of procedure has been pointed out. There was also no improper acceptance or rejection of evidence nor was there any defect of procedure or illegality in the conduct of the trial vitiating the trial itself.

(ii) 2005 Scc (cri) 276 Sathyajit Banerjee and Ors. v. State of W.B. and Ors., an excerpt from it would run thus:

22. The cases cited by the learned Counsel show the settled legal position that the revisional jurisdiction, at the instance of the complainant, has to be exercised by the High Court only in very exceptional cases where the High Court finds defect of procedure or manifest error of law resulting in flagrant miscarriage of justice.

18. A bare poring over and perusal of the above judgements would exemplify and demonstrate that revisional Court should be reluctant to interfere with the findings recorded by the lower Court, unless there is perversity or non-application of law in appreciating the evidence.

19. As such, both the Courts below based on factual analysis arrived at the conclusion, which cannot be interfered with in the revision. There is no perversity or non-application of law in understanding and interpreting the evidence on the part of the Courts below. Hence, no interference by this Court is warranted.

20. Regarding sentence is concerned one year substantive imprisonment has been awarded in each of the cases. Taking into consideration the quantum involved in all the five pro-notes i.e. Rs. 1,96,924/-, I am of the considered opinion that imposing one month simple imprisonment would meet the ends of justice, leaving the compensation awarded by the lower Court in tact. Accordingly, the sentence of one month simple imprisonment is imposed in each of the cases and the same shall run concurrently.

21. The criminal revision cases are partly allowed. The trial Court, on receipt of a copy of this order is expected to issue warrant to secure the presence of the revision petitioner to undergo sentence, if not already undergone.