

Therja Vs. Jayalaxmi

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Court : Karnataka

Decided On : Apr-06-2016

Judge : A.V. Chandrashekara

Appeal No. : Criminal Revision Petition No. 662 of 2010

Appellant : Therja

Respondent : Jayalaxmi

Judgement :

(Prayer: This Crl.RP is filed under Section 397 r/w Section 401 Cr.P.C, praying that this Hon ble court may be pleased to set aside the impugned order of Judgment and conviction and sentence dated: 29.11.2008 in C.C.No.2542/2008 on the file of the XVI Addl. CMM., Bangalore and order dated: 12.4.2010 passed by the P.O., FTC-IX, Bangalore City, in Crl.A No.967/2008 and to acquit the petitioner herein.)

1. The present revision petition is filed under Section 397 Cr.P.C., challenging the Judgment of conviction and sentence of fine imposed on the petitioner by the learned 16th ACMM., Bangalore in C.C. No.2542/2008 and affirmation of the same by the first Appellate Court in Crl.A. No.967/2008. The petitioner was accused in C.C. No.2542/2008, in a case instituted by the respondent/complainant for the offence punishable under Section 138 of the Negotiable Instruments Act [hereinafter referred to as the N.I. Act for short].

2. The parties will be referred to as the complainant and the accused, as per their rank given in the trial Court.

3. The facts leading under the present revision petition in terms of Section 397 Cr.P.C. is as follows:

The accused had approached the complainant seeking financial assistance to an extent of Rs.4.6 lakhs and the complainant gave a sum of Rs.4.6 lakhs as financial assistance to the accused in April 2007 and as a security, the accused issued a cheque favouring the complainant, drawn on Canara Bank, D.V.G. Road, Bangalore, dated 29.09.2007, in a sum of Rs.4.6 lakhs. The said cheque was presented for encashment by the complainant and the same was returned with endorsement funds insufficient. Hence, the complainant got issued a legal notice through her advocate on 02.11.2007, calling upon the accused to pay back a sum of Rs.4.6 lakhs within 15 days from the date of receipt of the notice lest, she would be constrained to take appropriate legal action. In spite of receipt of the legal notice, the accused did not repay the amount and hence a complaint was filed before the Chief Metropolitan Magistrate Court.

After taking cognizance, process were issued and plea was recorded. The accused had pleaded not guilty and claimed to be tried. In order to bring home the accused, the complainant is examined herself as P.W.1 and has got marked 7 documents. The accused is examined as D.W.1 and her defence is that she had taken only a sum of Rs.1.9 lakhs as financial assistance from the complainant and that she had repaid the same and the cheque marked at Ex.P2 had only been issued as a security and did not return the same even after the repayment of Rs.1.9 lakhs.

After analyzing the evidence placed on record, learned 16th ACMM has convicted the accused for the offence punishable under Section 138 of the N.I. Act and has directed the accused to pay a sum of Rs.5 lakhs as fine. Out of the said sum, Rs.4.9 lakhs is ordered to be paid as compensation to the complainant in terms of Section 357 Cr.P.C.

The aforesaid Judgment of conviction and sentence dated 29.11.2008 was called into question by filing an appeal under Section 374 Cr.P.C. before the Sessions Court at Bangalore and the same was withdrawn and transferred to the Fast Track Court, Bangalore. The said appeal is dismissed after contest. Hence, the present revision petition is filed.

4. Heard learned counsel appearing for the parties at length.

5. What is argued before this Court by learned counsel for the petitioner is that the presumption available under Sections 118 and 139 of the N.I. Act has been effectively discharged by effective cross-examination of P.W.1. It is argued that the complainant has thoroughly failed to prove that the accused had received a sum of Rs.4.6 lakhs as financial assistance. It is argued that the evidence placed on record would probablize that the accused had received a sum of Rs.1.9 lakhs only as financial assistance and the same was repaid and the cheque marked at Ex.P2 was not returned by the complainant.

Per contra, learned counsel for the complainant has vehemently argued that the presumption available under Sections 118 and 139 of the N.I. Act is not effectively discharged and that the accused has thoroughly failed to probablize the defence taken up on her behalf in regard to receipt of Rs.1.9 lakhs only as financial assistance and the cheque marked at Ex.P2 was given only as a security for availing Rs.1.9 lakhs. It is argued that there is no perversity or illegality found so far as invoking the provisions under Section 397 Cr.P.C. Hence, he has requested this Court to dismiss the revision petition.

6. After going through the records and after hearing the learned counsel for the parties, following points arise for consideration. The same is as follows:

1. Whether the trial Court as well as the Appellate Court have committed serious illegality while assessing the evidence placed on record in regard to the rebuttal of presumption available under Section 118(a) and 139 of the N.I. Act?

2. Whether any interference is called for by this Court, if so, to what extent?

REASONS

7. Point No.1: What is argued before this Court by the learned counsel for the complainant is that the scope of revision available under Section 397 of Cr.P.C. is very limited and therefore revision petition may be dismissed. He has argued that the accused has not been able to probablise his defence and that the accused has not effectively rebutted the statutory presumption available under Section 118 and 139 of N.I. Act.

8. Learned counsel for the complainant has drawn the attention of this Court to some of the admissions elicited during the cross examination of accused as DW-1. During the course of cross examination, accused has admitted that complainant was very well known to her and both of them were living in the same locality for quite a long time. DW-1 has admitted that she has purchased a built house in the year 2005 for Rs.20 lakhs. Suggestion put to her that she purchased the house for Rs.74 lakhs is emphatically denied by her. During the cross examination of DW-1, she has admitted that she had the knowledge of complainant having a sum of Rs.4 lakhs by mortgaging her house. She has admitted her signature found at Ex.P2 cheque. But she has denied having given the cheque in favour of the complainant. In the light of the unequivocal admission in regard to her signature being found at Ex.P2 cheque, it cannot be said that she had not given this cheque to the complainant. She has admitted the writing found in Ex.P2 is in the same ink. She has admitted that complainant had come to her house and demanded her to repay the amount. Whether the admission elicited from her mouth in regard to the complainant mortgaging her house to avail a sum of Rs.4 lakhs and her signature being found at Ex.P2, could be considered as supporting the case of the complainant.

9. Section 118(a) deals with special rule of evidence and stated that every negotiable instrument is deemed to have been drawn for consideration.

10. Section 139 of N.I. Act enables the Court to presume, unless contrary is proved, that the holder of the cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability.

11. The presumption available under Sections 118 and 139 of N.I. Act is rebuttal nature. The accused can rebut the same by either entering into the witness box or

effectively cross examining the complainant and her witness.

12. Therefore, it is useful to scan the evidence of PW-1 the complainant. In the affidavit filed in lieu of examination in chief, she has deposed that accused had borrowed hand loan of Rs.4.6 lakhs and agreed to repay the same. For prompt repayment of the said amount, accused issued a cheque dated 29.09.2007 for Rs.4.60 lakhs drawn on Canara Bank, D.V.G. Road, Bangalore. The defence set up on behalf of the accused is she had received financial assistance of Rs.1.9 lakhs from the complainant and had given cheque marked as Ex.P2 as security and infact she had not availed financial assistance of Rs.4.6 lakhs as averred by the complainant.

13. During the course of cross examination, PW-1 - the complainant has testified about the source of money in order to pay the same to the accused. Specific question is put to her stating as to whether she had given any amount to the accused after availing the same from others. To the said pointed question, she specifically deposed that she had availed loan from Siddamma, Threja, and Soma. She is stated to have availed a sum of Rs.1 lakhs from Siddamma and availed from others by pledging her gold ornaments. She has specifically admitted that she has not mentioned to that effect in the complaint filed by her. During the course of cross examination, she has denied the suggestion put to her that she had given only a sum of 1.9 lakhs to the accused and the cheque in question marked as Ex.P2 was given as a security.

14. Learned counsel for the accused has relied upon the decision rendered in the case of K. SUBRAMANI v. K. DAMODARA NAIDU (2015) 1 SCC 99. The Hon ble Supreme Court has held that burden is always upon the complainant to prove that debt was legally recoverable. As per the facts of the said case, complainant could not prove the source of income from which alleged loan was paid to the accused. Therefore, Hon ble Supreme Court has held that presumption is in favour of holder of the cheque has stood rebutted. As per the facts of the case, accused had taken a loan of Rs.14 lakhs in cash from the complainant promising to repay with 3% interest per month and issued a post-dated cheque. Cheque was dishonoured with an endorsement funds insufficient . The trial Court acquitted appellant for

want of proof of legally recoverable debt payable by the accused. Whereas, High court set aside the acquittal and remanded the case for retrial on the finding that presumption under S.139 of N.I. Act accrues to the benefit of the complainant unless accused rebuts that presumption.

15. Source of loan amount claimed by the complainant to be the savings from his salary and an amount of Rs.5 lakhs derived by him from sale of Site No.45 belonging to him. There was no averment with regard to said sale in complaint or in chief-examination of complainant or in his income tax return. Complainant had obtained a loan of Rs.1,49,205 from LIC in the year 1997 when alleged loan of Rs.14 lakhs was claimed to have been disbursed to the appellant. Therefore, Hon ble Supreme Court has restored the judgment of the trial Court and upheld the opinion of the trial Court that complainant had no source of income to lend to the accused. The facts of the present case are almost identical. PW-1 has not placed any material to show that she had sufficient gold and had pledged the same to avail the loan with a specific purpose of financially assisting the accused.

16. The complainant is thoroughly examined in regard to the source of her income. She has admitted that her husband is a retired employee and she has got two sons. Out of two sons, one is staying in abroad and another one is working in Taluk Office, Bangalore and admitted that she had no personal income. According to her, her son who is staying in Germany was sending Rs.5,000/- - 6,000/- per month and except that income, she had no other source of income. If really her son was sending Rs.5,000/- - Rs.6,000/- per month from Germany, it would have been credited to her savings bank account and nothing came in her way to produce relevant bank document. She has admitted that she has bank account in SBI and there is no difficulty for her to produce the SBI Bank statement for the past 10 years. When she was cross examined on 10.11.2008 she did not take any pain to produce the bank account details to vouch-safed her source of income. 17. The case of the complainant is that accused approached her for financial help on 07.04.2007 in person and she paid the amount by way of cheque. According to her, she paid the cheque drawn on SBI Bank, Thygarajnagar favouring the accused. Later on, she has made an attempt to withdraw the said admission stating that she had paid the entire amount to the accused by way of cash only

and not by way of cheque. It is in this regard, further cross examination done on 10.11.2008 of PW-1 is relevant.

18. In her further cross examination conducted on 10.11.2008 she has specifically admitted that there was no monetary transaction between her and accused. But she has admitted the suggestion put to her that cheque was issued by her in favour of accused drawn on SBI Bank for Rs.65,000/- and cheque was issued in favour of the son of the accused for Rs.45,000/- drawn on SBI Bank and a sum of Rs.23,000/- was given in favour of the accused relating to Mandara Chit fund. She has admitted that she has given one more cheque to the accused. If the amount of these three cheques referred to her cross examination conducted on 10.11.2008 is taken into consideration, the total amount would be Rs.1.33 lakhs. The quantum of amount in respect of four cheques issued by the complainant to the accused is not forthcoming. The amount found in the four cheques should be taken into consideration, because it probablises the defence of the accused that she had taken Rs.1.90 lakhs.

19. It is useful to refer to certain clarification given by her soon after the said admission. She has volunteered to state that she had received the entire amount of Rs.1.90 lakhs in cash from the accused and later on given the cheque marked as Ex.P2.

20. What is argued before this Court by the learned counsel for the complainant is that the cheque issued as security by the accused in respect of Rs.1.33 lakhs was returned to the accused after receiving entire amount of Rs.1.33 lakhs. This explanation sought to be given cannot be considered as an explanation in support of her case.

21. If really, there was no monetary transaction between the accused and the complainant, except the one sought to be projected by way of Ex.P2, she would not have deposed about the three cheques issued to the accused relating to Rs.1.33 lakhs and another cheque of which the amount is not mentioned.

22. At one stage, the complainant has deposed that she had sufficient amount at her disposal, in view of the amount being sent to her by her son from Germany

every month. At another instance, she has deposed that she raised loan from 3 persons for the specific purpose of financially supporting the accused. This appears to be wholly inconsistent and improbable.

23. Though accused is not able to probablise the return of Rs.1.9 lakhs to the complainant, the complainant herself has admitted that accused had paid entire amount of Rs.1.9 lakhs, when she was cross examined on 10.11.2008. There are serious inherent inconsistencies in the very deposition of PW-1 in regard to her capacity in advancing the amount of Rs.4.6 lakhs during April 2007. If really accused had approached her in the month of April 2007, nothing would have come in her way to have mentioned in the very compliant marked as Ex.P1. Even in the legal notice got issued vide Ex.P1, there is no reference about the amount of Rs.4.6 lakhs being paid to the accused in the month of April 2007 and accused issuing post dated cheque putting the date as 29.9.2007. If really she had sufficient amount at her disposal, in view of the amount being sent to her by her son, there was no necessary for her to pledge her gold ornaments and avail loan in order to financially help the accused.

24. Taking into consideration, the entire evidence of PW-1, it can be said that the accused is able to probablise his defence that the cheque marked as Ex.P2 was not issued for availing Rs.4.6 lakhs and that the same was issued as security for the said sum of Rs.1.9 lakhs availed by her. Viewed from any angle, both the Courts have not critically evaluated the evidence placed on record and they have committed serious illegality in appreciating the evidence placed on record.

25. Both the Courts have attached too much of importance to the presumption available under Sections 118 and 139 of N.I. Act without looking to the categorical admission elicited from the mouth of PW-1. These important admissions could not have been so easily brushed aside by both the Courts. In this view of the matter, point No.1 will have to be answered in the affirmative.

26. Point No.2: In view of the finding on point No.1, absolute interference is called for and the judgment of conviction and sentence passed by the trial Court and affirmed by the First Appellate Court are to be set aside and consequently, accused is acquitted for the offences alleged against her. The illegality so

committed by both the Courts is writ large and hence revisional jurisdiction vested under Section 397 of Cr.P.C. is to be invoked. Hence, following order is passed:

ORDER

Revision petition is allowed. The judgment of conviction and sentence passed by the trial Court in C.C.No.2542/2008 and affirmed in Crl.A.No.967/2008 is set aside. Accused is acquitted for the offences alleged against her. Bail Bonds any executed by the accused or the surety stand cancelled.

If any amount deposited by the accused already withdrawn by the complainant, petitioner is at liberty to recover the same in accordance with law.

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