

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2016

CORAM :

THE HONOURABLE MS. JUSTICE R.MALA

CrI.O.P.No.14809 of 2013 & M.P.1 of 2013

T.Palanisamy

.. Petitioner

Vs.

P.C.Ramasamy

.. Respondent

Prayer: Criminal Original Petition is filed under Section 482 of Cr.P.C., to set aside the order dated 03.06.2013 passed in C.M.P.No.2013 of 2013 in S.T.C.No.233 of 2012 on the file of the Fast Track Judicial Magistrate No.I, Erode.

For Petitioner : Mr.A.K.Kumaraswamy

For Respondent : Mr.M.Guruprasad

O R D E R

The petitioner has come forward with the present petition to set aside the impugned order passed in C.M.P.No.2013 of 2013 dated 03.06.2013 passed by the learned Fast Track Judicial Magistrate No.I, Erode.

2. The petitioner, who is the complainant in S.T.C.No.233 of 2012 has filed an application to recall P.W.1 and against the dismissal of the same the present petition has been preferred. The petitioner herein filed a complaint under section 138 of the Negotiable Instruments Act on the basis of the cheque issued by the respondent dated 27.12.2007, which was presented in the bank for encashment and returned as insufficient fund and after issuance of statutory notice, the present complaint has been preferred. After both side evidence was over, when the case was posted for arguments, the petitioner herein has filed the application under section 311 Cr.P.C. to recall P.W.1 stating that D.W.1 to D.W.3 were examined to disprove that the petitioner has means to lend such a huge amount. For rebutting the same, recall of P.W.1 just and necessary and that factum was not considered by the trial Court. Hence, to set aside the impugned order passed by the trial Court, the petitioner has come forward with the present application.

3. Resisting the same, the learned counsel for the respondent would submit that the petitioner has no means to lend the money. Father-in-Law of the petitioner has been examined as D.W.1. Through him, some documents were marked. Now to fill up the lacuna, he has filed the application to recall P.W.1 and it was rightly dismissed by the trial Court. He further relied upon the judgment reported in 2014 (13) Supere Court Cases Page 59 - Mannan Shaikh and Others Vs. State of West Bengal and another stating that recalling application shall be allowed if no prejudice will be caused to the accused and prayed for dismissal.

4. Considering the rival submissions made on either side and on perusal of typed set of papers, admittedly the petitioner has preferred a complaint under section 138 of Negotiable Instruments Act stating that the respondent herein has borrowed a sum of Rs.7,00,000/- and to discharge the same, he issued a cheque dated 27.12.2007 for Rs.7,00,000/-, which was presented for encashment was returned as insufficient funds and after issuance of statutory notice, complaint has been preferred by the complainant. On the side of complainant, P.W.1 was examined and the respondent examined D.W.1 to D.W.3. When D.W.1 was examined, the signatures of D.W.1 in the document dated 20.6.2007 were marked as Ex.D.5 and Ex.D.6. In another document dated 20.3.2009, the signature of D.W.1 has been marked as Ex.D.7.

5. It is well settled principle of law that once the signature in the cheque is admitted, the complainant is entitled to invoke presumption under section 139 and 118 of Negotiable Instruments Act. The cheque has been issued for discharging legally subsisting liability. Once this burden has been rebutted by the respondent/ accused, the burden is shifted to the complainant. Hence, the petitioner has come forward with this application stating that when the respondent/accused has examined D.W.1 to prove that the petitioner has no financial status to lend such a huge money, the burden is shifted to the petitioner. So, to prove his financial status, an opportunity must be given to him. Hence, I am of the view that it is a fit case to give a chance to the petitioner/complainant to prove his means and financial status to lend money of Rs.7,00,000/- on 27.11.2007.

6. The learned counsel for the respondent relied on the judgment reported in 2014 (13) Supreme Court Cases Page 59 in which in para 12 it has been held as follows :

"12. The aim of every court is to discover truth. Section 322 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the section uses the word "shall". It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words "essential to the just decision of the case" are the keywords. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill up the lacuna. Whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because the line of demarcation is then. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

While allowing the recall petition, prejudice to be caused to the accused has to be taken in to consideration. In the cases under section 138 of Negotiable Instruments Act, if the signature in the cheque is admitted the complainant is entitled to invoke presumption under section 139 and 118 of the Negotiable Instruments Act that the cheque has been issued to discharge the legally subsisting liability. So the burden to prove that he has not received any amount and complainant has no financial status to lend money is on the accused. Once the accused has proved the same, the burden is shifted to the complainant to prove that he has sufficient means to lend money. In such circumstances, merely because P.W.1 has already been examined and the matter was posted for arguments, is not a ground to dismiss the application filed by the petitioner to recall P.W.1. A fair opportunity must be given to the

petitioner/complainant to prove that he has sufficient means to lend money. So that fact was not considered by the trial Court.

7. Hence, the impugned order dated 03.06.2013 in CrI.M.P.No.2013 of 2013 in S.T.C.No.233 of 2012 is hereby set aside and this petition is allowed. Since, the learned Counsel for the respondent submitted that the accused is aged 83 years, the learned Fast Track Magistrate No.I, Erode is directed to dispose of the case in S.T.C.No.233 of 2012 within two months from the date of receipt of a copy of this Order. Consequently, the miscellaneous petition is closed.

-s/d-

Assistant Registrar(CS-VII)

True Copy

Sub-Assistant Registrar

vrc

To

1. The Fast Track Judicial Magistrate No.I,
Erode.

2. The Chief Judicial Magistrate
Erode

+1 cc to Mr.A.K.Kumarasamy Advocate vide sr.8280

+1 cc to Mr.M.Guruprasad Advocate vide sr.8334

CrI.O.P.No.14809 of 2013

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