IN THE HIGH COURT OF JUDICATURE AT MADRAS

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THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

RESERVED ON :10.08.2017

PRONOUNCED ON :15.11.2017

CRL.RC. No.1233 of 2012

V.R.Thirumoorthy .. Petitioner/Respondent/Complainant

..Vs..

1.Ponnar Shankar and Co.,
167,Jawahar Main Road,
P.Puliampatti-59
Sathyamangalam

2.S.Gopal
3.P.Subramaniam .. Respondents/Appellant/Accused

Prayer:- Criminal Revision Petition filed under Section 397 and 401 of Cr.P.C., against the order passed in Criminal Appeal No.87 of 2012 dated 13.08.2012 on the file of Principal District and Sessions Judge, Erode modifying the order passed by the Judicial Magistrate, Sathyamangalam in C.C.No.170 of 2009 dated 17.04.2012.

For Petitioner : Mr.S.Parthasarathy
For R1&R2 : Notice served - No appearance
For R3 : Mr.V.S.Kesavan

ORDER

This Criminal Revision Petition is filed under Section 397 and 401 of Cr.P.C., against the order passed in Criminal Appeal No.87 of 2012 dated 13.08.2012 on the file of Principal District and Sessions Judge, Erode modifying the order passed by the Judicial Magistrate, Sathyamangalam in C.C.No.170 of 2009 dated 17.04.2012.

2. The case of the prosecution is that the 1st accused is the firm and the 2nd accused is the Managing Partner and the 3rd accused is the partner of the 1st accused. the 1st accused firm borrowed a sum of Rs.12,00,000/- for the business purpose on

21.06.2009. On the date of receiving the amount, the 2nd accused being the Managing Partner of the 1st accused issued Ex.P1 cheque drawn on Indian Bank, Sathyamangalam. The complainant when presented the above cheque on 20.08.2009 for encashment, the above cheque has been dishonored for the reasons insufficient funds on 22.08.2009 and the dishonour Memo is Ex.P4. The collection slip is Ex.P3. Immediately, the complainant sent a legal notice on 1.9.2009. The 2nd accused received the notice on 5.9.2009. The 3rd accused received the notice on 4.9.2009. However, the notice sent to the 1st accused was returned unserved. The bank statement of the accused is Ex.P8. The Cheque Return Register is Ex.P9.

3. The suggestive case of the defence is that the complainant being the neighbour has taken a cheque from the house of the accused and misused the same and the complainant has not proved the responsibility of the partners. The complainant has also filed the complaint before the day of cause of action and marked Ex.D1.

4. Based on the evidence and materials, the learned trial Magistrate has found the accused guilty under Section 138 of Negotiable Instruments Act and convicted them the 1st accused to pay a fine of Rs.3,000/- directing the accused 2&3 to pay the same failing which to suffer Simple Imprisonment for one month and sentenced the accused 2 and 3 to undergo S.I for 6 months each and to pay compensation of Rs.6,00,000/- each being the value of the cheque. Aggrieved over the conviction and sentence, the Criminal Appeal has been filed before the Principal District Judge, Erode.

5. The point for determination is that:-

i) Whether the order of lower Appellate Court is sustainable in law?

6. For the sake of convenience, the parties are referred to as per the ranking before the Trial Court.

7. The complainant/revision petitioner has filed in C.C.No.170 of 2009 before the District Munsif, Sathiyamangalam for the offence under Section 138 of Negotiable Instruments Act in respect of cheque to the amount of Rs.12,00,000/- . After evidence of trial, the learned Judicial Magistrate, Sathiyamangalam laid conviction and also sentenced the 1st accused to pay a find of Rs.3,000/- directing the accused 2 and 3 to pay the same and A2 and A3 to pay Rs.6,00,000/- each representing the total amount of the cheque viz., Rs.12,00,000/-.

8. On appeal in Crl.A.87 of 2012, the lower Appellate Court have set aside the conviction and sentence only in respect of A3/R3, on the ground that he has only a partner in the partnership firm, the respondent herein and in the absence of any positive evidence to show any active involvement and participation of the third respondent/third accused in the day-to-day affairs of the first respondent/partnership firm, he cannot be held liable and neither directed to pay fine and accordingly, modified the conviction and sentence as against the third accused/third respondent alone.

9. Aggrieved against the said order, the defacto-complainant has preferred this criminal revision.

10. The learned counsel for the revision petitioner that the accused have not rebutted legal presumption attached to the cheque. The contention of the accused that the cheque has been stolen from their house and filed the case is not at all established. Such contention is vague and without any substance. Hence, submitted that the accused has not discharged the statutory presumption.

11. It is seen from records that the evidence of P.W.4 clearly show that the 1st accused is the firm and the accused 2 and 3 are Managing Partner and Partner respectively. When the issuance on the cheque has not been denied, the accused cannot escape from the liability. Further, to the legal notice, reply notice was issued by the accused and in the reply notice they have not even denied the liability on cheque. That itself clearly show that the cheque is supported for valid consideration.

12. It is not in dispute that the cheque issued by the 2nd accused in the name of the 1st accused as Managing partner has been dishonoured for funds insufficient. It is also not disputed that the complainant has sent statutory notice within the period. Of course, on perusal of the lower court records, it appears that without expiry of statutory period, the complaint was presented before the Court. But the fact remains that the cognizance has been taken on 25.09.2009. The above aspect has not been challenged by the accused by way of appeal or revision, the lower Appellate Court, after consideration of material before it, has held that the conviction and sentence imposed on the 3rd appellant/3rd accused is hereby set aside and he is acquitted from the charge leveled against him. The fine amount paid by the 3rd appellant/3rd accused shall be refunded to him.

13. It remains to be stated that the A1 and A2 has not filed any revision against the order of conviction and sentence as confirmed by the lower Appellate Court in Criminal Appeal

No.87 of 2012.

14. When such being the case, this scope of revision is confine to whether the order of acquittal given by the Principal District Judge, Erode in acquitting the A3/third respondent herein and also setting aside the sentence against them is valid in law.

15. As stated supra, the lower Appellate Court has taken note of the absence of any pleading and evidence in connection with the responsibility of the third accused. Admittedly, the first accused is a partnership firm and second accused is the Managing Partner who had issued the cheque as could be seen from Ex.P1.

16. After perusing the complaint as well as the evidence of the P.W.1, the lower Appellate Court has come to the conclusion that absolutely, there is no material on record to infer the third accused/third respondent is having an any active role mush less any role in the day-to-day business affair of the first accused firm neither in the complaint nor during his cross-examination. There was nothing whisper about the role and responsibility of the third accused/third respondent in managing the day-to-day affairs of the first accused has been taken note by the lower Appellate Court and has come to the conclusion that merely because is a partner, he cannot be prosecuted in the absence of any material to provide a nexus between the accused and the crime and hence, the order of acquittal passed by the lower Appellate Court in respect of the third accused/third respondent does not call for any interference by this Court.

17. The learned counsel for the petitioner would submit that as against the cheque amount to Rs.12,00,000/-, the trial Court has awarded Rs.6,00,000/- as a fine and compensation to be payable by the A2 and A3 respectively and the lower Appellate Court while allowing the Criminal Appeal filed by the accused have acquitted the A3. However, the Rs.6,00,000/- amount which was levied as a sentence by way of compensation to be payable by the third accused, there was a total silence in the order and hence, prayed for necessary modification.

18. Having regard to the fact that both the Courts has come to the conclusion that the execution of the cheque has been admitted and also proved in the manner known to law. Though the private complaint has been filed well in the advance of time. However, the same was taken only on the proper time and hence, taking cognizance cannot be invalidated with and further, the cheque was issued in the name of the first respondent/first accused partnership firm by the second accused /second respondent Managing partner for a sum of Rs.12,00,000/- and

hence, in the interest of justice, this Court is of the considered view that the order of the lower Appellate Court in granting the sentence of six months alone in respect of A2 is hereby stands modified as that of the Rs.12,00,000/- being representing the cheque amount and with such the modification in sentence in respect of A2 alone, this revision is allowed.

19. In view of the discussion in the presiding paragraphs, the conviction and sentence has modified by the lower Appellate Court against the A1 and A2 is hereby confirmed and order of acquittal as against third respondent/third accused is confirmed and in respect of awarding of sentence as against A2, the same shall stands modified and the fine amount is enhanced from Rs.6,00,000/- to Rs.12,00,000/- representing the cheque amount and with this modification alone, this Criminal Revision filed by the complainant stands partly allowed to the extent indicated above.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To
1.The Principal District and Sessions Judge, Erode
2. The Judicial Magistrate, Sathyamangalam
3.The Public Prosecutor, High Court, Madras.

+1cc to Mr.S.Parthasarathy Advocate, S.R.No. 81075
+1cc to Mr.V.S.Kesavan Advocate, S.R.No. 81078

Pre-Delivery Order in
CRL.RC. No.1233 of 2012

KJ(CO)
TR(12/12/2017)