IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.O.P No.14698 of 2010
and
M.P.Nos.1 and 2 of 2010

P.Ramalakshmi ... Petitioner

vs.

R.Vasudevan ... Respondent

Prayer: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to the order of the learned XV Metropolitan Magistrate, George Town, Chennai, dated 19.02.2010 made in M.P.No.1381 of 2009 in C.C No.2520 of 2008 and set aside the same.

For Petitioner : Mr.S.Gurumoorthy

For Respondent : Mr.A.Manoharan

JUDGMENT

The petitioner has filed this Criminal Original Petition praying to set aside the order passed in M.P.No.1381 of 2009 in C.C No.2520 of 2008 on the file of the learned XV Metropolitan Magistrate, George Town, Chennai dated 19.02.2010.

2.The case of the petitioner is that she is facing a trial for an offence under Section 138 of the Negotiable Instruments Act in C.C No.2520 of 2008 on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, filed by the respondent /complainant.

3.In the said case the petitioner required some vital documents to be produced before the Trial Court, so as to prove his innocence. Therefore she filed an application in M.P.No.1381 of 2009 under Section 91 of Cr.P.C praying for a direction to the respondent to produce the following documents namely:

1. The Statement of Accounts relating to the transaction made by the respondent/ complainant for the financial year 2005-2006.

2. Income Tax Returns filed by the respondent/complainant for the financial year 2005-2006.

4.Being so, on misconception of law and fact the above application in M.P.No.1381 of 2009 came to be dismissed by the learned trial Judge vide the impugned order herein dated 19.02.2010, which is warranted interference by this Court. Therefore, the present Criminal Original Petition has been filed by the petitioner.

5.I heard Mr.S.Gurumoorthy, learned counsel appearing for the petitioner and Mr.A.Manoharan, learned counsel appearing for the respondent and perused the entire records.

6.The learned counsel for the petitioner would submit that since the production of the above referred documents are indispensible for the petitioner to falsify the respondent's case, so as to prove her innocence; the above application was filed by the petitioner for production of such documents. Whereas, on a mechanical approach besides on misconceiving law and fact involved in the case, the trial Court has dismissed the application. The production of above records would disclose that the respondent do not have sufficient means to lend the alleged sum, said to have been borrowed by the petitioner.

7.To support his case, the learned counsel appearing for the petitioner has produced the copy of the judgment in the case of Krishna Janardhan Bhat v. Dattatraya G.Hedge reported in (2008) 4 Supreme Court Cases 54, it is held as follows:

> "26.The courts below failed to notice that ordinarily in terms of Section 269-SS of the Income Tax Act, any advance taken by way of any loan of more than Rs.20,000 was to be made by way of an account payee cheque only.
>
> 27.Section 271-D of the Income Tax Act reads as under:
>
> > "271-D. Penalty for failure to comply with the provisions of Section 269-SS.-(1) If a person takes or accepts any loan or deposit in contravention of the provisions of Section 269-

SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."

8.It is the case of the respondent is that the petition itself is not maintainable since the trial of the suit was posted for defense witness as early as on 20.11.2008. The application is not maintainable as, there was no petition filed under Section 311 of Cr.P.C. by the petitioner to recall the prosecution witness/respondent herein. Only on proper appreciation of the above material facts, the learned Magistrate has rightly dismissed the petitioner's application.

9.As per the judgment rendered by the Hon'ble Supreme Court in the above case reported in (2008) 4 Supreme Court Cases 54, it is made clear that ordinarily in terms of Section 269-SS of the Income Tax Act, any advance taken by way of any loan of more than Rs.20,000/- was to be made by way of an account payee cheque only.

10.Apart from this, the document sought for in this case is vital document and unsustainable by the petitioner to false by the respondent in this case. The Hon'ble Supreme Court also considered in yet another case in unreported judgment in Criminal Appeal No.2402 of 2014, it is stated as follows:

"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 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.

10.In our view the said conclusion of the trial court has been arrived at on proper appreciation of material evidence on record. The impugned judgment of remand made by the High Court in this case is unsustainable and liable to be set aside."

11.In yet another case in Criminal Application No.4694 of 2008, dated 24.02.2009, the Hon'ble Bombay High Court has clearly held that if the amount already given to the accused if not disclosed in the Income Tax Return cannot be a legally recoverable liability. The Hon'ble Bombay High Court also states that if such liability is held to be a legally recoverable debt, it will render the explanation to section 138 of the said Act. The Hon'ble Bombay High Court has held as follows:

"16.Considering the aforesaid admission of the applicant, the conclusion recorded by the learned trial Judge that the applicant has failed to establish that the cheque was issued towards discharge of a legally recoverable debt is correct."

12.Therefore, as per the above judgment, it is made clear that as per Section 269-SS of the Income Tax Act, any advance taken by way of any loan of more than Rs.20,000/- was to be made by way of an account payee cheque only. Hence, in the case on hand, it is the case of the respondent/complainant that he has given Rs.10,90,000/- to this petitioner/accused and that should be paid through an Account Payee cheque only as per the above provision of the Income Tax Act. Therefore, the petition filed by the petitioner/accused before the learned XV Metropolitan Magistrate, George Town, Chennai, seeking certain documents particularly the statement of accounts relating to the above transactions and also the Income Tax returns filed by the respondent/ complainant in the financial year 2005-2006 covering the relevant point of time, is a vital document and to substantiate the case of the respondent/complainant in the said complaint filed under Section 138 of Negotiable Instruments Act in C.C.No.2520 of 2008, on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, is liable to be produced.

13.In the above circumstances, this Court warranting interference in the order passed by the learned XV Metropolitan Magistrate, George Town, Chennai, in M.P.No.1381 of 2009 in C.C.No.2520 of 2008, dated 19.02.2010, is liable to be set aside and accordingly the same is set aside.

14.In the result:

(a) this Criminal Original Petition is allowed by setting aside the order passed in M.P.No.1381 of 2009 in C.C.No.2520 of 2008, dated 19.02.2010, on the file of the learned XV Metropolitan Magistrate, George Town, Chennai;

(b) the respondent/complainant is hereby directed to produce the documents as sought for by the petitioner/accused, failing which adverse inference to be drawn against the complainant and his claim;

(c) the learned XV Metropolitan Magistrate, George Town, Chennai, is directed to take up the complaint in C.C.No.2520 of 2008, on day to day basis, without giving any adjournments to either parties and dispose the same within a period of three months from the date of receipt of a copy of this order. Both the parties are hereby directed to give their fullest co-operation for early disposal of the complaint. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

vs

To

The XV Metropolitan Magistrate,
George Town, Chennai.

+1cc to Mr.A.Manoharan, Advocate, S.R.No.74229
+1cc to Mr.S.Gurumoorthy, Advocate, S.R.No.74571

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CS/20/04/18