

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.R.C.No.1102 of 2013
and
M.P.No.1 of 2013

Anarkali

...Petitioner

Vs.

Arumugam

...Respondent

The Criminal Revision filed under Section 397 read with 401 of Code of Criminal Procedure to set aside the order in Cr.A.No.46 of 2011 passed by the learned Additional District and Sessions Judge, Krishnagiri District dated 02.02.2013 partly confirming the judgment of the learned Judicial Magistrate II, Hosur in S.T.C.No.489 of 2010 dated 01.06.2011.

For Petitioner : Mr.R.Muniyapparaj

For Respondent : Mr.S.Shankar

O R D E R

This Criminal Revision has been filed to set aside the order in Cr.A.No.46 of 2011 passed by the learned Additional District and Sessions Judge, Krishnagiri District dated 02.02.2013, partly confirming the judgment of the learned Judicial Magistrate II, Hosur in S.T.C.No.489 of 2010, dated 01.06.2011.

2. The respondent filed a private complaint against the revision petitioner for offence under Section 138 of Negotiable Instrument Act, before the learned Magistrate No.II, Hosur. After completing the legal formalities, the same was taken on file in S.T.C.No.489 of 2010. On the side of the respondent, the learned Magistrate examined as many as 2 witnesses viz., P.W.1 and P.W.2 and 8 documents viz., Ex.P.1 to Ex.P.8 were marked. On the side of the accused, she was examined as DW1 and no document has been produced.

3. The learned Magistrate, after trial, found the petitioner

guilty for offence under Section 138 of Negotiable Instruments Act and sentenced her to undergo imprisonment for a period of six months and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a period of one month. Aggrieved against the same, the accused had filed an appeal in C.A.No.46 of 2011, before the learned Additional District Sessions Judge, Krishnagiri. The lower appellate Court, being a fact finding Court, re-appreciated the entire evidence, and after giving due opportunities to both the parties, dismissed the appeal by judgment dated 02.02.2013 and convicted the appellant and modified the sentence to undergo one month simple imprisonment and to pay a fine of Rs.5000/-, in default, to undergo simple imprisonment for a period of one month.

4. Aggrieved against the said judgment dated 02.02.2013 in C.A.No.46 of 2011, the accused has preferred this present criminal revision before this Court.

5. The learned counsel for the petitioner/accused would submit that the cheque was issued in the name of Approse Industries, as the proprietor of the company and the said company has not been added as a party and without adding the company, the complaint filed by the respondent is not maintainable. Both the Courts below had failed to consider these aspects. The learned counsel in support of his contentions has relied on the decisions of this Court reported in 2018(1) MWN (Cr.) DCC 57 (MAD.), 2018(1) MWN (Cr.) DCC147 (MAD.), and the decisions rendered by the Hon'ble Supreme Court report in (2015) 1 SCC 99, (2012) 5 SCC 661 and (2008) 4 SCC 54.

6. Further, the learned counsel for the petitioner submitted that at the time of lending money, the respondent was not working anywhere. Therefore, she has stated in her evidence that he was having that money for more than one month and source of money is doubtful. Further, the revision petitioner was working as a teacher and at that time of receiving notice, she was not working in the school and one notice was sent to the address of the company and another notice was sent to the school. Since, the revision petitioner does not know about the respondent/complainant, after receiving the notice, she did not send any reply. She has borrowed a sum of Rs.10,000/- from one Gandhi, for which, she has given three blank cheques for security purpose to him. One Gandhi had filed a case against the revision petitioner. Subsequently, the amount of Rs.10,000/- borrowed from one Gandhi was repaid along with interest to him and the case filed by him was closed. But, he did not return the cheque leaves. The said fact was also not taken into consideration by the Courts below. The said Gandhi set up the respondent and filed case against the revision petitioner. The revision petitioner examined herself as D.W.1. She rebutted the

presumption from probable defence. These facts have not been considered by the both the Courts below. The trial Court did not give any opportunity to the revision petitioner and did not call for the records of the case filed by the said Gandhi and the said case was pending before the very same Court below. Without considering all these facts, the learned Magistrate simply found the petitioner guilty, which warrants interference. The lower Court has not properly appreciated the case put forth by the revision petitioner and also the explanation given in the evidence and also cross examination. On a perusal of oral and documentary evidence, it could be seen that the revision petitioner/accused has not issued the cheque to the respondent and the respondent has not proved that the cheque was issued for discharging legally enforceable debt. The presumptions under Sections 118 and 139 of negotiable Instruments Act is rebuttable presumption. It is the revision petitioner who has rebutted the said presumptions. The settled propositions have not been considered by both the Courts below. Hence, both the Courts below have failed to consider the above legal and factual issues erroneously convicted the appellant, which warrants interference of this Court. The learned Counsel for the petitioner placed reliance on the judgment by the Hon'ble Supreme Court in (2015) 1 SCC 99 and (2008) 4 SCC 54.

7. The learned counsel for the respondent/complainant would submit that the revision petitioner is the proprietor of Approse Industries Company and she has borrowed a sum of Rs.90,000/- from the respondent and executed a cheque on the same day, he has stated that she was working in the company. Subsequently, she left the company. The amount was only Rs.90,000/- Therefore, the contentions raised by the learned counsel for the petitioner and the judgments referred by the learned counsel for the petitioner are not applicable to the present case on hand.

8. Further, the learned counsel for the respondent has taken a stand that she had issued the cheques only to Gandhi. But the said Gandhi was not examined. Even though, opportunity was given by the learned Magistrate, she has not taken any steps to examine Gandhi and she has examined only herself as D.W.1 Further, after receiving the notice, she has not sent any reply. Signature has been admitted and execution of the cheque has been admitted. When the cheque is in possession of the complainant, the legal presumption is that the cheque is issued for legally enforceable debt under Section 118 & 139 of Negotiable Instruments Act. Of course, the said presumption is rebuttable presumption. The petitioner has not rebutted the presumption in the manner known to law. The stand taken by the learned counsel for the petitioner is not acceptable and the citations is not applicable to the present case on hand.

9. Heard the learned counsel appearing on either side and

perused the materials available on record.

10. It is the case of the respondent that the revision petitioner was working as teacher and also running a small industry in the name and style of Approse Industries. She has stated in her evidence that she functioned as the proprietor of the said Company and also stated that she does not have any account on her own. She has admitted the signature found in cheque. It is well settled proposition of law that in a proprietary concern, only the proprietor alone is responsible for debt. Therefore, contention of the learned counsel for the petitioner that the petitioner is not responsible for the debt of the Approse Industries only proprietorship concern alone responsible. The complaint is not filed against the concern, filed only against the proprietries alone, hence the complaint filed by the respondent against the revision petitioner is not maintainable. The said judgments are not applicable to the present case on hand. In that cases, the transactions were for and on behalf of the company and partnership firm. However, in this case, Approse Industries is not either company or partnership firm. Further, source of lending money in this case is proved and the petitioner has not rebutted the presumption. Therefore, the judgments referred to the learned counsel for the petitioner is not applicable to the present case on hand.

11. So far as, source is concerned, the respondent has clearly stated that he was employed in Uma maheswari Mills at Hosur. At the time of lending money, he was not working anywhere. But he is left from the company. He was having the money in his house more than one month. The amount of Rs.90,000/- is not a big amount and the person who lends hand loan is not necessary to be an income tax assessee and need not file any tax returns. Therefore, the contention of doubt regarding source of lending money is not acceptable.

12. The contention of the learned counsel for the petitioner regarding the cheque issued in favour of Thiru. Gandhi is concerned, though, the petitioner raised contention that the cheque leaves were issued in favour of one Gandhi. The said Gandhi was not examined. The respondent has clearly stated in his evidence that a sum of Rs.90,000/- was kept in his house and the petitioner borrowed the same from him and she executed a cheque on the same day. Subsequently, when the cheque was presented for collection, it was returned as 'Account Closed'. After that, the respondent sent a statutory notice to the school address of the petitioner/accused where she was working and another notice was sent to the address where she was residing. The revision petitioner, during the course of examination, has clearly admitted that she received the notice. However, she has not sent any reply on the ground that she does not know the

respondent/complainant. Normally, when notice was received, it is the duty of the receiver to send a reply either accepting or denying the contention made in the notice. However, the petitioner has remained silent without sending any reply. The petitioner has entered the witness box and made a claim that the cheque leaves were only given to one Gandhi and not to the respondent. However, neither she has chosen to examine the said Gandhi, nor she has given any complaint to the police against Gandhi and the respondent about the misuse of the cheque, she has also not demonstrated the relationship between the said Gandhi and the respondent. On a reading of entire evidence and also judgments of both the Courts below, it is evident that the respondent/complainant has proved his case beyond reasonable doubt and also signature found in the cheque is also admitted. It is a statutory presumption that the said cheque was issued for legally enforceable debt. The revision petitioner has not rebutted the statutory presumption in the manner known to law. The revision Court need not sit in the arm chair of the appellate court and re-visited the entire evidence, since the appellate Court has re-appreciated the entire evidence. As a revision Court, this Court has to see if there is any perversity in the Judgment passed by the Courts below. On a reading of the judgments of the Courts below, this Court does not find any perversity and there is no merit in the revision.

13. As regards the sentence, the petitioner being a lady, this court is of the view that ends of justice would be met by modifying the sentence imposed for offence under Section 138 of Negotiable Instruments Act instead of one month simple imprisonment ordered to pay a fine of Rs.5,000/- and to pay the compensation to the respondent/complainant. The revision petitioner is directed to pay a compensation of Rs.1,80,000/- which is double the amount to the cheque amount, under Section 357(iii) of Cr.P.C., to the respondent/complainant, within a period of one month from 09.11.2018, in default, to undergo one month simple imprisonment. The Conviction is confirmed and the revision is partly allowed.

14. With the above modification of sentence by confirming the conviction, the Criminal Revision Case is partly allowed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

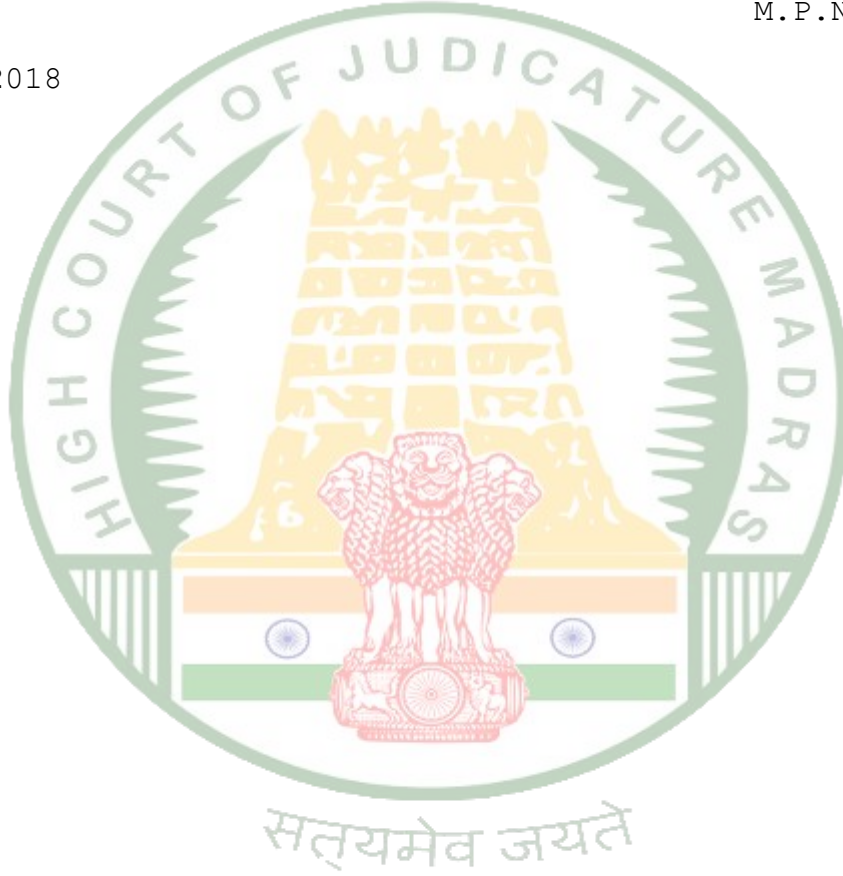
1. The Additional District and Sessions Judge,
Krishnagiri District.
2. The Judicial Magistrate II, Hosur.

+1cc to Mr.R.Muniyapparaj, Advocate, S.R.No.75482

+1cc to Mr.S.Shankar, Advocate, S.R.No.75183

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CS/02/11/2018



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