

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 27..08..2018

CORAM:
THE HONOURABLE MR . JUSTICE P. VELMURUGAN

CRIMINAL APPEAL NO.606 of 2013

Tmt. G. Jayaradha

... Appellant

-Vs-

Sri. C. R. Umapathi

... Respondent

Criminal Appeal filed against the judgment dated 16.07.2013 made in C.A. No.37 of 2011 passed by the 1st Additional District and Sessions Judge, Cuddalore, whereby the judgment dated 21.04.2011 made in C.C. No.316 of 2003 passed by the Judicial Magistrate No.II, Cuddalore, has been set aside.

For Appellant : Mr.S. Ashok Kumar
(Senior Counsel for Mr.A.Sasidharan)

For Respondent : Mr.R. Thiagarajan

J U D G M E N T

The complainant is the appellant herein. The respondent herein was convicted and sentenced for the offence punishable under Section 138 of Negotiable Instrument Act, 1881 by the trial Court but was acquitted by the First Appellate Court.

2. The appellant/complainant herein has filed C.C. No.316 of 2003 on the file of the learned Judicial Magistrate No.II, Cuddalore, against the respondent herein for the offence punishable under Section 138 of Negotiable Instrument Act, 1881 (in short " the N.I. Act.). On completion of trial, the learned Judicial Magistrate No.II, Cuddalore, by Judgment dated 21.04.2011, convicted the respondent herein for the offence punishable under Section 138 of N.I. Act and also sentenced him to undergo 6 month simple imprisonment and to pay a fine of Rs.5,000/- in default, to undergo one month simple imprisonment. Challenging the above said order, the respondent herein has filed C.A. No.37 of 2011 on the file of the learned Ist Additional District and Sessions Judge, Cuddalore, by and which

the the learned Ist Additional District and Session Judge has allowed the said appeal by the Judgment dated 16.07.2013, acquitting the respondent and setting aside the conviction and sentence imposed on the respondent herein. Aggrieved by the above Judgment, the appellant herein has preferred this Criminal Appeal.

3. Brief facts of the case as follows:

3(i). The case of the appellant herein who is the complainant and the tenant in the premises owned by the respondent, is that the respondent is the landlord of the commercial complex by name Savitha Plaza. The appellant/complainant's husband Gopalakrishnan and his Father in law, had approached the respondent/landlord to let a portion of the building in the said complex. Originally, the respondent/landlord had agreed to let out an extent of 1520 sq. ft in the said complex on a monthly rent of Rs.13 per Sq.ft and Rs.13,00,000/- (Rupees Thirteen lakhs only) was fixed as caution deposit. Accordingly, a lease agreement was entered into between the appellant/tenant and the respondent/landlord on 05.10.2002. But, the respondent/landlord had allotted an extent of 522 Sq.Ft. only instead of 1520 Sq.Ft. in the said complex to the appellant-tenant/complainant and raised rent to Rs.20/- per sq. ft. and Rs.5,00,000/- (Rupees Five Lakhs only) was fixed as caution deposit for the above said allotted extent portion. The respondent/landlord also agreed to return the balance amount of Rs.8,00,000/- (Rupees Eight Lakhs only) from the total caution deposit amount of Rs.13,00,000/- (Rupees Thirteen lakhs only) that was already paid by the appellant/complainant for an extent of 1520 Sq.Ft. to the respondent/landlord.

3(ii). In view of the above, the respondent/landlord had issued a cheque bearing No.394338, dated 15.03.2003, drawn on Corporation Bank, Pondicherry, for a sum of Rs.8,00,000/- (Rupees Eight Lakhs Only) due to the appellant/complainant. According to the respondent/landlord instruction, the cheque was presented with the appellant's Bankers, Central Co-operative Bank, Cuddalore after 5 months, i.e. on 04.08.2003. The presented cheque was returned for the reason that "the payment stopped by the drawer". In this regard, the appellant-tenant/complainant sent a legal notice to the respondent/landlord on 25.08.2003. In reply dated 08.09.2003, the respondent/landlord denied the allegation made by the appellant/complainant. As the respondent/landlord has not paid the due amount of Rs.8,00,000/- (Rupees Eight Lakhs Only) to the appellant-tenant/complainant, the appellant/complainant has filed complaint against the respondent/landlord under Section 138 of N.I. Act in C.C.No.316 of 2003 on the file of Judicial Magistrate No.II. Cuddalore.

3(iii). The learned Judicial Magistrate has questioned the

respondent/landlord about the substance of the offence after perusing the entire documents. The respondent/landlord has denied the allegation made by the appellant/complainant. Thereafter, the case was posted for examination of complainant's/landlord side witnesses.

3(iv). On the side of complainant/appellant herein, the husband of the complainant Mr. Goplakrishnan had been examined as P.W.1 and P.W.2., who is the complainant, and P.W.3., Mr.Sairam, an official of Central Co-operative Bank, had been examined and Ex.P.1 to Ex.P.13 had been marked.

3(v). On the side of defence/respondent herein, Mr. Narayanan, Manager, Corporation Bank, Puducherry, had been examined as D.W.1, and Ex.D1 to Ex.D3 had been marked.

4. After carefully analyzing the rival submissions made by both sides and considering the material evidence, the learned trial Judge has come to the conclusion that the respondent/landlord herein is found guilty of the offence punishable under Section 138 of N.I. Act. Accordingly, the trial Judge has convicted and sentenced the respondent/landlord herein to undergo simple imprisonment for 6 months and also to pay a fine of Rs.5,000/- in default, to undergo simple imprisonment for one month. Being aggrieved by the above said order, the respondent/landlord herein has preferred an appeal in C.A. No.37 of 2011 on the file of the Ist Additional District and Session Judge, Cuddalore.

5. The learned Ist Additional District and Session Judge, Cuddalore, after carefully examining the entire material evidence placed on record and arguments advanced by the counsel for both sides, has allowed the appeal by its Judgment dated 16.07.2013 in C.A.No. 37 of 2011 setting aside the conviction and sentence imposed on the respondent/landlord and acquitted the respondent herein.

6. Challenging the above said reversal Judgment, the appellant/complainant has preferred this Criminal Appeal by way of leave before this Court.

7. Leave granted.

8. The learned senior counsel appearing for the appellant would submit that the respondent is the owner of the commercial complex by name of Savitha Plaza. The appellant/complainant along with his father-in-law approached the respondent-landlord to let out a portion of the said premises. Initially, the respondent-landlord had agreed to let out an extent of 1520 Sq. Ft. for which the monthly rent of Rs.13 per Sq. ft. and rental

advance of Rs.13,00,000/- (Rupees Thirteen Lakhs Only) were fixed. The same was paid by the appellant/complainant to the respondent-landlord. Accordingly, both of them have entered into agreement. Thereafter, the respondent/landlord wanted to allot an extent of 522 Sq. ft only to the appellant/complainant for which the monthly rent was raised to Rs.20/- per Sq.ft. instead of Rs.13. per Sq. ft. and also the rental advance of Rs.5,00,000/- for the allotted extent were fixed. Hence, the respondent/landlord agreed to return a sum of Rs.8,00,000/- (Rupees Eight Lakhs only) from the total advance of Rs.13,00,000/- (Rupees Thirteen Lakhs Only) which was already paid for the extent of 1520 Sq.Ft. In view of the above, the respondent/landlord had issued a cheque bearing No.394338 dated 15.03.2003 drawn on Corporation Bank, Pondicherry, for a sum of Rs.8,00,000/- (Rupees Eight Lakhs Only) to the appellant/complainant. It was marked as Ex.P.2. On instruction of the respondent-landlord, on 04.08.2003 the said cheque was presented with the appellant's Bankers, Central Co-operative Bank for encashment by the appellant-tenant/complainant and the same was dishonoured with an endorsement "Payment stopped by drawer". The return memo was marked as Ex.P.4. In this regard, the appellant/complainant had issued a legal notice to the respondent/landlord on 25.08.2003, which was marked as Ex.P5 and the respondent-landlord has given frivolous reply on 08.09.2003 through his counsel which was marked as Ex.P.7. Thereafter, the appellant has preferred a Complaint in Calendar Case No.316 of 2003 on the file Judicial Magistrate No.2, Cuddalore, against the respondent/landlord under Section 138 of N.I. Act. Having considered the above said facts and circumstances of the case and on perusal of the entire material evidence, the trial Judge has come to the conclusion that the respondent is found guilty for the offence punishable under Section 138 of N.I. Act. Accordingly, the trial Court passed the Judgment dated 16.07.2013, convicting and sentencing the respondent/landlord to undergo simple imprisonment for 6 months and also to pay a fine of Rs.5,000/- in default, to undergo simple imprisonment for one month. Against the above said order, the respondent/landlord has filed C. A. No.37 of 2011 on the file of the Ist Additional District and Sessions Judge, Cuddalore, wherein the first appellate court allowed the same by setting aside the trial Court order.

9. The learned senior counsel for the appellant would mainly contend that the Sessions Judge has allowed C.A. No.37/2011 solely on the ground that the power of attorney was not filed along with complaint by the appellant/complainant without considering the alleged offence punishable under Section 138 of N.I Act, committed by the respondent/landlord herein. It is further contended by the learned Counsel that the Complaint even if not signed by the power of attorney on behalf of de-

facto complainant, but signed his/her own name, is maintainable and not bad in law because it is more procedural than substantive. Though the General power of attorney was not filed at the time of complaint, the same can be produced at the subsequent court proceedings as and when its validity is questioned by the accused. Thereafter, the Court could call upon the same to decide the genuineness or validity. In support of his submission, the learned senior counsel for the appellant relied upon the decision made by this Court in 2006 (4) CTC 333, K.Gopalakrishnan Vs. Karunakarann rep. by the Power of Attorney Holder, Dhandapani. In the case on hand, P.W.2, the de-facto complainant is the wife of P.W.1, the appellant, who has given letter of authorization while filing the complaint against the respondent. the appellant/complainant had signed in the complaint and filed through P.W.1, her husband, with Ex.P1, letter of authorization. Further, the appellant/complainant had duly executed Ex.P10, Power of attorney at later stage and the appellant herein/complainant was examined as P.W.2 in the trial Court. In this regard, he has relied on the decision made in the Supreme Court Judgment reported in (2008) 3 SCC (Cri) 558, SHANKAR FINANCE AND INVESTMENTS Vs. STATE OF ANDHRA PRADESH OTHERS wherein it is held in paragraph No.16 as follows: ...

"16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of Cr. Procedure Code, and only the secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge or transaction, should be examined. Of course, where the cheque is drawn in the name of proprietor of a proprietary concern. but an employee such (who is not an attorney holder) has knowledge of the transaction, may both have to be examined. Be that as it may. In this case we find no infirmity "

and the learned Counsel has also relied on another decision of the Hon'ble Supreme Court reported in (2013) 5 CTC 560, A.C. Narayanan & Another Vs. State of Maharashtra & Another, in support of his submission.

10. The learned senior Counsel for the appellant would further contend that though the respondent/landlord has accepted his liability of the cheque amount in his reply notice, the amount is yet to be settled and the cheque for Rs.8,00,000/- (Rupees Eight Lakhs Only) have been returned by his Banker with

the endorsement "payment stopped by the drawer" as per instruction given by the respondent/landlord.

11. The learned senior counsel for the respondent would contend that P.W.2, the appellant/tenant has filed complaint in her individual name without furnishing power of attorney in favour of her husband, P.W.1. Subsequently, Ex.P.10, the power of attorney has been filed after two years of making complaint. Further, as the Appellant has committed act of waste to the premises for the cost of Rs.1,00,000/- (Rupees One Lakhs Only), the respondent/landlord has given stop payment instruction to his Bankers. Since the complaint was neither filed along with Power of attorney and also the damage caused to the building for Rs.1,00,000/- (Rupees One lakhs only) was not paid to the respondent/landlord, the complaint against the respondent/landlord is not maintainable in law.

12. The learned senior Counsel for the respondent would further contend that the respondent/landlord herein had filed HRCOP. No.3 of 2005 on the file of the Rent Controller, Puducherry, for eviction on the ground of wilful default and for owner's occupation while the appellant-tenant filed HRCOP No.49 of 2003, HRCOP No.48 of 2004 and HRCOP No.41 of 2006 on the file of the Rent Controller, Puducherry, for restoration of amenities, for fixation of fair rent and seeking permission to deposit the rent respectively. During the pendency of the petition, the respondent filed I.A. No.1633 of 2009 under Section 11(3) of the Pondichery Buildings (Lease and Rent Control) to stop further proceedings as the appellant herein-tenant has committed default in payment of rent wherein the learned Rent Controller, Puducherry passed in favour of the respondent herein directing the appellant/complainant herein to deposit the amount as per the claim of the respondent/landlord and stopped further proceedings in HRCOP No. 3 of 2005. The learned Rent Controller had dismissed the above said petitions filed by the appellant-tenant as a result of non-payment of rent by the appellant/complainant as per the order in I.A. No.1633 of 2009 in HRCOP No.3 of 2005. Against this order, the appellant/complainant has filed R.C.A. Nos.10,11,13,14, and 15 of 2009 on the file of the III Additional District Judge. The same were dismissed by the learned IIIrd Additional District Judge, concurring with the findings of the learned Rent Controller. Being aggrieved by the above said order, the appellant has filed C.R.P. (P.D.) Nos. 3315, 3316, 3317, 3318 and 3319 of 2010 on the file of this Court wherein the parties are directed by its order dated 28.10.2010, to submit the calculation namely, rent at the rate of Rs.10,440/- per month from 01.01.2003 with enhanced rent of 15% for every three years till 31.08.2009. Against the said amount, the appellant-tenant is entitled to deduct a sum of Rs.8,00,000/- and other payment

paid on behalf of the respondent-landlord by producing the necessary proof and if any balance is payable by the tenant, the same shall be paid within the time granted by the Rent Controller, Puducherry. If the tenant failed to pay the said amount within the time granted by the learned Rent Controller, it is open to the learned Rent Controller to pass further order in HRCOP. No.3 of 2005.

13. In view of the above, the learned senior counsel for the respondent would submit that this Court has held in the above said order, the liability amount for the cheque issued by the respondent shall be adjusted with the due rent payable by the appellant/complainant herein after producing the calculation of rent due. In this regard, the learned senior counsel for the appellant/complainant has admitted the same before this Court. Hence, there is no liability to pay the amount for the cheque to the appellant herein/complainant. Hence, this Criminal appeal is liable to be set aside filed by the appellant/complainant.

14. On a perusal of the Judgment passed by the learned Judicial Magistrate No.II, Cuddalore, it appears that it was disposed of only on 21.04.2011, but, this Court has passed the order in C.R.P. Nos.3315, 3316, 3317, 3318 and 3319 of 2010 as early as on 28.10.2010. Despite this Court has passed order to adjust the dues payable by the respondent/landlord, with the arrears of rent which has to be paid by the appellant/complainant to the respondent/landlord on 28.10.2010, prior to order passed by the trial Court on 21.04.2011, the learned counsel for both sides have not brought the order of this Court to the knowledge of the Magistrate. Therefore, the learned Magistrate, without considering the order passed by this Court in C.R.P. Nos.3315, 3316, 3317, 3318 and 3319 of 2010 on 28.10.2010 filed by the appellant herein, has come to the conclusion that the respondent is guilty and accordingly, the respondent/landlord was convicted and sentenced for the offence punishable under Section 138 of N.I. Act. Thereafter, the respondent/landlord has brought to the knowledge before the Sessions Judge in the appeal while the respondent/landlord had filed C.A. 37 of 2011 against the trial Court's order, regarding the order passed by this Court in C.R.Ps. Then, the Sessions Judge having considered the order passed by this Court, allowed the C.A. No.37 of 2011 solely on the ground that no execution of the power of attorney has been submitted by the appellant/complainant at the time of complaint and set aside the trial Court's Judgment dated 21.04.2011 and not on the merit of the case.

15. In the order dated 28.10.2010 passed by this Court in C.R.P. Nos.3315, 3316,3317,3318 and 3319 of 2010, it has been clearly held in paragraph nos.9 and 10 as follows:

.....

9. Mr. A.V. Arun, the learned counsel for the respondent/landlord also agreed for adjusting a sum of Rs.8,00,000/- payable by the landlord as per the cheque issued by the landlord to the tenant towards the arrears of rent payable by the tenant.

10. Recording the above submissions made by the counsel appearing for both parties the orders passed in I.A. No.1633 of 2009 in HRCOP No.3 of 2005 and corresponding R.C.A. No.10 of 2009 and the order in HRCOP No.3 of 2005 and corresponding R.C.A. No.11 of 2009 are set aside and I.A. No.1633 of 2009 is remanded back to the Rent Controller, Puducherry and the parties are directed to submit the calculation as indicated above namely rent at the rate of Rs.10,440/- per month from 1.1.2003 with enhanced rent of 15% for every three years till 31.08.2009. Against the said amount, the tenant is entitled to deduct a sum of Rs.1,40,000/- Rs.8,00,000/- and Rs.1,82,367/- and other payments by producing necessary proof and if any balance is payable by the tenant the same shall be paid within the time granted by the Rent Controller, Puducherry. If the tenant failed to pay the said amount within the time granted by the learned Rent Controller, it is open to the learned Rent Controller to pass further order in HRCOP. No.3 of 2005.

.....

It is open to the landlord to get appropriate order from the Judicial Magistrate No.2, Cuddalore, in C.C. No.316 of 2003 having regard to the adjustment of Rs.8,00,000/- by the tenant towards rent.

16. With regard to the above, in this appeal, this Court cannot take different views because this Court has already given a direction to the Court below regarding the settlement of dues of Rs.8,00,000/- between both the parties. Further, the respondent/landlord has not brought to the knowledge of the Judicial Magistrate No.2 Cuddalore, regarding the above said order, to get appropriate order in C.C. No.316 of 2006 having regard to the adjustment of Rs.8,00,000/- by the tenant towards rent. Since neither the above said order has been complied with nor considered by the learned Magistrate, and also without considering the rent control proceeding, this Court cannot take different views in this appeal for the very same Cheque. Since there is no illegality and infirmity in the order dated 21.04.2011 passed by the Judicial Magistrate No.II, Cuddalore, in C.C. No.316 of 2003 and also the order dated 16.07.2013 in C.A. No.37 of 2011 which has been allowed on different reasons

by the District and Sessions Judge, are liable to be set aside. Since the amount mentioned in the cheque is in dispute, it has got to be settled as directed by this Court in earlier order dated 28.10.2010. This Court finds that the respondent has not committed any offence. Hence, this appeal is liable to be dismissed.

17. Having considered the above view and in order to avoid multiplicity of proceedings and conflicts of decision, this Court is not inclined to allow the appeal and accordingly this Appeal is dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Judicial Magistrate No.II,
Cuddalore.

2.The Chief Judicial Magistrate,
Cuddalore. (For Information)

+1cc to Mr.A.Sasidharan, Advocate, S.R.No.58466

+1cc to Mr.R.Thiagarajan, Advocate, S.R.No.58549

Cr1.A.No.606 of 2013

GP(CO)
GSP(16/11/2018)

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