

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.02.2018

DELIVERED ON : 27.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.R.C.No.325 of 2017

and

Crl.M.P.No.3064 of 2017

D.Santhosam .. Petitioner

Vs

V.K.Periyasamy .. Respondent

Prayer: Criminal Revision Case filed under Sections 397 and 401 of the Criminal Procedure Code, to set aside the order passed by the learned Fast Track Magisterial Level No.2, Poonamallee, Thiruvallur District in CMP.No.4454 of 2016 in STC.No.131 of 2016 by its order dated 20.01.2017.

For Petitioner : M/s.M.R.Uma Vijayan

For Respondent : Mr.C.Prabakaran

JUDGMENT

This criminal revision petition is filed by the petitioner / accused against the order of the Learned Trial Court in dismissing the petition filed under section 45 of the Indian Evidence Act by the order dated 20.01.2017 in C.M.P.No.4454 of 2016 in STC.No.131 of 2016 on the file of the learned Fast Track Magisterial Level No.2, Poonamallee, Tiruvallur District.

2.The brief case of the Revision Petitioner:

One Daniel, the husband of the revision petitioner/accused approaches the complainant to sell his house. The sale consideration was agreed and fixed the rate of Rs.40,00,000/- and on 11.10.2010, the husband of the revision petitioner / accused executed a power of attorney in favour of the respondent/complainant and issued credit receipt for Rs.40,00,000/-. The husband of the revision petitioner/accused failed to hand over to the property to the respondent/complainant and lease out to third party and demand to cancel the power of attorney for selling the property. The respondent/complainant after repeated demands to the husband of

the revision petitioner/accused to settle of the amount of Rs.77,20,000/- The revision petitioner/accused has issued three postdated cheques on behalf of her husband.

3.The revision petitioner/accused filed miscellaneous petition in CMP.No.4454 of 2016 under section 45 of the Indian Evidence Act stating that there is no privities to contract between him and the respondent. The contents and numerical found in the cheque was not filled by the revision petitioner. She never issued cheques Exhibit P4 to P6 in favour of the respondent /complainant. Therefore the cheques Exhibit P4 to P6 for obtaining expert opinion is to be sent for forensic department.

4.The brief case of the respondent is that:

The respondent/complainant filed his objections alleging that proof affidavit was filed before the trial Court on 27.09.2016 and his evidence was closed on the same day for non cross-examination. The revision petitioner/accused filed petition under Section 311 of Cr.P.C. to recall the respondent/complainant for cross examination on 11.11.2016 and filed the present petition under section 45 of the Indian Evidence Act. The signature in the cheque has not been disputed by the revision petitioner/accused and hence the cheque is valid as per Section 20 of the Negotiable Instruments Act. The revision petitioner/accused filed this petition just to protract the proceedings and prayed this Court for dismissal of this petition.

Rival submissions:

5.The learned counsel for the Revision Petitioner contends that the trial Court failed to consider the complainant's own admission will prima facie reveal there exist no liability between the Revision petitioner/accused and the respondent, hence the essential ingredients to constitute offences under section 138 will not attract, that therefore the Revision Petitioner/Accused would not have issued Exhibits-P4 to P6 to the Respondent which could be proved and substantiated only by way of expert opinion.

6.The Learned counsel for the Revision Petitioner contends that the trial Court had erroneously dismissed the petition for the only reason as premature when in no defense has been raised by the Revision Petitioner/Accused will prove that the Trial Court failed to appreciate the fact the Respondent himself have admitted the alleged transaction was between the Revision Petitioner's/accused husband and him, that being the case absolutely there are all possibilities of misusing the cheques Ex P4 to P6 whose scripts (both alphabetical as well as numerical) therein were disputed by the Revision

Petitioner/Accused herein as stated in the petition which warrants an opinion from the hand writing expert to prove the innocence of the Revision Petitioner/Accused who did not issue Exs-P4 to P6 in favour of the Respondent/complainant.

7.The Learned counsel for the Revision Petitioner contends that the trial Court failed to appreciate the fact that the signed unfilled cheques of the Revision Petitioner/accused herein were misplaced, hence in order to safeguard her interest the account pertaining to Ex P4 to P6 were closed by her on 08.09.2010 itself, that being the case the allegation of the respondent/complainant that the Revision Petitioner/accused came forward to issue Exhibit P4 to P6 on 09.11.2015 is absolutely false and purposely invented cause of action by the respondent/complainant to camouflage his misuse and misdeed to make illegal benefit from Exhibits-P4 to P6.

8.The Learned counsel for the Revision Petitioner contends that the trial Court miserably failed to appreciate the fact that the Revision Petitioner/Accused having clearly stated that Exhibits-P4 to P6 were misused and the hand writing both alphabetical as well as numerical available in Exhibit P4 to P6 were not drawn by her that being the case the Trial Court having observed that the petitioner is unable to explain and convince the Trial Court for entertaining this petition and the Revision Petitioner/Accused is seeking aid of the Court to gather defense which is erroneous and liable to be set aside.

9.The Learned counsel for the Revision Petitioner contends that the trial Court should have to meet the ends of justice and to bring the truth to light, Expert Opinion on the hand writing available in Exhibits-P4 to P6 is absolutely necessary.

10.The Learned counsel for the Respondent supported the order passed by the Trial Court and argued that the revision petitioner was protracting the proceedings before the Trial Court.

11.I have heard M/s.R.Uma Vijayan, learned counsel for the petitioner and Mr.C.Prabakaran, learned counsel for the respondent and perused the entire materials available on record.

12.The point that arises for my consideration is:

a) Whether the Trial Court was justified in dismissing the application filed by the Revision petitioner under section 45 of the Indian Evidence Act?

13.Ordinarily in the criminal case, the onus is on the complainant to establish his case against the Accused beyond all shadow of doubt. In fact an Accused can maintain silence. Furthermore, he need not enter into the witness box for the purpose of adducing evidence. Per contra, he can collect gather

favourable points from the evidence of the complainant and can make endeavour before the trial Court to shake the case of the Complainant. But in so far as the offence under section 138 of the Negotiable Instruments Act is concerned, it is to be borne in mind that it is a civil liability clothed in a criminal colour. Apart from that, an offence under section 138 of the Negotiable Instruments Act does not involve any moral turpitude. The purpose of cheque transaction is for ensuring credibility and by indicating section 138 of the Negotiable Instruments Act, the efficacy of the Bank transactions to operate in healthy atmosphere is the purpose in the considered opinion of this Court. Section 106 of the Indian Evidence Act is an exception to the General Rule to governing the onus of proof applies to such matters of defence which were supposed to be specifically within the knowledge of the concerned litigant. Besides this, any presumption as to the quantum of consideration as distinguished from the mere existence of consideration has accordingly to be drawn, not by means of Section 118 or even under section 114 of the Indian Evidence Act, but only from the recitals, if any, that instrument may contain.

14. On consideration of the various aspects and provisions of the Act, I am of view that the contention raised by an accused in a prosecution under Section 138 of the Act that he issued a blank signed cheque will not amount to admission of execution of cheque. A signed blank cheque leaf is very often referred to as a blank "cheque", but, strictly speaking, it is not a "cheque", as defined under the Act. It can be treated only as a "cheque leaf" containing admitted signature of accused. The admission of signature in a cheque leaf alone will not constitute admission of execution of the cheque. The argument that accused admitted "execution" of the cheque cannot, be accepted.

15. The person, who is stated to have received the document, may also establish his acquaintance with the handwriting and signature and his competence to identify the writing and signature of the person who executed the document and thereby prove execution of the document. There are also certain other modes of proof of documents. The evidence of a handwriting expert under Section 45 of the Act may be obtained to prove that the authorship of writing and signature in the document. The Court may also reach a conclusion on the authorship of the handwriting and signature by comparison, as envisaged under Section 73 of the Evidence Act. However, the only caution is, the Court must be find it safe to act upon such evidence, before it is accepted.

16. In *S. Gopal Reddy v. State of A.P.*, (1996) 4 SCC 596, at page 616, the Hon'ble Supreme Court held thus:

"The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. The receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document. These modes are legitimate methods of proving documents but before they can be accepted they must bear sufficient strength to carry conviction.

17. The prosecution shall however, make clear to Court, each of the circumstance which is relied upon by it, to establish drawing of the cheque by accused. The mere fact that the cheque produced in Court came from possession of complainant alone will not be sufficient to prove execution, even though it may be one of the circumstances. No law allows a Court to presume that the cheque which is produced and marked in Court was handed over or delivered to complainant by accused. The Court, at best, can say that the cheque was in possession of complainant. But, under what circumstances it came to his possession is to be stated by complainant. In the absence of such statement, Court cannot proceed on any assumption that it was handed over to complainant by accused. For a successful prosecution of offence under Section 138 of the Act, complainant must allege and prove that the cheque was "drawn" or executed by the accused. In the absence of an allegation in the complaint that the cheque was drawn by the accused and in the absence of proof of such fact, an accused cannot be convicted for offence under Section 138 of the Act.

18. The well-known observations of Jenkins, C.J. in *Barindra Kumar Ghose v. Emperor*, ILR 37 Cal 467 on this point have been quoted repeatedly in support of the theory that a Judge must remain blind and not use his eyes except by the light of the handwriting expert on the argument of the counsel. The observations which Jenkins, C.J. made in that case is as follows at page 503:

"I cannot think this was a proper course to pursue; a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and

without such guidance as might be derived from the arguments of counsel, and the evidence of experts. In Phooddee Bibee v. Govind Chunder Roy, (1874) 22 Suth WR 272 it was said by the Court that a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution'".

19. Section 45 of the Evidence Act, therefore, shows that the opinion of a handwriting expert on the identity of handwriting is a relevant fact and that such a person who is specially skilled is an expert. Apart from saying that the opinion of such a handwriting expert is a relevant fact, it does not proceed to prevent the Judge from using his own eyes to see or examine the identity or otherwise of the handwriting in question.

20. The learned trial judge in her order observed that section 20 of the Negotiable Instrument Act confers implied authority upon payee to fill up the instrument and in this case the signature of the accused is admitted and hence the opinion of handwriting expert is not necessary for deciding the point as to legally enforceable debt.

21. The above observation made by the learned trial judge is legally incorrect. A bare reading of Section 20 of the Negotiable Instruments Act would go to show that it would apply to only a stamped instrument, promote and bill of exchange and not to the cheques. As per Section 20 of the Negotiable Instruments Act, the holder in due course has every authority to complete the blank promote and bill of exchange delivered by him after properly signing therein by the maker of the instrument. But, Section 20 will have no application to the blank cheques issued after signing by the drawer.

22. The main contention made by the respondent is that the revision petitioner remains silent before the trial Court and not even cross examined by the respondent. This contention raised by the respondent cannot be sustained for the simple reason that the revision petitioner can maintain silent before the trial Court and for that reason, it cannot be said that the application filed by the revision petitioner deserves to be dismissed.

23. Therefore, the order passed by the learned magistrate in dismissing the application filed by the revision petitioner is not correct.

24. In view of the facts and circumstances of the case, this Court is of the opinion that if the words contained in the impugned cheque are compared, the interest of the respondent /

complainant will not be prejudiced. The revision petitioner has sought permission to prove her case. Therefore, this Court allow the criminal revision case filed by the petitioner and further directed the learned Judicial Magistrate, Fast Track Court, (Magisterial Level No.II), Poonamalle to send Exhibits-P4 to P6 to the handwriting expert for verifying the authenticity of the hand writing both alphabetical as well as numerical contained in the said documents. Consequently, the dismissal order passed in the CMP.No.4454 of 2016 in STC.No.131 of 2016 is set aside. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vs

To

The Judicial Magistrate, Fast Track Court,
(Magisterial Level No.II), Poonamalle,
Thiruvallur District.

+1 cc to Mr.T.Subramanian, Advocate Sr.No.80688

+1 cc to Mr.C.Prabakaran, Advocate Sr.No.81565

Judgment made in
Crl.R.C.No.325 of 2017
and
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RGN (CO)
CSL/14.12.2018

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