IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2018

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.R.C.No.1444 of 2018 and
Crl.M.P.No.16839 of 2018

A.Krishnasamy, M/70
S/o. Arumughagounder,
No.2/153, Raju Nagar,
Chinnampalayam,
Pollachi Taluk.
.. Petitioner/Complainant

Vs.

K.S.Kalaiselvan,
S/o. Sethuramalingam,
No.11, "Kailash",
Venkateswara Colony,
Ambikapuram Post,
Palakkad, Kerala - 678 011 ..Respondent/Accused

Prayer: Criminal Revision filed under Sections 397 and 401 of Cr.P.C., against the order dated 12.10.2018 made in C.M.P.No.6062 of 2017 in S.T.C.No.45 of 2014 on the file of the learned Judicial Magistrate No.1, Pollachi.

For Petitioner : Mr.D.Arun Kumar

ORDER

This criminal revision has been preferred seeking to set aside the order dated 12.10.2018 in C.M.P.No.6062 of 2017 in S.T.C.No.45 of 2014, on the file of the Judicial Magistrate Court No.1, Pollachi.

2 For the sake of convenience, the petitioner and the respondent will be referred to as the complainant and the accused respectively.

3 The brief facts leading to the filing of this criminal revision are as follows:

3.1 It is the case of the complainant that on 05.08.2013, the accused borrowed a sum of Rs.5,00,000/- in cash for his urgent family needs and issued a post dated cheque dated 03.10.2013 drawn on State Bank of Travancore, for Rs.5,00,000/-. The complainant presented the cheque for

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clearance on 04.10.2013 in Indian Bank, Pollachi Branch, where he was holding his account. The cheque was returned unpaid on 11.10.2013, with the endorsement "Account Closed".

3.2 Hence, the complainant issued statutory notice dated 15.10.2013 to the accused. Since the accused did not pay the cheque amount, the complainant initiated a prosecution in S.T.C.No.45 of 2014 before the Judicial Magistrate Court No.1, Pollachi, under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") against the accused.

3.3 On the appearance of the accused, he was questioned under Section 251 Cr.P.C. and he denied the accusation.

3.4 To prove the charge, the prosecution examined three witnesses, viz., the complainant (PW1), the Branch Manager (PW2) of Indian Bank, Pollachi Branch, where the complainant had his account and the Branch Manager (PW3) of State Bank of Travancore, Palakkad Branch, where the accused had his account and marked one exhibit, viz., the impugned cheque (Ex-P1).

3.5 It is seen that the Branch Manager (PW3) of State Bank of Travancore, Palakkad Branch, where the accused had his account has stated in his evidence that the impugned cheque relates to the account of a partnership firm by name OMCO Dairy Products, in which Kamalam, Kalaiselvan, Kuppusamy and Selvarathinam were partners and that the said account was closed on 31.12.2009.

3.6 Under such circumstances, the complainant filed Crl.M.P.No.6062 of 2017 in S.T.C.No.45 of 2014 under Section 319 Cr.P.C. for including OMCO Dairy Products as co-accused.

3.7 After hearing either side, the trial Court, by order dated 12.10.2018, has dismissed Crl.M.P.No.6062 of 2017 in S.T.C.No.45 of 2014, aggrieved by which, the complainant is before this Court.

4 Heard Mr.D.Arun Kumar, learned counsel appearing for the complainant and perused the impugned order.

5 To appreciate the contentions of Mr.D.Arun Kumar, learned counsel appearing for the complainant, it may be necessary to once again recapitulate the case of the complainant.

6 It is the specific case of the complainant that for the hand loan of Rs.5,00,000/- that was borrowed by the accused on 05.08.2013, the accused issued the impugned post dated cheque for Rs.5,00,000/- which was signed by him. The impugned cheque does not indicate that it has been issued from the account of OMCO Dairy Products inasmuch as it bears only the signature of Kalaiselvan. Therefore, the complainant believed that the impugned cheque had been issued by Kalaiselvan from the account held by him in his name. The complainant presented the cheque for clearance and it was returned by State Bank of Travancore, Palakkad Branch, on the ground "Account Closed". Even at that

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time, the State Bank of Travancore, Palakkad Branch, did not inform the payee Bank (Indian Bank, Pollachi Branch – complainant bank) that the impugned cheque relates to one OMCO Dairy Products and that the said account has been closed. Hence, there was no possibility for the complainant to know even at that time that the impugned cheque relates to the account of OMCO Dairy Products. Therefore, the complainant believed that the impugned cheque was issued by Kalaiselvan from the account maintained by him and so, he issued the statutory notice dated 15.10.2013 to Kalaiselvan alone. Since Kalaiselvan (accused) did not make any payment, the complainant filed the case in S.T.C.No.45 of 2014 only against Kalaiselvan and not against OMCO Dairy Products.

7 Normally, if a cheque is issued from the account maintained by a company/firm, it would bear the seal of the company/firm and also the signature of the authorized signatory. In such circumstances, it is imperative for the complainant to array the company as an accused in the complaint and the directors/partners of the company/firm can be made co-accused by invoking Section 141 of the NI Act, viz., vicarious liability provision and the failure of the complainant to array the company/firm as accused in such cases will be fatal to the complainant's case.

8 The first question to be answered by this Court is whether OMCO Dairy Products could be included as a co-accused under Section 319 Cr.P.C. in view of the evidence of the Branch Manager (PW3), State Bank of Travancore, Palakkad Branch.

8.1 The trial Court has given a specious reasoning that the name of the accused is "Kalaiselvam", but, the Branch Manager (PW3), State Bank of Travancore, Palakkad Branch, has given the name of one of the partners of OMCO Dairy Products as "Kalaiselvan". This Court does not know whether while typing the deposition, the Typist had typed it as "Kalaiselvam" instead of "Kalaiselvan". In fact, in the evidence of the Branch Manager (PW3), State Bank of Travancore, Palakkad Branch, he has clearly stated that the accused in this case was a partner in OMCO Dairy Products.

8.2 The trial Court has failed to appreciate the seriousness of the case at hand and has proceeded to deal with this case like any other run of the mill case under Section 138 of the NI Act. It should have shocked the conscience of the trial Magistrate when it came to the light from the evidence of the Branch Manager (PW3), State Bank of Travancore, Palakkad Branch that the impugned cheque relates to the partnership firm, OMCO Dairy Products, and he should have called upon the Branch Manager (PW3), State Bank of Travancore, Palakkad Branch, to produce further evidence relating to the complete details of the partners of OMCO Dairy Products by exercising the powers under Section 311 Cr.P.C. on his own accord in order to elicit the

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truth.

8.3 Unfortunately, this has not been done by the Magistrate, may be, due to work pressure. However, OMCO Dairy Products cannot be impleaded as co-accused in view of the fact that the account itself was closed in the year 2009 and there is no material to show that the impugned cheque was issued on behalf of OMCO Dairy Products, because, it is the case of the complainant that a sum of Rs.5,00,000/- was borrowed as hand loan by Kalaiselvam and not as a loan given to OMCO Dairy Products. Therefore, the trial Court was right in not allowing the petition for impleading OMCO Dairy Products as a co-accused but the reason given by the trial Court is not sound.

9 The next question to be answered by this Court is what is the remedy for the complainant. The complainant can now lodge a police complaint or file private complaint before the Magistrate for cheating against Kalaiselvan alleging that he had issued the cheque of OMCO Dairy Products and had cheated him. The prosecution of an offence under Section 138 of the NI Act need not be clubbed with the complaint of cheating, because, the two penal provisions do not have the same ingredients. There is an additional burden on the accused under Section 139 of the NI Act as well under Section 106 of the Evidence Act, to prove the facts that are exclusive to his knowledge.

Hence, this petition is closed with liberty to the complainant to approach the Central Crime Branch/District Crime Branch, as the case may be and lodge a complaint of cheating and the police are directed to investigate the same in accordance with law. Connected Crl.M.P. is also closed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

nsd

To

1. The Judicial Magistrate I
   Pollachi.
2. Do Thro The Chief Judicial Magistrate
   Coimbatore.

+1 CC to Mr.D.Arunkumar, Advocate sr 85621.

Crl.R.C.No.1444 of 2018 and
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