

BAIL SLIP

The appellant herein/accused viz., V.Kanchana, W/o.Viswanathan, was directed to be released on bail as per the order of this Court dated 30.09.2011 made in CRL MP NO.1 of 2011 in CRL RC No.1393 of 2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.02.2019	Pronounced on: 20.02.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Criminal Revision Case Nos.1393 & 1533 of 2011

V.Kanchana,
W/o.Viswanathan,
Proprietor Sri Viswanathan Stores,
No.736, Ranga Gounder Street,
Coimbatore.

... Appellant/Accused
in Crl.R.C.No.1393 of 2011

T.Suresh Kumar,
S/o.Thammanan,
No.208, Palanisamy Colony,
Ponnaiya Rajapuram,
Coimbatore-641 001.

... Appellant/Complainant
in Crl.R.C.No.1533 of 2011

/versus/

T.Suresh Kumar,
S/o.Thammanan,
No.208, Palanisamy Colony,
Ponnaiya Rajapuram,
Coimbatore-641 001.

... Respondent/Complainant
in Crl.R.C.No.1393 of 2011

V.Kanchana,
W/o.Viswanathan,
Proprietor Sri Viswanathan Stores,
No.746, Ranga Gounder Street,
Coimbatore.

... Respondent/Accused
in Crl.R.C.No.1533 of 2011

Prayer in Crl.R.C.No.1393 of 2011: Criminal Revision Case is filed under Section 397 & 401 of Cr.P.C, against the conviction and sentence fine imposed on her by the Judicial Magistrate

No.I, Coimbatore in S.T.C.No.131 of 2009, dated 10.05.2011, which was confirmed and sentence above modified by the Additional District Judge, Fast Track Court No.III, Coimbatore by his order dated 06.09.2011 in Criminal Appeal No.115 of 2011. Prayer in Crl.R.C.No.1533 of 2011: Criminal Revision Case is filed under Section 397 r/w 401 of Cr.P.C, against the judgment dated 06.09.2011 in C.A.No.115 of 2011 Additional District Judge, (Fast Track Court No.III), Coimbatore by modifying sentence imposed in the Judgment dated 10.05.2011 in S.T.C.No.131/2009 on the file of Judicial Magistrate No.I, Coimbatore.

For Petitioner : Mr.P.R.Thiruneelakandan
in Crl.R.C.No.1393 of 2011

For Respondent : Mr.A.V.Raja
in Crl.R.C.No.1393 of 2011

For Petitioner : Mr.A.V.Raja
in Crl.R.C.No.1533 of 2011

For Respondent : Mr.P.R.Thiruneelakandan
in Crl.R.C.No.1533 of 2011

C O M M O N O R D E R

Both the Revision Petitions are directed against the order passed by the Lower Appellate Court confirming the sentence and conviction passed against the accused in S.T.C.No.131 of 2009. While the accused in Crl.R.C.No.1393 of 2011 questions the legality of the order passed by the Courts below convicted him for offence under Section 138 of Negotiable Instrument Act.

2. The complainant has preferred Crl.R.C.No.1533 of 2011 seeking for enhancement of sentence.

3. The brief facts leading to these two Revision Petitions are as below:

T.Suresh Kumar, the complainant has filed the complaint under Section 138 of Negotiable Instrument Act alleging that the accused V.Kanchana borrowed a sum of Rs.5,00,000/- on 03.03.2008 from him to met out her urgent necessity. She executed a pro-note agreeing to repay the same with interest at the rate of 18% per annum. Despite repeated demand to repay the money, the accused failed to pay the said sum. Finally, she issued three cheques as detailed below:-

Sl. No.	Date	Cheque No.	Drawn at	Amount
1.	05.08.2008	313450	State Bank of India Coimbatore City Branch, Coimbatore-641 001.	Rs.1,00,000/- -
2.	25.08.2008	313451	State Bank of India Coimbatore City Branch, Coimbatore-641 001.	Rs.1,00,000/- -
3.	10.09.2008	313453	State Bank of India Coimbatore City Branch, Coimbatore-641 001.	Rs.1,00,000/- -

4. When those cheques were presented for collection on 11.09.2008 in the complainant bank HDFC bank, R.S.Puram, Coimbatore, same was returned with endorsement "Refer the Drawer". The statutory notice intimating the return of cheque was issued to the accused on 16.09.2008. Notice was received by the accused on 24.09.2008, the accused neither paid the money nor replied to the notice. Hence, private complaint for alleged offence punishable under Section 138 of Negotiable Instrument Act.

5. The trial Court took up the complaint on file. Caused notice to the accused and tried her. After considering the pro-note Ex.P.1, Cheques Ex.P.2 to Ex.P.4, return memos of the respective banks marked as Ex.P.6 to Ex.P.7, common debt advance from the bank Ex.P.8, Statutory Notice (Ex.P.9) and Acknowledgement card (Ex.P.10) and appreciating the evidence of PW.1 (T.Suresh Kumar) complainant, PW.2 (Ravichandran), D.W.1 (Indrani), D.W.2 (Balaji) and D.W.3 (Kanchana) accused and the defence documents (1). F.I.R regarding missing of the accused husband and (2). paper publication of man missing which were marked as Ex.D1 and Ex.D.2 found the accused guilty for offence under Section 138 of Negotiable Instrument Act. Convicted and sentenced her to undergo 6 months S.I and fine of Rs.5,000/- in default 1 month S.I.

6. The accused has preferred the appeal before the District and Sessions Court, Coimbatore in C.A.No.115 of 2011 contended that pro-note Ex.P.1 not proved in accordance with law and the cheques Ex.P.2 to Ex.P.4 were not issued to discharge legally enforceable debt. Further, contended that the trial Court failed to consider the suspicious background of the origin of the complaint and the fact that cheques were issued as security for the loan availed from the mother of the complainant. The complainant have no financial capacity to lend money.

7. The Lower Appellate Court on re-appreciation of the evidence in the light of grounds of appeal has held that the complainant has proved through Ex.P.1 the legally enforceable debt and cheques Ex.P.2 to Ex.P.4 was issued to discharge the said debt. Regarding the Financially capacity of the complainant, the lower Appellate Court has considered the background of the complainant, his avocation in the International Company with Post-Graduation has held that the Financial capacity of the Company cannot be doubted.

8. Analysing the deposition of DW.2 attesting witness to the pro-note Ex.P.1, the Lower Appellate Court has held against the accused upholding the conviction. However, modified the sentence on the ground that the trial Court has conducted the case as a summary proceedings. Therefore as per Section 262 (2) of Cr.P.C, Court cannot impose imprisonment for a term exceeding three months.

9. In the above said background, aggrieved by conviction the accused has preferred the revision. Aggrieved by the reduction of sentence the complainant has filed his revision petition for enhancement.

10. The learned Counsel appearing for the Accused/petitioner in CrI.R.C.1533 of 2011 would submit that when the accused through oral and documentary evidence has probablised the non-existence of enforceable debt, the Courts below ought not to have presumed against the accused. He would further submit that when the cheques returned with an endorsement "Refer the Drawer", it is not one of the ingredients to invoke under Section 138 of Negotiable Instrument Act.

11. Per contra, the Learned Counsel appearing for the complainant would submit that return of cheques with endorsement "Refer the Drawer" will squarely falls within the scope and ambit of Section 138 of Negotiable Instrument Act. This legal issued has been settled by Hon'ble Supreme Court in Electronic Trade and Technology Development Corporation., Ltd Vs. Indian Technologists and Engineers (Electronics) Pvt. Ltd. reported in 1996 (1) SCR 843.

12. As far as, the reduction of sentence is concerned, the learned Counsel for the complainant would submit that though the trial was conducted as summary procedure since, the provisions of Negotiable Instrument Act prescribes higher punishment, the provisions of special Act will prevail over the Procedural Code. Therefore, the Lower Appellate Court ought not to have reduced the period of imprisonment. Hence, Section 262(2) of Criminal Procedure Code has no application, insofar as

offence under Negotiable Instrument Act even if its tried summarily

13. Heard the respective counsels and perused the records.

14. As far as, the 1st plea regarding maintainability of complaint under Section 138 of Negotiable Instrument Act, when cheque is returned with endorsement "Refer the Drawer", the Hon'ble Supreme Court after considering the provisions of Negotiable Instrument Act, in Electronic Trade and Technology Development Corporation., Ltd Vs. Indian Technologists and Engineers (Electronics) Pvt. Ltd. reported in 1996 (1) SCR 843 has held as below:-

"Explanation to Section 138 amplifies that for the purpose of the Section, "debt or other liability" means a legally enforceable debt or other liability.

It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "I refer to the drawer" (2) "instructions for stoppage of payment" and (3) "stamp exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

15. Therefore, it is settled by Supreme Court long back that return of cheque with endorsement "Refer the Drawer" squarely falls within the scope and ambit of Section 138 of Negotiable Instrument Act, which prescribes penal provision for issuance of cheque without sufficient fund.

16. The 2nd plea involved in these two revision petitions are whether the Courts are competent to impose sentence for a term exceeding three months while convicting the accused under Section 138 of Negotiable Instrument Act. When the trial being conducted as per summary procedure under chapter

XXI of the Code where Section 260 to Section 265 of Cr.P.C, prescribes the procedure and power to try summarily. No doubt under Section 262 (2) of Cr.P.C, the maximum period of imprisonment is prescribed as three months. However, when the trial though numbered as summary trial Case being conducted as per the procedure under the calendar cases, Section 262(2) Cr.P.C, will have no application. Furthermore, the Negotiable Instrument Act is a special Act wherein, the statute prescribes the procedure as well as the punishment. Therefore, the Special statute will prevail upon the general statute. Under Section 143 Negotiable Instrument Act, the trial can be conducted summarily at the same time, if a person found guilty, the imprisonment shall extend to a term of two years. Therefore, the reason given by the Lower Appellate Court for modifying the sentence per se not legally tenable. However, just because the statute prescribes higher punishment, it is not necessary that the maximum sentence should be imposed.

17. As far as, the facts of the case is concerned, though the Lower Appellate Court has reduced the sentence to three months S.I for a wrong reason, the same need not be interfered, in view of the fact that the accused being a Lady and the default in payment as occurred due to missing of her husband suddenly for the reason best known.

18. For the aforesaid reason, this Court finds no merit in either of these revision petitions. Hence, both the Revision Petitions are dismissed. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

bsm

To,

1. The Additional District Judge, (Fast Track Court No.III), Coimbatore.

2. The Judicial Magistrate No.I, Coimbatore.

3. The Section Officer,
V.R Section, High Court, Madras. (2 Copies)
+1 cc to Mr.A.V.Raja, Advocate SR.No.15910

order in

Cr1.R.C.Nos.1393 & 1533 of 2011

MR(CO)
CSL/22.04.2019