

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2019

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Cr1.R.C.No.1412 of 2011

Thirunarayanan, 60 years,
S/o. Gopalakrishnan,
116-A, Rasikumaripalayam,
Namakkal Road, Mohanur,
Namakkal District.

... Petitioner/Accused

Vs.

Govindasamy, 65 years,
S/o. Narayanasamy,
A-3, Hydrogen Street,
Block-27, Neyveli-3.

..Respondent/Complainant

Criminal Revision filed under Sections 397 and 401 Cr.P.C., against the judgment dated 28.09.2011 made in C.A.No.43 of 2011 on the file of the Additional District and Sessions Court (FTC No.3), Vridhachalam, confirming the judgment dated 05.01.2011 made in S.T.C.No.368 of 2009 on the file of the District Munsif cum Judicial Magistrate Court, Neyveli.

For Petitioner : Mr.S.Sivakumar

ORDER

This criminal revision has been preferred seeking to set aside the conviction made by judgment dated 28.09.2011 in C.A.No.43 of 2011 on the file of the Additional District and Sessions Court (FTC No.3), Vridhachalam, confirming the judgment dated 05.01.2011 made in S.T.C.No.368 of 2009 on the file of the District Munsif-cum-Judicial Magistrate Court, Neyveli.

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

3 The facts in brief leading to the filing of this criminal revision petition are as under:

3.1 It is the case of the complainant that on 10.03.2009, the accused borrowed a sum of Rs.3,00,000/- for his family expenses promising to return the amount within one month and on the same day, he issued the impugned cheque (Ex-P1) dated 13.04.2009 drawn on Canara Bank, Neyveli Branch, for Rs.3,00,000/-. The complainant presented the cheque on 13.04.2009 and the same was dishonoured on the ground "Account Closed". This was intimated to the complainant by the Bank. The complainant issued the statutory demand notice (Ex-P3) dated 24.04.2009 to the accused who received it on 25.04.2009 and issued a reply notice (Ex-P5) dated 19.05.2009. Since the accused did not make payment, the complainant initiated a prosecution in S.T.C.No.368 of 2009 before the District Munsif-cum-Judicial Magistrate, Neyveli, under Section 138 of the Negotiable Instruments Act, 1881, (for brevity "the NI Act" against the accused.

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

3.3 To prove the case, the complainant examined himself as PW1 and marked Exs-P1 to P6.

3.4 When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. On behalf of the accused, three witnesses (DW1 to DW3) were examined and five exhibits (Exs-D1 to D5) were marked.

3.5 After considering the evidence on record and hearing either side, the trial Court, by judgment dated 05.01.2011, passed in S.T.C.No.368 of 2009, convicted and sentenced the accused as follows:

Provision under which convicted	Sentence
Section 138 r/w 142 of the NI Act	One year simple imprisonment and fine of Rs.5,000/-, in default to undergo six months simple imprisonment
Section 357(1) (b) Cr.P.C.	Within the fine amount of Rs.5,000/-, Rs.2,500/- shall be paid to the complainant as compensation.

3.6 Challenging the above conviction and sentence, the accused filed C.A.No.43 of 2011 which was heard by the learned Additional District and Sessions Judge, Vridhachalam, who

dismissed the appeal on 28.09.2011, challenging which, the accused is before this Court.

4 Heard Mr.S.Sivakumar, learned counsel for the accused. Notice has not been served on the complainant. However, the case is pending from the year 2011 onwards.

5 Before advertng to the submissions of the learned counsel for the accused, it may be necessary to state here that this Court cannot re-appreciate the evidence like a second appellate Court in view of the judgment of the Supreme Court in State of Maharashtra, etc. vs. Jagmohan Singh Kuldip Singh Anand and Others, etc.¹, wherein, it has been held that the powers under Section 397 read with 401 Cr.P.C. cannot be exercised as a second appellate power. The relevant portion of the said judgment reads as follows:

"22. The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,

"for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court".

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

(emphasis supplied)

23. On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn. [(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC

1 2004 (7) SCC 659

p. 651, para 5)

"The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."

However, the power under Section 397 r/w 401 Cr.P.C. can be exercised if it is shown that the order passed by the Courts below suffer from any illegality or impropriety.

6 Before deciding to issue a fresh notice in this revision petition, this Court heard Mr.S.Sivakumar, learned counsel for the accused, extensively, in order to find out if there is any illegality or perversity in the order passed by the Courts below.

7 The learned counsel for the accused contended that the complainant did not have means to give the loan and he has not proved the debt. In this regard, he contended that the complainant has admitted that he was facing a prosecution under Section 138 of the NI Act that has been filed against him by Jayapriya Chit Funds for the dishonour of a cheque amounting to Rs.18,00,000/-, which itself shows that the complainant is not a man of means. He further contended that the impugned cheque was issued by the accused to one Muthu and the complainant, who is the friend of Muthu, has obtained the cheque and has filed the present prosecution.

8 This Court perused the evidence on record. On perusal of the evidence, it is seen that the complainant and the accused were good friends. The accused himself has admitted that he had earlier borrowed monies from the complainant. In the cross-examination, the complainant has clearly stated that he retired from Neyveli Lignite Corporation and after retirement, he was working as agent in Sriram Chit Funds and Life Insurance Corporation of India. He has also admitted that he himself has filed five prosecutions under Section 138 of the NI Act against different persons and has received around Rs.4,00,000/- prior to 01.03.2009. Both the Courts below have believed the testimony of

the complainant on the aspect of means and have rejected this argument of the defence.

9 Independent of that, after perusal of the evidence of the complainant, this Court is unable to agree with the submissions of the learned counsel for the accused that the impugned cheque was issued by him to one Muthu. Both the Courts below disbelieved this defence. In response to the statutory demand notice (Ex-P3) issued by the complainant, the accused issued a reply notice (Ex-P5) to the complainant wherein he has completely denied not only the borrowal of the money but has also denied the very issuance of the cheque. In fact, in the reply notice (Ex-P5), there is no whisper about Muthu or the alleged transactions with Muthu. In the statutory demand notice (Ex-P3), the complainant has clearly given the description of the cheque including the cheque number, whereas, in the reply notice (Ex-P5), the accused has completely denied the very issuance of the cheque. Though the accused can take various defences, yet, in the teeth of the Section 139 of the NI Act, the accused cannot take mutually destructive defences.

10 In Rangappa Vs Sri Mohan [(2010) 11 SCC 441], the Supreme Court has held that when once a cheque is issued, the presumption that it has been issued for a legally enforceable debt is available and the accused can discharge the presumption by preponderance of probability. In this case, the accused has not discharged the burden by preponderance of probability. In such perspective of the matter, the conviction of the accused by the Courts below is confirmed.

11 Considering the facts and circumstances of the case, the substantive sentence of one year simple imprisonment slapped on the accused by the trial Court in S.T.C.No.368 of 2009 and confirmed by the Appellate Court in C.A.No.43 of 2011 is reduced to six months simple imprisonment. However, the sentence of fine and the default sentence shall remain the same.

In the result, this criminal revision stands allowed in part. The trial Court is directed to secure the accused for undergoing the remaining period of sentence, if any.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District and Sessions Judge,
(FTC No.3), Vridhachalam.
2. The District Munsif cum Judicial Magistrate,
Neyveli.

Copy to
The Section Officer,
Criminal Section,
High Court, Madras.

Crl.R.C.No.1412 of 2011

KS (CO)
GSP (21/02/2019)



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