

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2018

DELIVERED ON : 12.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.R.C.Nos.1103 and 1104 of 2017
and
Crl.M.P.No.10430 of 2017

Balu @ Chinnasamy ... Petitioner in both Crl.R.Cs

Vs

C.Murugesan ... Respondent in both Crl.R.Cs

Common Prayer: Criminal Revisions filed under Section 397 r/w 401 of the Code of Criminal Procedure, against the order in Crl.M.P.Nos.1167 and 1168 of 2017 in STC.No.28 of 2011, on the file of the learned Fast Track Court (Judicial Magistrate Level), Dharmapuri, dated 26.07.2017.

(In both the Crl.R.Cs)

For Petitioner : Mr.P.Vasanth

For Respondent : Mr.C.Prabakaran

COMMON ORDER

These Criminal Revision Petitions were filed by the Petitioner/Complainant against the orders passed in Crl.M.P.Nos.1167 and 1168 of 2017 in STC.No.28 of 2011, on the file of the learned Fast Track Court (Judicial Magistrate Level) Dharmapuri dated 26.07.2017.

2.Brief case for the Petitioner in both Revisions:

The Petitioner was doing real estate business for the past 20 years and on 25.08.2006 the respondent borrowed a sum of Rs.75,000/- as hand loan from him and assured to repay the loan with interest . The respondent issued two cheques bearing Nos.003678, 003679 dated on 25.01.2007 and 27.01.2007 for the amount of Rs.50,000/- and Rs.25,000/- respectively both drawn on Central Bank of India Tharmapuri branch. The petitioner presented the above said cheques through his Banker, Central Bank of India, Dharmapuri Branch for realization on 4.6.2007 and

the same was returned with an endorsement "Insufficient funds" on 06.06.2007. The petitioner/complainant issued statutory notice dated 19.06.2007 and the same was not received by the respondent and failed to pay the above said cheques amount within the stipulated time. Thus the complaint was filed under section 138 of Negotiable Instrument Act.

3.The petitioner/complainant examined himself and examined witnesses PWs 2 and 3 Bank Managers. The statutory notice and return postal cover is marked as documents Exhibits P 1 and P 2 and also marked as Exhibits P3 to P5 through PWs 2 and 3.

4.The original cheques had been lost along with the return memo dated 06.06.2007 without which it will be legally non feasible for the petitioner. At the time of filling, the original cheques and the memo were presented before the learned trial Court and after it is being compared, Xerox copies of the same have been produced and kept custody of the Court and subsequently accepted. The petitioner has lost the cheques and lodged a complaint before the police to trace the cheques and the complaint copy marked before the learned trial Court on 12.7.2017.

5.The bank managers of drawer and drawee bank as official witness and adduced evidence as PW 2 and 3 had stated in their evidence the aforesaid cheques in fact had been produced and bounced at the respective dates and the details were recorded in their respective cheque return registers both of which were marked as exhibits. Hence the petitioner/complainant filed miscellaneous applications in CrI.M.P.Nos.1167 and 1168 of 2017 in STC.No.28 of 2011, to mark the xerox copies of the cheques and return memo as secondary evidence.

6.The learned counsel for the petitioner submits that the learned Magistrate had committed a grave error in dismissing the plea of the petitioner to mark the photocopies of the original cheques, which were compared with the original at the time of filing and kept under the custody of the Court, as secondary evidence.

7.The learned counsel for the petitioner submits that the learned Magistrate ought to have known that the photocopies of the original cheques are very much permissible under law to be marked as secondary evidence.

8.The learned counsel for the petitioner submits that the learned Magistrate ought to have known that the very fact that sessions case was numbered proves the fact that the petitioner had filed the original cheques at the time of filing the case as held unambiguously in Enkay Texofood Industries Ltd v. The State of Andhra Pradesh (Criminal Petition No.5195 of 2014 dated 22.4.2015).

9.The learned counsel for the petitioner submits that the learned Magistrate ought to have known that the original cheques are returned to the interim custody of the petition upon filing a memo, available on the record of the Court, to that effect after the originals were compared with the photo copies and kept under the Court custody. Therefore the photo copies which are now available in the Court can be presumed as the exact copies of the original cheques as held supra.

10.The learned counsel for the petitioner submits that the learned Magistrate had miserably failed to take into account the additional evidence with respect to the proof of existence of the original cheques adduced by PW3, the bank manager of the drawee (petitioner) bank by whose evidence it was established convincingly through the "cheque return register" of the bank marked as Exhibit P5, that the aforesaid original cheques were presented by the petitioner in his savings account at his bank for collection 04.06.2007 and the same were returned on 6.6.2007 on the grounds of insufficiency funds.

11.The learned counsel for the petitioner submits that the learned Magistrate had miserably failed to note that PW3 had categorically testified that only the "original cheques" would normally be processed to the drawer bank upon presenting which again goes on to show that the cheques presented by the petitioner in his savings account through his bank were originals.

12.The learned counsel for the petitioner submits that the learned Magistrate had miserably failed to take note of the fact that the above evidence was substantiated by the evidence of PW2, the bank manager of the drawer (accused) bank who too had categorically testified that exactly the same cheques bearing the same numbers and dates as testified by PW3, i.e, cheques bearing Nos. 003678 and 003679 and dated 25.01.2007 and 27.01.2007 respectively were returned for insufficiency of funds as evinced in the cheque return register of the drawer bank marked as Exhibit P4. Additionally, penalty of Rs.68/- were

deducted from savings of the respondent for the bouncing of the cheques in his account.

13.The learned counsel for the petitioner submits that the learned Magistrate ought to have taken serious note of the fact that the petitioner had made a complaint dated 5.7.2017 to the police about the loss of the original cheques and around the same time the respondent himself testified before this Court that he has at his custody the original cheques causing serious suspicion upon the manner of loss of the cheques from the custody of the petitioner. The complaint copy is marked as Exhibit P6.

14.The learned counsel for the petitioner submits that the learned Magistrate ought to have known that the appellant could file the complaint about the loss of the cheques only after he realized they were lost and accordingly the appellant had preferred a complaint dated 05.07.2017 and the same had been produced before the Court and marked as Exhibit P6 and a separate petition about the loss of the cheques before the Court earlier or after 12.07.2017 is not contemplated under any law of this land and such requirement as observed by the learned Magistrate is totally misconceived.

15.The learned counsel for the petitioner cited the reported in CRP (PD) 1963 of 2013 in support of his submissions.

16.The learned counsel for the respondent supported the findings of the learned Judicial Magistrate and sought for dismissal of this revision petition.

17.I heard Mr.P.Vasanth, learned counsel for the petitioner and Mr.C.Prabakaran, learned counsel for the respondent in both the Criminal Revision Cases and perused the entire materials available on record.

18.At this juncture, it would be apropos to look into the provision of Section 65(a) of the Indian Evidence Act, 1872 and the same reads as follows:-

"Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(a). When the original is shown or appears to be in the possession or power - of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it and when, after the notice mentioned in Section 66, such person does not produce it."

19. From the close reading of the provision of Section 65(a) of the said Act, it is easily discernible that a party to a proceeding can seek evidence of Section 65(a) of the said act. Only after proving the fact that the original document in question is in possession or power of the person against whom, the same is sought to be proved. Therefore, a primordial duty is cast upon him to prove that the person against whom the document is sought to be proved is in possession of the same and further, Section 65(a) of the said Act can be invoked only after giving notice mentioned in Section 66 of the said Act.

20. With these legal backdrops, the Court has to analyse the argument advanced by the learned counsel appearing for the petitioner/complainant.

21. As stated earlier, all the cheques in question have been presented in the concerned Bank for collection and the concerned Bank has returned all the cheques stating "funds insufficient". The petitioner/complainant after getting proper memorandum from the concerned Bank has issued a statutory notice and the same has also been received by the respondent/accused. But the respondent/accused has not chosen to give any reply denying issuance of the cheques in question. Therefore, it is pellucid that the respondent/accused has issued the cheques in question to the appellant/complainant and the Court need not decide the same in detail.

22. The only point that has now winched to the fore in the present Criminal Revision is "Whether the Xerox copies of the impugned cheques in question can be marked and whether the provision of Section 65(a) of the Indian Evidence Act, 1872 can be invoked in the present case?"

23. The entire contention of the petitioner/complainant hinges upon the evidence of P.W.1. The petitioner/complainant has been examined as P.W.1. He would say in his evidence that the respondent/accused received the loan and issued two cheques

in question. But the respondent/accused has not turned up and after some time and he cheated the petitioner/complainant.

24. At this juncture, it would also be more useful to look into the xerox copies of the cheques in question. The specific contention of the petitioner/complainant is that at the time of filing the complaint, original cheques have been produced for the scrutiny of the Court and after making scrutiny, the same have been returned to the petitioner/complainant. In fact, this Court has closely perused the xerox copies of the cheques in question and no indication is found that at the time of filing the complaint, original cheques have been produced for the scrutiny of the Court. On that score also, the contention of the petitioner/complainant cannot be accepted.

25. It has already been pointed out that the entire argument advanced by the learned counsel appearing for the petitioner/complainant rests purely upon the provisions of Section 65(a) of the Indian Evidence Act, 1872. It is an admitted fact that the petitioner/complainant has not filed the originals of cheques in question and he has filed only xerox copies of the same. The trial Court has rightly dismissed the miscellaneous application mainly on the ground that the originals of cheques have not been marked. It has already been pointed out that a party to a proceeding can seek evidence of Section 65(a) of the Indian Evidence Act, 1872 only after proving the fact that the original document in question is in possession or power of the person against whom the same is sought to be proved. In the instant case, the petitioner/complainant alleged that he lost the original cheques and to that effect Police Complain was given. Therefore, it is quiet clear that in the instant case the provisions of Section 65(a) of the Indian Evidence Act, 1872 cannot be invoked. Since the petitioner/complainant has failed to file the originals of impugned cheques, it is needless to say that the entire argument advanced by the learned counsel appearing for the petitioner/complainant is sans merit and the same cannot be given weight to. The trial Court after considering the contentions urged on either side has rightly dismissed the application.

26. In view of the foregoing narration of both the factual and legal aspects, this Court has not found even a flimsy ground to make interference with the well merited judgment passed by the Court below in CrI.M.P.Nos.1167 and 1168 of 2017 in STC.No.28 of 2011 and altogether the present criminal revisions deserves to be dismissed.

27.In fine, both the criminal revisions deserves dismissed and accordingly dismissed and the judgment dated 26.07.2017 passed in Crl.M.P.Nos.1167 and 1168 of 2017 in STC.No.28 of 2011 by the learned Fast Track Court (Judicial Magistrate Level) Dharmapuri is confirmed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

vs

Sub Assistant Registrar

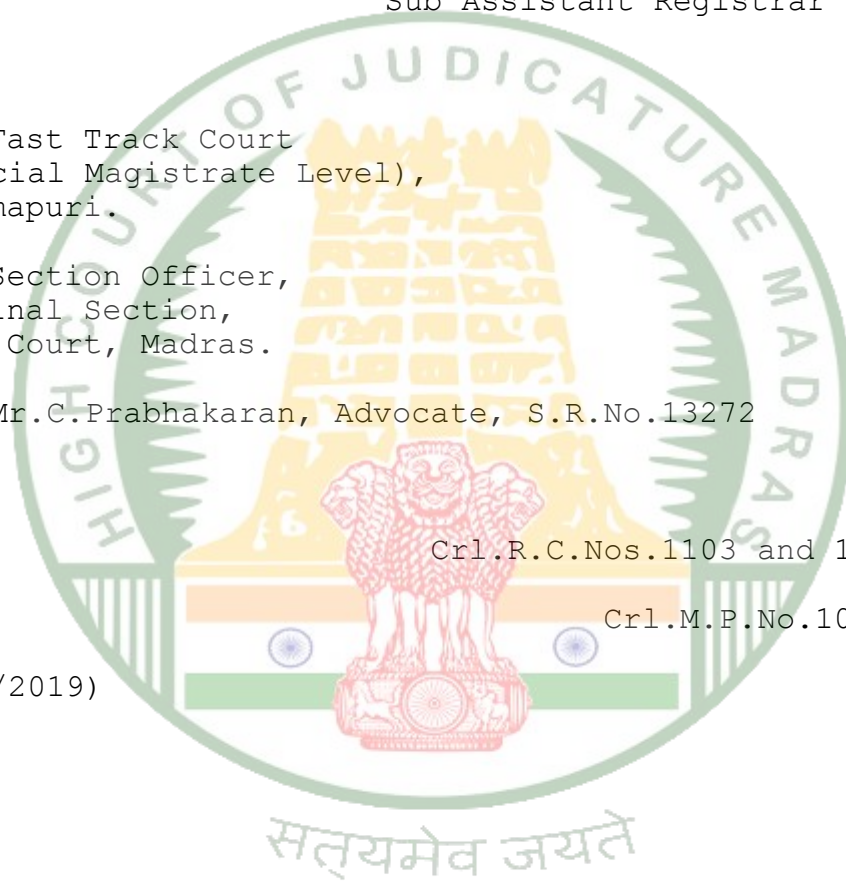
To

- 1) The Fast Track Court
(Judicial Magistrate Level),
Dharmapuri.
- 2) The Section Officer,
Criminal Section,
High Court, Madras.

+1 cc to Mr.C.Prabhakaran, Advocate, S.R.No.13272

Judgment in
Crl.R.C.Nos.1103 and 1104 of 2017
and
Crl.M.P.No.10430 of 2017

PPA(CO)
SSM(06/03/2019)



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