IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.02.2020

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.R.C.No.1209 of 2013

Graciammal .. Petitioner/Appellant/Accused

Vs.

J.Selvi .. Respondent/Respondent/Complainant

Criminal Revision filed under Section 397 and 401 Cr.P.C., to set aside the judgment and order dated 04.09.2012 passed in C.C.No.388 of 2011 on the file of the Judicial Magistrate Court (Fast Track Court No.II), Coimbatore, confirmed by the judgment and order dated 04.07.2013 passed in C.A.No.280 of 2012 on the file of the IV Additional District and Sessions Court, Coimbatore.

For Petitioner : Mr.D.J.Venkatesan

For Respondent : No Appearance

O R D E R

This criminal revision has been filed seeking to set aside the judgment and order dated 04.09.2012 passed in C.C.No.388 of 2011 on the file of the Judicial Magistrate Court (Fast Track Court No.II), Coimbatore, confirmed by the judgment and order dated 04.07.2013 passed in C.A.No.280 of 2012 on the file of the IV Additional District and Sessions Court, Coimbatore.

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

3. It is the case of the complainant that on 20.07.2008, the accused borrowed a sum of Rs.1,00,000/- and executed a promissory note (Ex-P8) agreeing to repay the amount with interest on demand; when the complainant demanded the repayment,

the accused issued a cheque (Ex-P2) dated 11.07.2009 for a sum of Rs.1,16,500/- drawn on ICICI Bank in favour of the complainant; the complainant presented the said cheque (Ex-P2) and it was returned unpaid with the endorsement "Funds Insufficient" vide bank's return memo (Ex-P3) dated 14.11.2009; therefore, the complainant issued a statutory demand notice (Ex-P5) dated 05.12.2009, which was received by the accused on 07.12.2009 vide postal acknowledgement card (Ex-P7); since the accused did not comply with the demand, the complainant initiated a prosecution in S.T.C.No.284 of 2010 before the Judicial Magistrate No.VII, Coimbatore, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act"), against the accused. On transfer of the case to the file of the Judicial Magistrate Court (Fast Track Court No.II), Coimbatore, the same was re-numbered as C.C.No.388 of 2011.

4. Before the trial Court, the complainant examined herself as PW1 and marked eight exhibits. The accused examined herself as DW1 and also one Geethanjali, sister of the complainant, as DW2. However, she did not mark any exhibit.

5. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 04.09.2012 in C.C.No.388 of 2011, convicted the accused of the offence under Section 138 of the NI Act and sentenced her to three months simple imprisonment and to pay a fine of Rs.3,000/-, in default to undergo two months simple imprisonment.

6. The appeal in C.A.No.280 of 2012 filed by the accused was dismissed by the IV Additional District and Sessions Court, Coimbatore, on 04.07.2013.

7. Aggrieved by the concurrent findings of fact arrived at by the Courts below, the accused has preferred the present criminal revision invoking Section 397 r/w 401 Cr.P.C.

8. Heard Mr.D.J.Venkatesan, learned counsel for the accused. Though notice has been served on the complainant and her name is printed in the cause list, none has entered appearance.

9. The learned counsel for the accused submitted that the accused has discharged the burden under Section 139 of the NI Act by establishing that the loan of Rs.1,00,000/- was not taken from the complainant.

10. This Court gave its anxious consideration to the submission made by the learned counsel for the accused.

11. Before adverting to the submissions made by the learned counsel for the accused, it is necessary to state here that while exercising revisional jurisdiction in a case involving concurrent findings of fact arrived at by two Courts below, the High Court cannot act as a second appellate Court [See State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand and Others, etc.[1]]. Very recently, in Bir Singh vs. Mukesh Kumar[2], the Supreme Court has held as under:

> "17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [Southern Sales & Services v. Sauermilch Design and Handels GmbH, (2008) 14 SCC 457] , it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error. .... "
> (emphasis supplied)

12. In the instant case, the complainant, in her evidence, has stated about the loan of Rs.1,00,000/- taken by the accused on 20.07.2008, the execution of the promissory note (Ex-P8) agreeing to repay the amount on demand with interest at 18 % per annum, the issuance of the impugned cheque (Ex-P2) for Rs.1,16,500/- with principle and interest, its presentation and dishonour on the ground "Insufficient Funds", the issuance of the statutory demand notice (Ex-P5) dated 05.12.2009, the receipt of the same by the accused vide postal acknowledgement card (Ex-P7) and the failure of the accused to comply with the demand.

13. The accused, in her evidence, took a defence that she does not know the complainant; she had borrowed a sum of Rs.20,000/- in September 2004 from Geethanjali and executed a blank promissory note (Ex-P8); again in January 2005, she borrowed a sum of Rs.30,000/- from Geethanjali and gave four cheques as security; she repaid the entire amount to Geethanjali, but, she did not return those cheques and had handed over one of the cheques to the complainant for initiating the present prosecution.

14. Strangely, the accused summoned Geethanjali and examined her as DW2. Geethanjali (DW2), in her evidence, has stated that the accused was her colleague in the Electricity Board and the accused used to borrow small amounts from her and other persons; once the accused wanted a huge loan for lesser interest and at that time, she (DW2) introduced the accused to her sister Selvi (complainant); since Selvi, who was working as

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1 (2004) 7 SCC 659

2 (2019) 4 SCC 197

a teacher, had received provident fund arrears and was wanting to invest the money; only under those circumstances, she (DW2) took the accused to the complainant and the complainant gave her Rs.1,00,000/- as loan, for which, the accused executed a promissory note (Ex-P7), in which, she (DW2) had signed as a witness.

16. From the above evidence, it is clear that the defence witness herself did not support the defence case, but, instead, has bolstered the prosecution case. Moreover, the original promissory note has been marked as Ex-P8, which admittedly has been signed by the accused. The accused has also not denied her signature in the impugned cheque (Ex-P2).

17. It is the defence of the accused that the cheque (Ex-P2) was not filled by her, but, by someone else. Section 20 of the NI Act permits the payee to fill up the cheque, provided, it has been signed by the drawer. Admittedly, the accused had not given any reply to the statutory demand notice (Ex-P5).

18. It is the further defence of the accused that she had discharged the loan that was taken from Geethanjali, for which, the accused did not place any credible material. In fact, the complainant in her cross-examination, has admitted that the impugned cheque (Ex-P2) was presented once and it was dishonoured and when the complainant approached the accused, the accused told her to re-present the cheque (Ex-P2), but, again it was dishonoured. The complainant did not issue any statutory demand notice for the first dishonour. The complainant re-presented the cheque (Ex-P2) on 14.11.2009 and again it was dishonoured.

19. This means that the accused was aware that the cheque (Ex-P2) issued by her is with the complainant and she could have easily given instructions to her bank for "Stop Payment" at least after the first dishonour, if she had really repaid the loan.

20. In view of the above discussion, this Court does not find any impropriety or illegality in the judgments and orders passed by the Courts below, warranting interference.

21. However, the learned counsel for the accused produced the receipt dated 19.06.2014 purportedly given by the complainant, wherein, it is stated that the complainant has received a sum of Rs.85,000/- as full and final settlement in this case. In the absence of the complainant before this Court, the veracity and the authenticity of the said receipt cannot be determined. He further submitted that he has received a letter dated 04.02.2020 from Mr.M.Gurusamy, Advocate, who represented

the complainant in the trial Court, to the effect that the accused had already settled the matter with the complainant on 19.06.2014 itself and he does not know the whereabouts of the complainant.

In such perspective of the matter, the conviction of the accused of the offence under Section 138 of the NI Act stands confirmed, but, the substantive sentence of three months simple imprisonment is set aside. However, the sentence of fine and the default sentence shall remain the same. Since the fine amount has already been deposited before the trial Court, the bail bond executed by the accused shall stand cancelled.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

nsd

To

1. The Judicial Magistrate,
   (Fast Track Court No.II),
   Coimbatore.

2. The IV Additional District
   and Sessions Court,
   Coimbatore.

3. The Deputy Registrar,
   (Crl.Side)
   Madras High Court,
   Chennai - 104.

with a direction to return the original records to the Courts below concerned

Crl.R.C.No.1209 of 2013

GP(CO)
GN(26/05/2020)