

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.21222 of 2017
and
Crl.M.P.No.12557 of 2017

Sree Gokulam Chit & Finance Co.P Ltd.,
Rep.by its Manager/Authorised Representative,
Mr.A.Selvaraj,
Having Office at,
No.66, Old No.356, Arcot Road,
Kodambakkam, Chennai - 600 024. Petitioner

Vs.

R.Rupa
W/o.G.Ramesh Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the entire records connected with the docket order dated 11.08.2017 in CMP.No.5559/2017 in S.T.C.No.210 of 2016 pending trial on the file of the learned Fast Track Judicial Magistrate, Ambattur and set aside the same consequently direct the trial Court to take the proof affidavit and the documents filed along with in S.T.C.No.212 of 2016 for S.T.C.No.210 of 2016 by permitting the petitioner to rectify the erratum in putting the case number in the said proof affidavits.

For Petitioner : Mr.K.Thilageswaran

For Respondent : Mr.Ashwin Kumar
Legal Aid Counsel

O R D E R

The petitioner has filed a private complaint against the respondent for an offence under Section 138 of the Negotiable Instruments Act, 1881, which is pending trial in S.T.C.No.10 of 2016 on the file of Judicial Magistrate, Fast Track Court, Ambattur. The present quash petition has been filed seeking to set aside the order passed in C.M.P.No.5559 of 2017 dated 11.08.2017.

2. Notice sent through the Court was received by the respondent on 01.09.2020. The lower Court, on service of notice, had sent the proof through Disc.No.239/2020 dated 09.09.2020 to this Court. Thereafter, there is no representation for the respondent. Thereafter, the petitioner was directed to take private notice to the Lower Court counsel. The private notice dated 20.07.2020 was served to one Mr.M.Raja, Enrol.3583 of 2020. Upon service of notice, one Mr.John Josh Enrol.No.968 of 2011 had appeared and submitted that Mr.D.Saikumaran, Enrol No.167 of 1999 have been instructed to appear on behalf of the respondent. This submission was made on 03.09.2020. Thereafter, when the case was listed, there was no representation on behalf of the respondent. This Court, finding that the respondent, being aware of the pendency of the above case, is only protracting the proceedings before this Court, as well as consequently before the trial Court for one reason or other. The case under section 138 of Negotiable Instruments Act is pending before the trial Court from the year 2016, i.e., for the past four years without any progress due to the pendency of the above original petition. Further, considering the fact that the case is pending without any progress coupled with the fact that the issue involved in the case is only technical, this Court proposes to proceed with the case and dispose the case on merits.

3. The gist of the case is that Sree Gokulam Chit & Finance Co.(P) Ltd., represented by its Manager had filed this complaint against the respondent. The petitioner is carrying on the chit business. The accused joined in four chits and being a successful bidder of four chits, she has taken the chit amount. However, she has failed to pay back the monthly dues and thereafter, in repayment of the dues and discharge of liability, she had issued four cheques for the outstanding dues. The details are as follows:

Sl .N o	Chit Group	Outstanding Amount	Cheque No. & date	Bank
1	G2L/0884/KDM/15	Rs.17,59,050 /-	037778 09.03.2016	Axis Bank, Korattur Branch
2	G2L/0884/KDM/18	Rs.17,59,050 /-	037780 09.03.2016	Axis Bank, Korattur Branch
3	G2L/1536/KDM/18	Rs.2,34,320/ -	037779 09.03.2016	Axis Bank, Korattur Branch
4	G2L/1536/KDM/19	Rs.5,04,020/ -	037781 09.03.2016	Axis Bank, Korattur Branch

4. The above four cheques when presented for payment, were returned on 11.03.2016 with an endorsement "Insufficient Funds" and a bank written memo to the effect was issued. Thereafter, a statutory notice dated 05.04.2016 was sent to the accused. The said statutory notice was not refused and the same was returned to the petitioner on 09.04.2016. Thereafter, following the statutory requirements, four cases came to be filed, which are as follows:

(i) S.T.C.No.210 of 2016 in respect to cheque No.037780 for Rs.17,59,050/-.

(ii) S.T.C.No.211 of 2016 in respect to cheque No.037778 for Rs.17,59,050/-.

(iii) S.T.C.No.212 of 2016 in respect to cheque No.037779 for Rs.2,34,320/-.

(iv) S.T.C.No.213 of 2016 in respect to cheque No.037781 for Rs.5,04,020/-.

5. The respondent / accused had appeared and copies were served. During the trial, the petitioner had filed proof affidavit. Inadvertently, the cheque numbers have been wrongly mentioned. Not knowing the same, the proof affidavit filed and the corresponding cheques were marked as Exhibits, which led to mix up in marking of the cheques, more particularly, cheque pertaining to S.T.C.No.210 of 2016 had been marked in S.T.C.No.212 of 2016, cheque pertaining to S.T.C.No.211 of 2016 had been marked in S.T.C.No.210 of 2016, cheque pertaining to S.T.C.No.212 of 2016 had been marked in S.T.C.No.211 of 2016 as Ex.P.2 in all the three cases.

6. Taking benefit of the mix up and wrong marking and mentioning of the cheques numbers, cross-examination proceeded on that line. Thereafter only, the petitioner realised the mistake and thereafter, filed a memo to rectify the defect. The Lower Court directed the petitioner to file a petition instead of memo. Hence, a petition in Crl.M.P.No.5559 of 2017 came to be filed.

7. The trial Court though admitted that it is purely an erratum and that due to over sight the mixing up of cheques had taken place, the trial Court felt that the evidence already recorded as per Section 138 of the Evidence Act, and once the chief examination is concluded, it becomes part of record and the trial Court have no inherent jurisdiction to scrap the witness or to order for denovo trial and dismissed the petition by order dated 11.08.2017.

8. The contention of the petitioner is that the respondent is a subscriber of the chit, which is conducted by the petitioner company. The respondent subscribed for four chits and she was the successful bidder for these chits. She received the chit amount and monthly repayment were not made. Thereafter, the four cheques, as stated above, were issued in discharge of her liability. All the cheques were dated 09.03.2016 and the cheques were presented with the complainant's bank namely Axis Bank, Korattur Branch. All these cheques got returned on 11.03.2016 for the reasons "Insufficient Fund". Thereafter, statutory notice was issued on 05.04.2016. The respondent refused to receive the same. The refused, return cover was received by the petitioner on 09.04.2016. Following the statutory provisions, a complaint under Section 138 Negotiable Instruments Act, filed against the respondent. The respondent appeared, copies received, initial questioning over and thereafter, during trial, the petitioner filed proof affidavit and had marked Ex.P.1 - Authorization Letter, Ex.P.2 - Cheque, Ex.P.3 - Bank Return Memo, Ex.P.4 - Copy of Statutory Notice, Ex.P.5 - Return cover. In all these cases these documents and Exhibit number are identical.

9. The date of the cheque, return memo, statutory notice, return cover are all on the same date and common in all the cases. However, the following error has occurred due to oversight:

(i) The proof affidavit got mixed up and the proof affidavit and Exhibits pertaining to S.T.C.No.210 of 2016 was placed in S.T.C.No.212 of 2016.

(ii) The proof affidavit and the Exhibits pertaining to

S.T.C.No.211 of 2016 were wrongly placed in S.T.C.No.210 of 2016.

(iii)The proof affidavit and the Exhibits pertaining to S.T.C.No.212 of 2016 was wrongly placed in S.T.C.No.211 of 2016.

10. This error has occurred since the transaction and documents are common in all the cases. Hence, the trial and recording of evidence had been done simultaneously. In view of the same, inadvertently, this wrong filing of proof affidavit and subsequent marking of Exhibits had occurred. This, the petitioner had realized only during cross-examination of P.W.1. Realising the mistake, had filed a petition before the trial Court. Though the trial Court admitted that the mistake was an inadvertent one and a mix up, the trial Court had dismissed the petition filed by the petitioner for the reason that it has no inherent powers. Since, the evidence is recorded and forms part of the case records.

11. The petitioner further submitted that unless the mix up is corrected and the Exhibits are marked correctly in the respective cases, great prejudice will be caused to the petitioner. Further, it would give a leverage for the accused to get away on technical grounds.

12. The cheques were issued in discharge of liability and the liability is in subsistence. The respondent's contention before the trial Court is that no where in the Criminal procedure code or in the Evidence Act scarping of evidence is permitted. The petitioner / complainant deliberately made the mistake, and hence, he has to suffer for the same and opposed the petition filed before the trial Court. In the cross-examination by the accused, it is stated that only due to mix up in filing the affidavit, this error occurred and consequently, resulted in misplacement of cheques of one case with other. He had not denied the liability, signatures and no where stated that their liability had been discharged.

13. Considering the submissions made and on a perusal of the materials, this Court finds that the contention of the petitioner is acceptable. Admittedly, in this case, four cases are filed by the petitioner against the accused. The transactions are similar. The respondent had been a successful chit bidder. She failed to make repayments. Four cheques have been issued in discharge of her liability, she issued the four cheques, four cases are filed, these cheques are marked as Ex.P.2, in all the four cases, the issue involved is common. Hence, trial of four cases are held simultaneously and in filing

of the proof affidavit, due to typographical error and oversight, such mix up is likely to occur. The petitioner counsel ought to have been vigilant. Any how, in the interests of justice, this Court is of the view that justice would be met only if the mistake is corrected by striking out the evidence so far recorded in this case.

14. Accordingly, the trial Court is directed to strike down the evidence recorded, permit the petitioner to file a fresh proof affidavit and to mark the exhibits according to the complainant's case, and thereafter, the respondent/accused shall cross-examine. In short, the evidence so far recorded is scrapped as non-est in law and the trial Court is directed to proceed by examining the complainant in chief afresh and thereafter, the respondent / accused shall cross-examine him.

15. Considering the fact that the above case is pending for the past four years without any progress, the trial Court is directed to complete the trial within a period of three months from the date of receipt of a copy of this order.

16. Accordingly, this Criminal Original Petition is allowed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

/true copy/

Sub Asst. Registrar

To

The Fast Track
Judicial Magistrate,
Ambattur

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