



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2021

CORAM:

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.No.23502 of 2021

V.Kalaivani

...Petitioner

Versus

K.Selvaraj

...Respondent

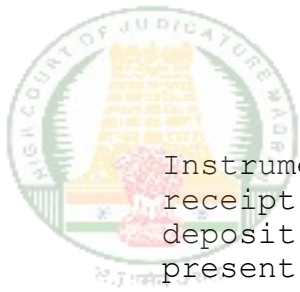
PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records pertaining to the order passed by the learned Principal District and Sessions Judge, Erode, in Crl.M.P.No.2210 of 2021 in C.A.No.145 of 2021 dated 23.11.2021 in so far as it relates to imposition of condition by directing the petitioner to deposit 20% of the cheque amount before the Judicial Magistrate, Fast Track Court No.II, Erode and set aside the same.

For Petitioner : Mr.C.Munusamy

#### O R D E R

This Criminal Original Petition is filed to call for the records pertaining to the order passed by the learned Principal District and Sessions Judge, Erode, in Crl.M.P.No.2210 of 2021 in C.A.No.145 of 2021 dated 23.11.2021 in so far as it relates to imposition of condition by directing the petitioner to deposit 20% of the cheque amount before the Judicial Magistrate, Fast Track Court No.II, Erode and set aside the same.

2.The petitioner is an accused in a 138 case filed by the respondent in S.T.C.No.87 of 2016, was convicted by the learned Judicial Magistrate, Fast Track Court, Erode by Judgment dated 26.10.2021, wherein the trial Court had directed the petitioner to undergo simple imprisonment for six months and ordered him to pay a sum of Rs.10,00,000/- towards compensation to the respondent, within a period of three months, Aggrieved against the same, the petitioner had preferred an appeal before the Principal Sessions Judge, Erode in C.A.No.145 of 2021 and also filed a petition in Crl.M.P.No.2210 of 2021 to suspend the sentence of imprisonment. The sentence of the trial court was suspended by the lower appellate Court with certain conditions. One of the condition was that the petitioner to deposit 20% of the cheque amount i.e. Rs.2,00,000/- to be deposited before the trial Court in terms of Section 148 of the Negotiable



Instruments Act, within a period of 30 days from the date of receipt of the copy of that order. The petitioner is unable to deposit the said 20% of the compensation. Against which, the present petition is filed.

WEB COPY

3. The contention of the petitioner is that the petitioner's husband Viswanathan (Late) had taken some loan from the respondent, for which the cheque was given as security. The petitioner does not know the respondent and she has no contact with the respondent and there was no business transaction between the petitioner and the respondent. She does not know for what reason the cheque had been given by her husband to the respondent and the said liability was also not known to the petitioner. She further submitted that the petitioner's husband and the respondent would have had some business transaction and her husband is now no more. The primary point in which the petitioner assails before the trial Court as well as before the lower appellate court is that the cheque had been drawn in the name of Southern Electronics and not in the name of the respondent, for a sum of Rs.10,00,000/- and a complaint has been filed by the respondent i.e. Selvaraj claimed him to be the Proprietor of Southern Electronics. But he has not produced either the Photostat copies of materials to show that he is the proprietor of Southern Electronics, or the Commercial Tax Registration Certificate, registering the proprietorship with any of the authorities.

4. He further contended that even in the complaint the inclusion of Proprietor Southern Electronics has been made by pen. Hence, the complaint is not a valid proof to show that the Souther Electronics is a proprietorship concern. When the same was questioned, the respondent was unable to give any proper answer. This point was though raised by the trail Court in paragraph No.37 of the Judgment, referring to the Judgment of this Court in the case of R.Sundar Vs. M/s. Agarwal Coal Corporation Pvt. Ltd., wherein this Court held as follows:

"6. Even though, it is a settled law that a company, which is incorporated under the Companies Act, is a separable legal entity, but, a sole proprietorship is concerned, it is not so. Mere registration of trader with the Government of Tamilnadu Commercial Tax Department in the name of 'Hari Treders', will not be construed as a company incorporated under the provisions of Companies Act."

Here the case is not whether the petitioner is a proprietorship concern or a company.

5. The learned counsel appearing for the petitioner



categorically stated that the Southern Electronics, a Proprietorship firm had not prosecuted the petitioner. As per Section 141 of the NI Act, the firm or other association has to be construed as company and the procedure is to be followed. First the complainant has to prove that it is a firm including Proprietorship firm. In view of the same, the fundamental aspect is not complied. The trial Court had not considered the same in its proper perspective. The evidence of PW1 had not been discussed at all. The lower court reasoning that during 313 questioning of the petitioner, the petitioner had given an answer that the said cheque has been given by her husband as security for the purpose of obtaining loan. Hence admission made. Further presumption under Sections 118 and 139 of the NI Act, is against the petitioner is not correct. The basic fundamental aspects have to be proved with regard to the transaction and cheque, thereafter only presumption comes to play. In this case basic, foundational, fundamental aspect not proved. The lower appellate court without going into the merits of the case, following Section 148 of NI Act, had directed the petitioner to deposit 20% of the cheque amount.

6.Considering the submissions and on perusal of the materials, this Court finds that there is a fundamental error in the case, which has not been properly addressed by the trial Court. This Court finds force in the submissions of the learned counsel appearing for the petitioner, further this Court have dealt that Section 148 of the NI Act is not mandatory in all cases. It depends upon the facts of the case. In this case the foundational aspect is shaky not proved. The trial Court failed to address this issue by proper analyze of the evidence and materials. In view of the same, the condition to direct the petitioner to deposit 20% of the cheque amount, before the learned Judicial Magistrate, Fast Track Court No.II, Erode imposed by the lower appellate court is hereby set aside.

7.Accordingly, this Criminal Original Petition stands allowed. The petitioner is directed to execute the sureties within a period of two weeks from the date of receipt of a copy of this order. The reference made above are for the limited purpose of disposing of this petition. The issue to be decided by the lower appellate court independently uninfluenced by any reference made above.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

ah



To

1. The Principal District and Sessions Judge,  
Erode.

2. The Judicial Magistrate,  
Fast Track Court No.II,  
Erode.

3. Do The Chief Judicial Magistrate,  
Erode.

CRL.O.P.No.23502 of 2021

GSM(CO)  
RGA(12/01/2022)