IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.10.2022

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.R.C.Nos.749, 750, 751 & 752 of 2018
and
Crl.M.P.Nos.8642, 8643, 8644, 8645, 8646, 8647, 8648 & 8649 of 2018

D.Devi Padmanabhan ... Petitioner in all cases

Vs.

Amaravathi Finance & Investment,
Prop. K.Radhakrishnan,
Rep. by its Power Agent Damodaran,
No.30, Old No.190, Kucherry Road,
Mylapore, Chennai – 4. ... Respondent in all cases

Common Prayer: The Criminal Revision case filed under Section 397 r/w 401 of Cr.P.C. praying to set aside the order in Crl.A.Nos.247, 248, 249 and 250 of 2017 dated 03.04.2018 on the file of the XVIII Additional Sessions Court, Chennai, and confirming the judgment in C.C.Nos.6598, 6712, 6807 and 6808 of 2003 dated 31.07.2017 on the file of the Metropolitan Magistrate, FTC-III, Saidapet, Chennai.

(In all cases)

For Petitioner : Mr.K.Sukumaran
for Mr.S.Patrick

For Respondent : Mr.B.Divakaran

COMMON ORDER

These Criminal Revision cases have been filed to set aside the Crl.A.Nos.247, 248, 249 and 250 of 2017 respectively dated 03.04.2018 on the file of the XVIII Additional Sessions Court, Chennai, thereby confirming the judgment in C.C.Nos.6598, 6712, 6807 and 6808 of 2003 respectively dated 31.07.2017 on the file of the Metropolitan Magistrate, FTC-III, Saidapet, Chennai.

2. The petitioner is an accused in all the cases and the respondent are one and the same in all the Revisions.

3. The respondent lodged a complaint for the offence under Section 138 of Negotiable Instruments Act, as against the petitioner alleging that the petitioner borrowed loan from the respondent on several occasions amounting to several lakhs. In order to repay the said loan amount, the petitioner issued cheques, when it was presented for collection the same was returned dishonored for the reason "funds insufficient". After causing statutory notice to the petitioner, the respondent lodged a complaint.

4. On the side of the respondent PW1 was examined and Exs.P1 to P9 were marked and on the side of the petitioner no one was examined and Exs.D1 to D8 were marked as exhibits.

5. On perusal of oral and documentary evidence, the trial Court found the petitioner guilty for the offence under Section 138 of NI Act and sentenced him to undergo six months simple imprisonment and also awarded compensation of the cheque amount. Aggrieved by the same, the petitioner preferred an appeal which was dismissed and confirming the order passed by the trial Court. Hence this Revision.

6. The learned counsel appearing for the petitioner in all the revisions would submit that there is no legally enforceable debt against the alleged cheque issued by the petitioner. The onus of proof lies only on the respondent to prove that the debt is legally enforceable debt, whereas the respondent failed to prove the same. The cheques were given to a Chit Fund Company, a sister concern of the respondent which were misused to lodge a complaint for the offence under Section 138 of NI Act. The petitioner in all the cases rebutted the legal presumption under Sections 118(a) and 139 of the NI Act, the burden of proof is

always on the shoulder of the respondent. The respondent neither produced material documents in support of alleged transactions nor it was proved through the examination of his witnesses.

7. He would further submit that the respondent, represented by Power of Attorney one Mani, he was examined as PW1 and before cross examination, he died. Subsequently, another Power of Attorney was substituted on behalf of the respondent to represent before the trial Court. Without any chief examination of the subsequent Power of Attorney, straight away he was subjected him to cross examination. Therefore, without any chief examination, the cross examination cannot be done and thus the respondent failed to prove the case.

8. That apart, the Power of Attorney had no knowledge about the transactions between the petitioner and the respondent. Further, the respondent is admittedly a Chit Company and it has no license to run money transactions and when the financial institution lends money it ought to have obtained license for lending money. In this case, the respondent failed to produce any license before the trial Court to prove that the respondent had lend money to the petitioner. In support of his contention, he relied upon the judgment reported in

(1995) 3 SCC 367 in the case of ***Sukhwant Singh Vs. The State of Punjab.***

9. Per contra, the learned counsel for the respondent in all the cases would submit that the respondent was represented through its Power of Attorney. He only filed the complaint and after examination of him in chief he died. Thereafter, another Power of Attorney of the respondent was substituted. Therefore, the chief examination of the earlier Power of Attorney was retained and substituted Power of Attorney was subjected for cross examination. There is absolutely no prejudice caused if another person substituted and cross examined after the chief examination of earlier Power of Attorney.

10. He would further submit that the petitioner never denied the signature found in the cheques and as such, the respondent proved its initial burden as contemplated under Section 138 of NI Act. Therefore, both the Courts below concurrently held that the petitioner is liable to be punished for the offence under Section 138 of NI Act. In the cross examination of PW1, he categorically deposed that he had knowledge about the transaction between the petitioner and the respondent and as such he prayed for dismissal of the revision.

11. Heard, the learned counsel for the petitioner and the learned counsel for the respondent and perused the entire materials available on record.

12. The respondent lodged a complaint for the offence under Section 138 of NI Act, as against the petitioner. Both the Courts below concurrently convicted the petitioner for the offence under Section 138 of NI Act and sentenced him to undergo simple imprisonment for a period of six months and also awarded the cheque amount as compensation.

13. Admittedly, the respondent was represented by its Power of Attorney one Mani, he was examined as PW1. After chief examination he died. Thereafter, the respondent filed a petition for substitution of another Power of Attorney to represent the respondent and the same was allowed by the trial court. The trial court continued the trial from the cross examination of PW1. The learned counsel for the petitioner vehemently contended that without chief examination, cross examination cannot be done and therefore respondent failed to prove the case.

14. The Hon'ble Supreme Court of India in the case of ***Sukhwant Singh Vs. State of Punjab*** reported in ***(1995) 3 SCC 367*** held as follows;-

> *"20. The Division Bench, therefore was considering a peculiar fact situation in that case and even in that context it was observed that the witness "could have been produced for cross-examination by the accused" and that "the accused were entitled to test his evidence." The observations of the Division Bench in Jaggo's case, therefore, do not support the view that a material witness can be "tendered" for cross-examination only. The observations from a judgment of this Court cannot be read in isolation and divorced from the context in which the same were made and it is improper for any Court to take out a sentence from the judgment of this Court, divorced from the context in which it was given, and treat such an isolated sentence as the complete enunciation of law by this Court. The judgment in Jaggo.v (supra) has in our opinion been misappreciated and that judgment cannot be interpreted as a sanction from the Supreme Court to the prosecution to adopt the practice of tendering a witness for cross-examination only, without there being any examination in-chief, in relation to which the witness has to be cross-examined. All that the judgment In Jaggo's case*

(supra) emphasizes is that the mere ipse dixit of the prosecutor that a particular witness has been won over is not conclusive of that allegation and the Court should not accept the same mechanically and relieve the prosecutor o his obligation to examine such a witness. It was for this reason suggested by the Bench that where the prosecution makes such an allegation, it must keep the witness in attendance and produce him to enable the defence to cross examine such a witness to test his evidence as well as the allegations of the prosecution and bring out the truth on the record. After the coming into force of the Criminal Procedure Code, 1973, which replaced the Code of 1998, recording of evidence in commitment proceedings have been totally dispensed with and section 299 of that Code has been emitted. Consequently, the course suggested by some of the High Courts in the earlier quoted judgments regarding tendering of a witness for cross-examination who had been examined in the committal court, is also no more relevant or available. The Jaggo's case, which was decided when the Code of 1898 was operating in the field could not, therefore, be pressed into service by the trial court while dealing with the instant case tried according to the Code of 1973. Thus, considered it is obvious that the

trial court, wrongly permitted the prosecution to tender PW4 and PW5 for cross-examination only. Both PW4 and PW5 were, according to the prosecution case itself, eye witnesses of the occurrence and had removed the deceased to the hospital. Their evidence was, of a material nature which was necessary for the unfolding of the prosecution story. The effect of their being tendered only for cross examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination, in our opinion, seriously affects the credibility of the prosecution case and detracts materially from its reliability.

15. Thus, it is clear that the non-examination of the witnesses in chief seriously affects the credibility of the prosecution case and detracts materially from its reliability. Thus, when the witnesses were examined in the committal Court can be considered as chief examination and they were subjected to cross examination. Subsequently, the Course suggested by the High Courts regarding tender of a witness for cross examination who had been examined in the committal Court is also no more relevant or available.

16. In the case on hand, admittedly, the subsequent Power of Attorney

was not examined in chief, the earlier chief examination of the deceased Power of Attorney had been taken into account and the substituted Power of Attorney was subjected to only cross examination. A perusal of the cross examination of PW1 also reveals that he had no knowledge about the transactions between the petitioner and the respondent.

17. In this regard, it is relevant to rely upon the judgment reported in ***(2014) 11 SCC 790: (2014) 4 SCC (Civ) 343: 2013 SCC Online SCC 839*** in the case of ***A.C.Narayanan Vs. State of Maharashtra and Another.***

The relevant portion of the aforesaid judgment is hereunder;-

> *"33. While holding that there is no serious conflict between the decisions in M.M.T.C and Janki Vashdeo Bhojwani, we clarify the position and answer the questions in the following manner:*
>
> *33.1. Filing of complaint petition under Section 138 of NI Act through power of attorney is perfectly legal and competent.*
>
> *33.2. The power-of-attorney holder can depose and verify on oath before the court in order to prove the contents of the complaint. However, the power-of-attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess*

due knowledge regarding the said transactions.

33.3. It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

33.4. In the light of Section 145 of NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of NI Act and the Magistrate is neither mandatorily obliged to call upon his complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of NI Act.

33.5. The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

18. Thus, it is clear that it is required for the complainant to make specific

assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

19. In the case on hand, admittedly, the PW1 had no knowledge about the transaction between the petitioner and the respondent. Therefore, he could not have been examined as a witness in the case. Further, the respondent did not produce any license to lend money.

20. In this regard, it is relevant to rely upon the judgment reported in ***2004 SCC Online AP 1131: 2004 Cri LJ 4019: (2004) 4 ICC 390 (AP) : (2006) 129 Comp Cas 33: (2004) 4 BC 146 : (2004) 3 CCR 468: (2004) 1 ALT (Cri) 474: (2004) 1 ALD (Cri) 546*** in the case of ***M/s.Krishnan Raju Finances, Hyderabad Vs. Abida Sultana and Another.***

The relevant portion of the aforesaid judgment is extracted hereunder:-

> *" 20. I am in complete agreement with the submissions made by the learned counsel for the appellant. But, as seen above, admittedly, the*

appellant-complainant claimed that it is a money lender, but has not produced any licence as required under law and further the amount alleged to have been advanced by the complainant cannot be said to be a loan as defined under the Andhra Pradesh (Telengana Area) Money Lenders Act, 1349 Fasli. Since the appellant had no money lending business licence, it cannot be said that ehre was a legally enforceable liability of the respondent in view of Section 3(2) read with Section 2(4) of the Andhra Pradesh (Telengana Area) Money Lenders Act, 1349 Fasli. Once an Act declares that a particular transaction is illegal, it cannot be made legal for the purpose of any other Act. The sheet-anchor of Section 138 of the Act is as to legally enforceable liability against the respondent, which is conspicuously absent in the case on hand. Therefore, there was no legally enforceable liability against the respondent. I am of the opinion that the judgment of the Court below is a well reasoned one and does not suffer from any irregularity or illegality. There are no grounds to interfere with the judgement of the lower Court."

21. Thus, it is clear that once an Act declares that a particular transaction

is illegal, it cannot be made legal for the purpose of any other Act. The sheet-anchor of Section 138 of the Act is as to legally enforceable liability against the respondent, which is conspicuously absent in the case on hand. Therefore, there was no legally enforceable liability against the respondent. However, unfortunately, the Courts below failed to consider these aspects and mechanically convicted the petitioner for the offence under Section 138 of NI Act.

22. In view of the above, the judgment passed by the XVIII Additional Sessions Court, Chennai, in Crl.A.Nos.247, 248, 249 and 250 of 2017 dated 03.04.2018, thereby confirming the judgment in C.C.Nos.6598, 6712, 6807 and 6808 of 2003 dated 31.07.2017 on the file of the Metropolitan Magistrate, FTC-III, Saidapet, Chennai, is hereby set aside. Accordingly, these Criminal Revision cases stand allowed. Consequently, connected miscellaneous petitions are closed.

18.10.2022

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Index : Yes / No
Speaking / Non Speaking order

To

1. The XVIII Additional Sessions Court,
   Chennai.

2. The Metropolitan Magistrate, FTC-III, Saidapet,
   Chennai.

G.K.ILANTHIRAIYAN, J.

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