



Crl.R.C. No.590 of 2019

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DATED : 28.06.2024

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

Crl.R.C. No.590 of 2019 &
Crl.M.P. Nos. 7954 & 7955 of 2019 & 14020 of 2021

M.K. Balamurugan
S/o. M. Kannan

...Petitioner

Vs.

R. Thanigai Arasu
S/o. K.K.Ranganathan

...Respondent

Prayer: Criminal Revision Cases filed under Section 397 & 401 Cr.P.C. against the judgment and orders dated 24.07.2018 passed in C.A. No.277 of 2017 by the Principal Sessions Judge, City Civil Court, Chennai, confirming the judgement and orders dated 29.08.2017 passed in C.C.No.17 of 2010 by the Metropolitan Magistrate, Fast Track Court 2, Egmore, Allikulam, Chennai.

For Petitioner : Mr.V.V.Sairam
for Mr.P.Ambikapathi
For Respondent : Mr.K.Thilageswaran

ORDER



Crl.R.C. No.590 of 2019

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Challenging the conviction and sentence passed by both the courts below for the offence punishable under Section 138 of the Negotiable Instruments Act, the present revision is filed by the accused.

2. For the sake of convenience the parties are referred as complainant and accused.

3. The case of the complainant in a nutshell is as follows:

- i. The accused approached the complainant during 2004 and requested him to lend money as hand loan to meet his marriage expenses.
- ii. The complainant allowed the accused to purchase articles through his credit card for his marriage. On another occasion, the accused had requested the complainant to financially help him to start a new project in the name and style of "India Projects". The complainant helped him by arranging money from different sources.



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- iii. The complainant received reminders from his bankers to pay the outstanding credit card dues.
- iv. When the complainant requested the accused to repay bank dues and the loan which he paid for 'India Projects', the accused started evading him. Therefore, the complainant was forced to lodge a police complaint. During that time, the accused issued two cheques bearing numbers 893051, 893052 both dated 14.02.2009 drawn for a sum of Rs.13,44,505.73/- and Rs.7,00,000/- respectively.
- v. When the complainant presented both the cheques for collection through his banker, viz., Indian Bank, Ayanavaram Branch, they were returned for the reason "insufficient funds".
- vi. When the complainant informed the accused about the dishonour of cheques, the accused met the complainant and issued a fresh cheque (Ex.P1) in favour of the complainant bearing number 893053 dated 10.08.2009 for Rs.20,44,505.73/- drawn on United Bank of India, Nungambakkam Branch, after getting back the dishonoured cheques.



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- vii. When the complainant presented the cheque (Ex.P1) through his banker, viz., Indian Bank, Ayanavaram Branch, on 23.09.2009, the same was also returned unpaid for the reason insufficient funds on 24.09.2009, as is seen from the cheque return memo (Ex.P2).
- viii. Thereafter, the complainant issued a statutory notice dated 08.10.2009 (Ex.P3) to the accused calling upon him to pay the amount due under the cheque (Ex.P1) within fifteen days from the date of receipt of the notice.
- ix. The notice was sent to the address of the accused and the same was received by an authorised person of the accused on 10.10.2009 as is evidenced by the postal acknowledgement card (Ex.P4).
- x. According to the complainant, though the accused was in receipt of the statutory notice, he did not come forward to make good the payment and did not also send any reply.
- xi. Therefore, the complainant filed a private complaint under Section 200 Cr.P.C. against the accused for an offence punishable under Section 138 of the Negotiable Instruments Act (in short NI Act)



CrI.R.C. No.590 of 2019

WEB COPY

before the Metropolitan Magistrate, Fast Track Court,-2, Egmore at Allikulam, Chennai, in C.C.No.17/2010.

xii.The learned Metropolitan Magistrate, took cognizance of the offence under Section 138 of N.I. Act and issued summons to the accused under Section 204 Cr.P.C.

xiii.On the appearance of the accused, the copies of records were furnished to him under Section 207 Cr.P.C. The substance of accusation made in the complaint was put to the accused and since the accused pleaded not guilty, the case was posted for trial.

xiv. The complainant examined himself and marked 11 documents.

xv. The accused, when questioned under Section 313 Cr.P.C., with regard to the incriminating circumstances appearing in evidence against him, denied of having committed any offence. He marked Ex.D1 to Ex.D11.

xvi.The learned trial court judge on analysis of evidence on record, convicted the accused for the offence punishable under Section 138 of NI Act and sentenced him to undergo Simple Imprisonment for a period of one year and to pay compensation of



CrI.R.C. No.590 of 2019

WEB COPY

Rs.40,89,011.46/- under Section 357(3) Cr.P.C., in default, to undergo Simple Imprisonment for a period of three months. He also fixed the time for payment of compensation as one month.

xvii. Aggrieved over the same, the complainant filed an appeal in C.A.No.277/2017 before the Principal Sessions Judge, City Civil Court, Chennai. In the lower appellate court neither the accused nor his counsel appeared. Therefore, the appellate court judge without hearing the counsel for the accused dismissed the appeal by confirming the conviction and sentence passed by the trial court, vide her judgment dated 24.07.2018.

xviii. Aggrieved over the same, the accused has preferred this revision.

4. Heard Mr.V.V.Sairam, learned counsel for the revision petitioner and Mr.K.Thilageswaran, learned counsel for the respondent.

5. Mr.V.V.Sairam, learned counsel for the revision



Crl.R.C. No.590 of 2019

WEB COPY

petitioner/accused would contend that the judgment of the lower appellate court cannot be sustained for the following reasons:

- i. The lower appellate court had committed an error by proceeding to dispose of the appeal even without appointing a Legal Aid Counsel or an *amicus curiae* to defend the accused. He also relied on the following decisions to substantiate the same.

1. Christopher Raj vs. K. Vijaya Kumar reported in 2019 (2) MWN (Crl) DCC 97.
2. Krishna Kumar & others vs. State of Uttar Pradesh (order dated 01.12.2023 in Criminal Appeal No.3757 of 2023 of Hon'ble Supreme Court) .
3. K.S. Panduranga vs. State of Karnataka reported in 2013(3) SCC 721.

- ii. The appellate court had not also gone into the merits of the case and simply had confirmed the conviction and sentence passed by the trial court.

- iii. The complainant had not served the statutory notice on the accused



Crl.R.C. No.590 of 2019

WEB COPY

as contemplated under Clause b of proviso to Section 138 of NI Act and therefore it has to be held that the notice has not been served properly on the revision petitioner. He also relied on the following decisions in this regard.

1. M.D. Thomas vs. P.S. Jaleel and another reported in **2009 (14) SCC 398**
2. Krishna Texport & Capital Markets Ltd., vs. Ila A. Agarwal & others reported in **(2015) 8 SCC 28**.
3. B. Ramesh Kumar vs. S. Murugan (Order dated 19.01.2021 in Crl.RC. No.350 of 2017 of Madras High Court).
- iv. The complainant had not also proved the exact amount due and liable to be paid by the accused by way adducing acceptable evidence.
- v. When the complainant states that his credit card was used for purchase of items for the marriage of the accused, he could have produced the statement of accounts of his bank to show the actual amount payable by the accused.
- vi. When the credit card stands in the name of the complainant and all



Crl.R.C. No.590 of 2019

WEB COPY

the articles were purchased by him, it cannot be stated that the accused purchased the articles using the credit card of the complainant.

vii.The complainant states that the accused handed over the cheque to him after he lodged a police complaint. When the relationship between the two parties got strained on account of the police complaint, it is highly improbable that the accused had handed over a cheque to the complainant for a sum of Rs.20,44,505.73.

viii.The lower appellate court had not at all discussed all these aspects in its judgment and therefore, the same is liable to be set aside. He also prayed this Court to remit the matter back to the lower appellate court to dispose of the case on merits.

6. Per contra Mr.K.Thilageswaran, learned counsel appearing for the respondent/complainant would contend that the accused had not denied his signature on the cheque (Ex.P1) and once the signature is admitted, there is a presumption under Sections 118 and 139 of NI Act unless the contrary is proved. The accused had not rebutted the



Crl.R.C. No.590 of 2019

WEB COPY

presumption by adducing acceptable evidence and therefore, both the courts below were right in convicting and sentencing the accused for the offence punishable under Section 138 of NI Act. He also contended that it would not be appropriate for this Court to re appreciate the evidence and come to altogether a different conclusion, when the evidence has, already been properly appreciated by the Magistrate as well as by the Sessions Judge. According to him, no glaring feature is brought to the notice of this Court which would otherwise tantamount to gross miscarriage of justice. It is also his contention that the appellate court before proceeding to dispose of the appeal had actually issued notice to the appellant and his counsel and both of them did not appear before the lower appellate court and therefore, the appellate court was right in disposing of the case on merits. Relying on the Full Bench decision of the Hon'ble Supreme Court in ***Bani Singh and others vs. State of Uttar Pradesh*** reported in ***AIR 1996 SC 2439***, he contended that Section 385 Cr.P.C. provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient



Crl.R.C. No.590 of 2019

WEB COPY

since he was representing the appellant. Section 386 Cr.P.C. provides for a hearing to be given to the appellant or his lawyer, if he is present. According to him both the appellant and his lawyer need not be heard and it is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing and this is the requirement of the code on a plain reading of Sections 385 and 386 Cr.P.C. It is his specific submission that the law does not enjoin that the Court should adjourn the case if both the appellant and his lawyer are absent and the Court can dispose of the appeal after perusing the records.

6.1. He also placed reliance upon the Full Bench decision of the Supreme Court in *C.C. Alavi Haji vs. Palapetty Muhammed and others* reported in *2007 (2) CLJ (SC) 153* and contended that there is a presumption available under Section 27 of the General Clauses Act, 1897 that when the notice is sent by Registered post by correctly mentioning the address of the drawer of the cheque, mandatory requirement of issuance of notice as contemplated under proviso (b) of Section 138 of



Crl.R.C. No.590 of 2019

WEB COPY

N.I. Act is complied with and the accused is deemed to have received the notice. He therefore, prayed for dismissal of the revision petition filed by the accused.

7. It is true that the accused had not denied his signature on the cheque (Ex.P1). Once the signature is admitted, there is a presumption under Sections 118 and 139 of NI Act, unless the contrary is proved. Both the courts below had categorically held that the accused had not rebutted the presumption by way of adducing acceptable oral/documentary evidence.

7.1. However, it is seen from the records that the accused and his counsel did not appear before the lower appellate court despite notice was sent to them by the appellate court. Therefore, the appellate court proceeded to hear the respondent and disposed of the appeal in C.A. No.277 of 2017 on merits. In the grounds of appeal, it is mentioned that the complainant had not proved any legally enforceable debt by adducing acceptable evidence. This aspect was not at all considered by the



Crl.R.C. No.590 of 2019

WEB COPY

appellate court. Literally there was no re appreciation of evidence by the lower appellate court. The aspect of serving of notice on the accused as contemplated under proviso (b) to Section 138 of N.I. Act has not also been considered by the lower appellate court. Moreover, it has been the consistent view of the Apex Court that the criminal appeal can be decided on merits by appointing a Legal Aid Counsel or *Amicus Curiae* in the absence of the appellant and his advocate. The court is not also precluded from perusing the records and come to its own conclusion when the counsel engaged by them does not turn up to argue. In the Full Bench decision of the Hon'ble Supreme Court in ***Bani Singh and others vs. State of Uttar Pradesh*** (cited supra), it has been held that in an appropriate case in the absence of counsel on record, the appellate court should appoint a counsel at the state expense to argue for the cause of the accused. In the instant case, when the accused had been directed to pay a compensation of a huge sum of Rs.40,89,011.46/- (double the cheque amount) by the trial court, the appellate court should have appointed a Legal Aid Counsel in the absence of the counsel for the accused before proceeding to decide the appeal on merits. The appellate court had not



Crl.R.C. No.590 of 2019

also gone into important aspects of the case as pointed out by the counsel for the revision petitioner and therefore, the present case has to be remitted back to the Principal Sessions Judge, City Civil Court, Chennai, to hear the appeal afresh.

8. In the result,

- i. The Criminal Revision Case stands disposed of. Consequently connected miscellaneous petitions are closed.
- ii. The judgment and orders dated 24.07.2018 passed in C.A. No.277 of 2017 by the Principal Sessions Judge, City Civil Court, Chennai, is set aside.
- iii. The case is remitted back to the Principal Sessions Judge, City Civil Court, Chennai, to hear the appeal afresh.
- iv. The revision petitioner and the respondent and their respective counsels should appear before the Principal Sessions Judge, City Civil Court, Chennai on 28.08.2024 and the appellate court shall proceed to hear the matter and dispose of the appeal within three



Crl.R.C. No.590 of 2019

WEB COPY months.

- v. If the accused and his counsel do not cooperate with the Court, the appellate court can proceed further and dispose of the case in accordance with law.

28.06.2024

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga

To

1. Metropolitan Magistrate, Fast Track Court 2, Egmore, Allikulam, Chennai.
2. Principal Sessions Judge, City Civil Court, Chennai.
3. The Public Prosecutor, Madras High Court, Chennai.
4. The Criminal Section, Madras High Court, Chennai.



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Crl.R.C. No.590 of 2019

R. HEMALATHA, J.
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Crl.R.C. No.590 of 2019 &
Crl.M.P. Nos. 7954 & 7955 of 2019 &
14020 of 2021

28.06.2024