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Crl.A.(MD).No.111 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 23.10.2024

DELIVERED ON : 27.11.2024

CORAM:

THE HON'BLE MR JUSTICE G.ILANGO VAN

Crl.A.(MD).No.111 of 2021

K.K.D.Pandian

... Appellant/Complainant

Vs.

S.Tamilselvi

... Respondent/Accused

Prayer: Criminal Appeal has been preferred under Section 378 Cr.P.C., to call for the records relating to the judgment dated 10.01.2020 made in S.T.C.No.10 of 2017 on the file of the Judicial Magistrate Court (FTC) at Theni and set aside the same as illegal.

For Appellant : Mr.R.Gandhi, Senior Counsel for
M/s.Gandhi Associates

For Respondent : Mr.S.Sarvagan Prabhu

J U D G M E N T

This Criminal Appeal has been filed by the appellant to set aside the Judgment dated 10.01.2020 made in S.T.C.No.10 of 2017 on the file of the Judicial Magistrate Court (FTC) at Theni.



2.The complainant filed a complaint with the following
averments:

The accused promised the complainant to get permit for running bus between Yenam and Rajamundry. He demanded Rs.1,10,00,000/-. The complainant paid Rs.40,00,000/- on 08.01.2011 to the accused and her husband and second installment of Rs.25,00,000/- was given on 15.01.2011. The accused involved Ex-Chief Minister of Pondicherry stating that unless the balance amount is paid permit cannot be issued. So the third installment of Rs.45,00,000/- was also given. In spite of receipt of the money, the accused was evading. The above said act of the accused was informed to the then Chief Minister of Pondicherry through letter. In the meantime, there was change of Government in Pondicherry. The accused were hiding. Lastly in the year 2016 June month, they were found. At that time they promised to return Rs.1,05,00,000/-. Rs.10,00,000/- was paid in cash. Through banking transaction Rs.5,00,000/- was paid. For the balance amount the accused issued three cheques bearing Nos.179235, 179236 & 179237, dated 01.07.2016, 07.07.2016 & 15.07.2016 drawn on Indian Bank, Pondicherry and requested the complainant not to take criminal action. Those cheques were received by the complainant on 12.04.2016. They promised to honour the cheque on presentation for payment.



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3.The complainant presented the cheque on 26.08.2016, came to be returned on 29.08.2016 due to insufficient fund. Complaint was given to the District Superintendent of Police, on 12.09.2016. On knowing about the complaint, the accused promised the complainant to honour the cheque for Rs.40,00,000/- and asked to present the same for payment on 13.10.2016. Believing the words. the complainant presented the cheque bearing No. 179237 on 13.10.2016. Again it came to be returned due to insufficient funds. At that time, the complainant came to know that the accused are indulging in cheating. So he filed Crl.O.P.(MD).No.18586 of 2016 seeking direction to the Inspector of Police, Theni, to enquire the complaint. Direction was issued to enquire the complaint. Later the accused and her husband filed petition seeking anticipatory bail. The status report was filed by the Inspector of Police, in pursuance of the complaint given by the complainant. During the course of investigation by the Inspector of Police, it was concluded that the accused did not intend to cheat the complainant, since he has issued the cheques. Later after completing the statutory formalities, he filed the present complaint.

4.The trial Court at the conclusion of the trial process by the Judgment dated 10.01.2020, found the accused not guilty and acquitted him. Against which, this appeal is preferred.



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5. Heard both sides.

6. A short point was raised before the trial court to the effect that whether out of an illegal act any prosecution will lie under Section 138 of the Negotiable Instruments Act. The reason being that even as per the admitted case of the complainant the amount of Rs.1,10,00,000/- was given or paid by the complainant for the purpose of getting bus permit between Yenam and Rajamundry. So this is nothing but, an illegal activity, which is against the public policy. Apart from that other grounds were also raised and accepted by the trial Court.

7. The very same point was raised by the Court at the time of hearing to the learned senior counsel for the appellant. Even as per the admitted case of the complainant the legal fees for getting bus permit between Yenam and Rajamundry is only Rs.5,000/-. So naturally, this amount is illegal amount paid by the complainant for the purpose of obtaining the bus permit through illegal means. For which, the learned senior counsel for the appellant would rely upon the following judgments of the

1. **Kerala High Court** in the case of **Francis Mathew Vs. State of Kerala** reported in **2005 2 Bankmann 166**, and



2.Kerala High Court in the case of **C.V.Rajan Vs. Illikkal Ramesan and another** reported in **2016 1 Bankmann 117**.

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8.The judgment cited above in **2005 2 Bankmann 166**, the subject matter of the agreement is more or less similar. In that matter the accused received Rs.80,000/- promising to secure Government Job for the complainant's brother. Later, he failed. When the money was demanded back, the accused issued the disputed cheque. Argument was advanced before the High Court of Kerala stating that even as per the case of the complainant, that money paid to the accused is a bribe amount, to recover the amount no legal action will lie, that cannot be construed as a legally enforceable liability. Even though the motive or the idea behind the transaction is of course against public policy and illegal act, restricted meaning of legally enforceable liability cannot be made. Admittedly, the accused received the amount for illegal purpose. But, he is not entitled to keep the same without repaying. So he is legally bound to repay the money received by him for illegal purpose. So recovery of money paid for illegal purpose will not be covered under the definition of public policy. The following observation is made in that matter, which can be extracted herein:

“4.First of all, petitioner has no case that he had received any amount as bribe from second



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respondent. Petitioner is admittedly not an employee of Premier Tyres. What was alleged by second respondent was that petitioner promised that he could arrange employment for the brother of first respondent and towards that, he had received Rs. 80,000/-. That amount was paid by the first respondent. On the failure of petitioner to arrange job, second respondent demanded back the amount. Petitioner then issued Ext.P1 cheque. Question is whether such payment could be termed unlawful and opposed to public policy as canvassed by learned counsel appearing for revision petitioner. On going through the decision relied on by learned counsel appearing for petitioner, if the amount claimed was for realisation of the amount agreed to be paid as bribe, it could have been said that the contract is unenforceable as opposed to public policy. Case is different herein. If the case of second respondent is accepted, petitioner received certain amount, which he is not entitled to receive. Second respondent was persuaded to part with Rs. 80,000/- paid to petitioner on the promise that petitioner would arrange employment to his brother. Petitioner did not arrange the employment. Second respondent claimed it back. It was in such circumstances, petitioner issued Ext.P2 cheque. Question is whether it could be made unenforceable as opposed to public policy. On the



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facts and circumstances of the case, I cannot agree with the argument of learned counsel appearing for petitioner that Ext.P2 cheque is to be made unenforceable as opposed to public policy. Petitioner is not entitled to retain the amount, which he received unlawfully and illegally. Petitioner cannot be permitted to be benefited by retaining the amount which he is not entitled to. Therefore, the claim under Ext.P2 cheque cannot be rejected on the ground that it is opposed to public policy as canvassed by learned counsel appearing for petitioner.”

9. Similar situation arose in the case of ***C.V.Rajan Vs. Illikkal Ramesan and another*** reported in ***2016 1 Bankmann 117***, wherein, also the accused received Rs.2,30,000/-, promising to secure a job in School. Later, he failed. To discharge that amount, he issued the cheque. Similar argument was advanced. Para 7 requires reproduction.

“7. The case of the complainant in the complaint was that, the revision petitioner had obtained Rs. 2,30,000/- from him on promising to obtain a clerk job in B.E.M. School and since he could not fulfil the promise and when the amount was demanded, he had issued Ext.P1 cheque and the cheque when presented was dishonoured and in spite of notice issued he had not paid the amount. Though a



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contention was taken in the lower court that, the notice was issued beyond time on perusal of the postal receipt later produced, it was seen that it was sent in time, so that contention is not available. It is true that, in the complaint it was mentioned that, the amount was paid on the promise of procuring a job and when he could not fulfil the promise, on demand the cheque was issued. It may be mentioned here, though a person had obtained money for doing certain thing which he may know that he may not be able to fulfil the same, the innocent persons who were giving money on the basis of that promise cannot be blamed. Further law does not prohibit a person repaying the amount which he obtained on some illegal promise. So when the cheque was issued for repayment of that amount which he wanted to pay and it was issued in discharge of the amount received by him on making some false promise cannot be said to be an unenforcible debt, as law does not prohibit a person returning the amount which he obtained by illegal means. Once that cheque is issued, in discharge of the amount which he had obtained illegally, law does not prohibit prosecuting him for an offence under Section 138 of the Negotiable Instruments Act, if other conditions are satisfied. So the submission made by the counsel for the revision petitioner that,



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the cheque was not issued in discharge of a legally enforceable debt, cannot be accepted.”

10.By pointing out these observations, the learned Senior counsel appearing for the appellant would submit that the ground, on which, the trial court recorded a finding that it is not a legally enforceable liability, should not be sustained.

11.Per contra, the learned counsel for the respondent would rely upon the following judgment exactly on that issue to power of the court to go into judgment of acquittal and apart from that the issue of failure on the part of the appellant to prove the legally enforceable liability. The Judgment of this Court in the case of ***Balachandran Vs. State*** reported in **2019 (1) T.N.L.R. 358 (Mad.) (MB)**.

12.Coming to the core issue of whether section 23 of the Indian Contract Act is involved in this matter. Thorough study is required, Since this was the question posed to the learned senior counsel appearing for the appellant at the time of hearing.

13.By citing the above said judgment he would submit that the



case is not filed on the basis of the original cause of action namely giving money to the accused for getting the bus permit, but on the cause of action arose when the accused agreed to settle the money received by him and issued the three cheques. So according to him, a fresh cause of action arose on the date of issuance of the subject cheques, even though the original cause of action is not legal. But the case is not based upon that.

14.The issue of this nature has arisen in many cases. One among them is the earliest case available, is the judgment reported in (1967) ***Kammula Venkataramayya and another Vs. Yillapani Pullayya and another*** reported in ***1936 Mad 717 (FB)***, the following guidelines was made by the Full Bench of this Court.

“in order to prevent a person who has been a party to a fraudulent transaction from pleading his own fraud, the intended fraud must have been effected, or there must have been a substantial part-performance of the intention to defraud. The mere fraudulent intention evidenced by the transaction is not sufficient.”

15.The basic principle is elucidated in the Judgment of the Honourable Supreme Court in the case of ***Berg Vs. Sadler and Moore,***



reported in (1937) I ALL ET 637 (643) reported in wherein the following principle has been laid down.

“It is a well recognised principle that if the plaintiff in order to prove his case must set up his own illegality, he cannot succeed in his action, although it may be inequitable for the defendant to retain the money.”

16.Further, it has been observed like this

“It is certainly the law that the Court will refuse to enforce an illegal contract of obligations arising out of an illegal contract and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause of action without relying upon the illegal transaction must fail; and nonetheless is this true if the defendant does not rely upon the illegality. If the Court learns of the illegality, it will refuse to lend its aid. The rule is founded not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant by setting it up as a defence. It is founded on public policy... No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”

17.This basic principle was further clarified by the Full Bench of this Court in the case of ***Kammula Venkataramayya and another Vs.***



Yillapani Pullayya and another reported in ***1936 Mad 717 (FB)***. In this

context Section 65 of the Indian Contract Act, will not come to the aid of the person, who comes the Court raising his claim from illegal contract.

These are the settled principles of law, which requires no elaboration.

18.As mentioned above, it is contended on the part of the appellant that a fresh cause of action arose. Whether it is correct on record is a matter for consideration.

19.Now we will go to the evidence in this regard. Before that we will go back to the original cause of action. As mentioned in the complaint, PW1 has stated that towards getting the bus permit, he parted the amount on various dates. During the course of examination, he has stated that the legal charges for getting the bus permit is Rs.5,000/-. Further, he has stated that the amount was given for getting the bus permit and for other expenses. He does not want to say that the above said money was paid for illegal purpose. But, it is apparent that it was given to the accused only for illegal purpose and not for any legal charges for legal services.

20.Apart from that total denial was made with regard to the original transaction itself. It was suggested to the complainant by the



accused that the accused issued the cheques as security for her husband.

That was filled up by the complainant and foisted the case. There was no evidence on the side of the accused either by herself or by her husband. So when she issued the cheques, which were admitted by the accused stating that it was security, the accused was not able to further elaborate for what purpose the cheques were issued as security for her husband. Whether the accused admits that her husband promised the complainant to get the permit, received the amount and for security, the cheques were issued, defence is not clear, except stating that those cheques were issued only as security.

21.So, naturally the presumption will go into operation as provided under Section 139 of the Negotiable Instruments Act and it is for the accused to rebut the presumption by bring on record either direct or in direct evidence.

22.So, it is not clear that the complaint is not based upon the original cause of action, but upon the cause of action on issue of the disputed cheques. In this context we will go to the finding of the trial Court. During 313 1B Cr.P.C proceedings the accused has stated that her husband and the complainant are having money transaction. They were liable to pay Rs.15,00,000/-. That amount was discharged. But, the complainant



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demanded more money. When that was refused, he filled up the same and filed the complaint. So, the trial Court recorded a finding that in view of the admission made by the accused, the presumption under Section 139 and 118 of the N.I Act are attracted and went on to consider whether the presumption was rebutted by the accused successfully. But, on the basis of Ex.P1, the complaint, sent by the appellant to the Chief Minister of Pondicherry, dated 28.07.2013, pointing out the discrepancy and invoking section 23 of the Indian Contract Act, found that it was not issued for any legal enforceable liability. Apart from that the original cause of action of payment of money was not established. But, I am unable to agree with the contradictory findings recorded by the trial Court. At one point of time, it says that the presumption is available and in another point of time it says that accused has rebutted the presumption and the transaction itself is not proved by the complainant.

23.From the reading of the entire evidence on record, it is seen that the complainant and the accused's husband were involved in the above said illegal agreement of contract for getting bus permit through illegal means, so he parted money with accused's husband. But, later the accused issued the cheque towards discharge of that amount. So both are not coming to the Court with clean hands. In this context, now we will go to the



complaint given by the complainant before the police after dishonour of cheques. Ex.P8 is the copy of the report submitted by the Inspector of Police, Theni Police Station. During the enquiry, the Enquiry Officer concluded that the transaction was between complainant and the accused's husband namely T.Sambath Kumar. Her husband received Rs.1.05 Crores. Out of the above said amount Rs.15 lakhs was repaid by Sambath Kumar. The balance amount was Rs.90 Lakhs. For that three cheques were issued. Since the accused issued the cheques for the balance amount, there was no intention on his part to cheat the complainant. So he filed a closure report. This itself indicates that the respondent was not directly involved in the transaction between the complainant and her husband. This can also be clarified or confirmed by perusal of Ex.P1. Ex.P1 is the complaint sent by the complainant to the Chief Minister of Pondicherry, wherein, he has stated that only N.T.Sambath Kumar received the money promising to get bus permit. In spite of best efforts made by him, to get the money back, he was not able to collect it. So he requests the assistance or help of Chief Minister of Pondicherry, in this regard.

24.Now contrary to this, he has stated in his complaint that the respondent herein and her husband were involved in the original transaction. The complainant would have stated true facts in the complaint.



That there was a transaction, of course, illegal transaction between himself and the respondent's husband. But, towards the discharge of the amount illegally brought by her husband, the respondent herein issued the cheque towards the discharge of that liability. Had it been so, this Court would have accepted the contention on the part of the appellant.

25.The reason for me making this observation, that at the time of argument, it was strenuously and repeatedly argued that the complainant is the victim of crime and cheating committed by the accused and her husband. When the police complaint was given, it was closed stating that the accused issued cheques towards the liability, so there was no intention. When complaint was filed on the basis of Section 138 of the N.I. Act, it also came to be dismissed stating that the transaction is not true and public policy is involved.

26.But, the complainant himself has to be blamed for his uncleaned hands. One illegality cannot be answered by committing another illegality. No doubt that the husband of respondent committed illegality in receiving the money promising to secure the bus permit illegally. But, the stand of the complainant that the respondent was also involved in the above said illegal transaction is not less than an illegality, than one committed by



the husband of the respondent.

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27.Actually, the respondent has come to rescue her husband from the continuation of the illegality. But issued the cheque without ensuring that on date of presentation money must be available in her accounts.

28.So the question which arises for consideration is whether dishonour of cheque itself is sufficient enough to hold that the respondent has committed offence under Section 138 of N.I. Act. But it is not sufficient. As mentioned above, this is not the simple case of money transaction entered in between the two parties. But here, the liability is with the accused's husband. There is no bar for a person to issue cheque towards the discharge of others liability. It is a valid consideration. Issuing the cheque without ensuring the availability of funds for honouring the cheque, in this context, it will certainly amount to commission of offence under Section 138 of the N.I.Act.

29.But, here facing the position, the complainant suppressed the real transaction and filed the complaint. So that it is nothing but false averment. The complaint under Section 138 of the N.I.Act is quasi criminal and quasi civil in nature. In both the occasions, the person who comes to the



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Court must come with clean hands and if not, he is not entitled for any relief.

30. Therefore, without going into other aspects, I am of the considered view that this ground alone is sufficient enough to dismiss the appeal.

31. Accordingly, this criminal appeal stands dismissed. The order passed by the trial Court is hereby confirmed. In view of the finding recorded by this Court, liberty is always available to the appellant herein to take appropriate steps to reopen the criminal complaint given by him against the husband of the respondent.

27.11.2024

NCC: Yes/No
Index: Yes/No
Internet: Yes/No
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To

1. The Judicial Magistrate, Fast Track Court at Magisterial Level,
Theni.
2. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



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G.ILANGOVAN, J

TM

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