IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2015

DELIVERED ON : 07.08.2015

CORAM:

THE HONOURABLE MR.JUSTICE P.DEVADASS

Crl.O.P.No.14194 of 2015
in
Crl.A.No.SR3420 of 2015

C.P.Siva Arasu ... Petitioner / Complainant

-vs-

S.Sridhar
Proprietor
M/s.Sunshine Trading Company
Flat-9B, Palace Regency
No.80/93, Purasawalkam High Road
Kelleys, Chennai-600 010 ... Respondent / Respondent

PRAYER: Petition is filed under Section 378 (4) of the Code of Criminal Procedure, to grant leave to the petitioner to prosecute the above criminal appeal before this Court against the Order, dated 18.02.2014 in Criminal Appeal No.182 of 2012, on the file of Principal Sessions Judge, Chennai.

For Petitioner : Mrs.P.T.Asha
for M/s.Sarvabhuman Associates

For Respondent : Mr.A.Ramesh, Senior Counsel
for Mr.V.Vijayakumar

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O R D E R

This criminal original petition has been filed by the complainant in a cheque bouncing case seeking leave of the Court under Section 378 (4) of the Code of Criminal Procedure, to appeal as against the order of the acquittal passed by the Appellate Court.

2. The petitioner / appellant / complainant instituted a private complaint, under Section 200 Cr.P.C., before the learned Metropolitan Magistrate, Fast Track Court-I, Egmore, Chennai-8, as against the respondent herein for an offence under Section 138 of Negotiable Instruments Act, since Exs.P1 and P3 cheques for Rs.2,00,000/- and Rs.1,00,000/- respectively have not been honoured by the Banker of the respondent. The petitioner / appellant / complainant lodged the complaint, after issuing Ex.P5 Lawyer Notice which was replied to under Ex.P7 by the respondent.

3. The complainant alleged in his complaint in C.C.No.3199 of 2012 that he has advanced a sum of Rs.3,00,000/- as loan to the respondent. However, as stated above, it was not repaid. The respondent, in his reply Ex.P7, took the stand that he did not disown his signature in the subject cheques. However, he took the plea that he had business transactions with the Jothi Ramalingam and in connection with his said business transactions, he obtained certain blank cheques for security purpose, which he later filled-up in the name of his friend, namely, the complainant and made the subject cheque. This stand he took consistently during the trial also.

4. The Trial Court, appreciating the oral and documentary evidence, came to the conclusion that the complainant has let in preliminary evidence as to the issuance of cheques in discharge of legally recoverable sum and it had taken note of the fact that in view of the nature of the plea taken although it is not mandatory that the accused should rebut the presumption by examining himself, but in the facts and circumstances, he ought to have let in evidence to rebut the presumption. But, he did not so. In the circumstances, the Trial Court was of the view that the defence theory of blank cheques is a blank, further, during the trial, when the complainant stated that he did not charge interest, although, it has been averred in the complaint. It is a small matter. It is not a material contradiction goes to the root of the matter and the Trial Court ignored it. In the circumstances, the Trial Court came to the view that the accused had thoroughly failed to rebut the presumption arose under Section 139 N.I.Act and thus convicted and sentenced him one year simple imprisonment and also directed payment of cheque amount of Rs.5,00,000/- as compensation under Section 357 (3) Cr.P.C. to the complainant.

5. The respondent appealed as against the said Judgment to the next Appellate Court / Principal Sessions Court, Chennai, in Crl.A.No.182 of 2012.

6. The Appellate Court reheard the matter and reappraised the evidence. It also ruled that to rebut the presumption, it is not a condition precedent that the accused should enter witness box.

7. The findings of the Appellate Court runs as under in its impugned Judgment:

> *"11. In the reply notice Ex.P7 itself, the accused has taken his stand that the cheques were not issued for the discharge of any debit. According to the accused, the cheques were handed over only towards security in the course of business transaction he had with the complainant. The complainant has admitted in his evidence that the accused was one of his commission agent and half of his business was done through him. It appears from the evidence of the complainant that he had carried on his business till 2003. The cheques were issued in the year 2006. According to the complainant, the accused borrowed amount during February 2004 and according to him, it*

was agreed to be paid by January 2005. As per his evidence, he has lent money to the accused after closure of his business. According to the complainant, the amount has to be repaid nearly after 12 months. It is impossible to believe that after closure of his business, he lent Rs.2 lakhs to the accused, that too, without any agreement to pay interest. Absence of agreement to pay interest would also probablise the case of the accused

12. It is significant to note that the date of loan was not mentioned by the complainant. The complainant in his evidence would state that he had borrowed money and lent to the accused. However, he has not examined anybody to show that he has borrowed money and then lent to the accused. He has also not filed any document to show that he has borrowed money. According to the complainant, he obtained cheques for the discharge of the debt due to him from the accused. However, he has not obtained any document at the time of the alleged borrowing. Absence of any document to show that the accused has borrowed money during April, 2004 would probabilise the case of the accused. It is not possible to believe that the complainant lent Rs.2 lakhs without obtaining any document. The above circumstances throws a serious doubt on the case of the complainant. Therefore, it can be safely held that the accused has discharged his burden of rebutting the presumption drawn u/s.139 of the Negotiable Instruments Act.

Once the presumption is rebutted, it is for the complainant to prove that the cheques were issued towards enforceable liability. As already pointed out, the complainant has not produced any reliable evidence to show that he lent Rs.2 lakhs to the accused. His mere oral evidence is not sufficient to hold that he lent money to the accused.

8. On the above said premises, the Appellate Court acquitted the accused.

9. According to the learned counsel for the appellant / complainant, the complainant has discharged his burden of the cheque having been executed for a legally recoverable sum. He has also let in oral and documentary evidence. In view of the plea taken by the respondent that the cheque was issued as a blank cheque for security purpose, the accused ought to have entered the witness box. Further, the respondent did not disown his own signature in the subject cheque.

10. The learned counsel for the appellant / complainant contended that when the respondent is not able to establish a probable defence or refute the existence of consideration and non-existence of the same, the presumption under Section 138 N.I.Act stands as it its. In this connection, the learned counsel, cited ***Hiten P.Dalal v. Bratindranath Banerjee [(2001) (6) SCC 16*** and ***Rangappa vs. Sri Mohan [(2010) 11 SCC 441]***.

11. On the other hand, the learned Senior Counsel for the respondent submitted that as the appellant / complainant had no case he has dilly-dallied in the trial Court. The complainant adopted delaying tactics in the Court below.

12. The learned Senior Counsel further submitted that the perversity with which the Judgment has been rendered by the Court of First Instance has been substituted by a well reasoned Judgment of the Appellate Court in the criminal appeal.

13. The learned Senior Counsel further contended that merely because it is the wish of the defeated party that the next Court will come to a different conclusion, leave to appeal cannot be granted.

14. The learned Senior Counsel added that the appellant/ complainant must establish a possible defence and show that there is a chance for conviction, then only it is a case for leave under Section 378 (4)

Cr.P.C. The learned Senior Counsel cited the decisions in ***Sohan Singh v. Gurlabh Singh [MANU/PH/2004/2015]; Rajendran v. Kesavan [2015 SCC Online Mad 2584]*** and ***N.Eswaramoorthy v. Vennila Mani [2015 SCC Online Mad 3400***.

15. The learned Senior Counsel for the respondent further submitted that in order to draw adverse inference under Section 118 read with 139 N.I.Act, the burden is very much upon the complainant. In this connection, the learned Senior Counsel cited ***John K.Abraham v. Simon C.Abraham and another, [2014 Crl.L.J. 2304]***.

16. The learned Senior Counsel also contended that the proof required on the part of the respondent to rebut the presumption under Section 118 read with 139 N.I.Act is not high as expected on the part of the prosecution and the defence of the respondent shall be considered on the principle of preponderance of probabilities. In this connection, the learned Senior Counsel cited ***Vijay vs. Laxman and another [(2013) 3 SCC 86]***.

17. The learned Senior Counsel also contended that no Court will lend its assistance for any illegal transaction. In this connection, the learned Senior Counsel cited ***G.Pankajakshi Amma vs. Mathai Mathew***

[2004 (12) SCC 83].

18. I have anxiously considered the rival submissions, perused the materials on record and the decisions cited by both sides.

19. As rightly submitted by the learned Senior Counsel for the respondent, leave to appeal as against the order of acquittal is not as a matter of course. It cannot be given for mere asking. Nor it can be considered because the higher forum will to come to a different conclusion.

20. It is relevant here to note the following observation made in ***Sohan Singh v. Gurlabh Singh*** (supra):

> *"It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (I) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is*

generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. It the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."

21. But, while considering the plea for leave, the Court could not hunt for reasons as a condition precedent. (See ***N.Eswaramoorthy v. Vennilamani (2015 SCC OnLine Mad 3400***)) What the Court has to see is whether the finding recorded by the Court below in passing the order of acquittal fell into errors in appreciating the evidence and committed perversity. Whether it had considered the matters which ought not to have been considered or whether it has omitted to consider matters which it ought to have considered. Whether the reasons given to acquit the accused is unreasonable. Whether the conclusion of the Court below in passing the order of acquittal is palpably wrong and it is based on an erroneous view.

22. In a criminal case there is one case ie., prosecution case. It is also called prosecution version. As in civil case, there is no accused case and and prosecution case. In a criminal case there is defence theory. But as regards standard of proof is concerned, there is a distinction. The prosecution has to prove its case beyond all reasonable doubts. The prosecution has to prove his case to the guilt. Thus the standard of proof called upon on the part of the prosecution or complainant in a cheque bouncing case is very heavy. Further, as regards defence theory is concerned proof of it is based on preponderance of probabilities. The defence can establish the defence theory either by leading independent evidence or probable defence taken by showing the defects in the case/evidence let in by the prosecution/complainant. It may be culled out, could be drawn even from the mouth of the complainant and its witnesses, although there is only one scale to weigh the prosecution witnesses (P.W.s.) or defence witnesses (D.W.s) under the Indian Evidence Act. But standard of proof of both differ. But in certain circumstances, when the defence is such that defence may be required to establish the same by leading in some evidence to probabilise the defence theory. It all depends on the facts and circumstances of each case.

23. Now, in this case the signature in the subject cheque has not been disputed by the respondent. The complainant also adduced evidence as to the execution of the cheque and the connected matters. In the circumstances, the respondent is placed in a situation to cut the flowing of legal presumption. The trial Court took the view that in the facts and circumstances viz., the defence of issuance of blank cheque as a security remains blank. In other words, in the facts and circumstances, the defence need to advance/probabilise his said defence by placing some evidence or bringing on record some matters to tilt the scale in his favour.

24. It is pertinent here to note here the submissions of the learned counsel for the petitioner/appellant that the finding of the Appellate Court is mainly based on ifs, and buts. It cannot be stated that once a person closes his business venture, he should be considered a bankrupt and thereafter, he will be a reck, thereafter, he is unworthy of any amount (money/finance sources). It is also a point to remember that the P.W.1 had deposed before the trial Court after so many years as he is not having to remember any capacity as he is having a poor memory, that is why he could not spell the date of borrowing. By that alone, it cannot be said that his case is a false case.

25. The money transaction giving loan are also based on trust, honesty and integrity of the parties. There is no rule or law that every loan transaction must always be on some security documents. The confidence reposed in the debtor, when it is so high in the mind of the creditor these matters pale into insignificance. Changing or non-changing of interest, evidence in this regard are not matter of material contradictions, it all depends on the facts and circumstances of each case.

26. The allegations made in the complaint and in the evidence before the Court must be material. Every difference or a mole cannot be made a mountain.

27. In a leave petition, Court has to see whether there are arguable points involved in the appeal or the appellant got some case, points to ponder over so that the matter can be adjudicated upon so that a chance can be given to assail and access the finding recorded by the Court below. This would be a yardstick to grant leave under Section 378(4) Cr.P.C.

28. Now, on deep consideration of arguments of both the materials on record and the impugned judgment, I am of the view that there are certain eminent arguable points are involved in this criminal appeal. In the circumstances, a case for leave has been made out by the petitioner/ appellant.

29. In the result, this Criminal Original Petition is allowed and leave is granted.

07.08.2015

Internet : Yes/No
Index : Yes/No

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To:
The Principal Sessions Judge,
Principal Sessions Judge, Chennai.

P.DEVADASS, J.

sj/Svn

PRE-DELIVERY ORDER
in
Crl.O.P.No.14194 of 2015
in
Crl.A.No.SR3420 of 2015

07.08.2015