

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.14195 of 2015

in

Crl.A.No.SR3433 of 2015

K.Amudha Priya

... 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.184 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

ORDER

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 to P4 cheques for Rs.81,130/-, Rs.5,13,994/-, Rs.1,02,220/- and for Rs.6,47,632/- respectively towards principal and accrued interest have not been honoured by the Banker of the respondent. The petitioner /appellant / complainant lodged the complaint, after issuing Ex.P6 Lawyer Notice which was replied to under Ex.P7 by the respondent.

3. The complainant alleged in her complaint in C.C.No.201 of 2012 that she has advanced loan to the respondent on the recommendation of her husband C.P.Siva Arasu. 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 only with the said Siva Arasu 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 wife 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.184 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:

“12.As ready pointed out, the case of the accused is that he is commission agent of one Siva Arasu that he used to receive advance commission in business from the said Siva Arasu and during such business transaction, the said Siva Arasu had obtained many blank cheques as security and on closure of his business, he had transmitted some of the cheques to this complainant and through the complainant had falsely filed this case. According to the accused, the cheques were handed over only towards security in the course of business transaction.

13.The complainant has admitted in her evidence that her husband carried on business till 2004. She

would also admitted that her husband was incharge of her business. However, her husband was not examined to substantiate her case. There is no document to show that the total amount of Rs.13,44,976/- was payable by the accused to the complainant. It is also significant to note that there is no document to show that there was agreement to pay interest to the tune of Rs.7,49,852/- for the alleged advance amount. She would also state that the year, month and date on which she paid the money to the accused was not mentioned in the complaint. The cheques were of the year 2006 after the closure of her business, i.e., in 2004. The complainant in her evidence has stated that she could submit the accounts relating the transactions in question. However, no document has been filed to show that the amounts were due from the accused. In the absence of any document to show that the accused received amounts as alleged in the complaint, it cannot be said that the accused was liable to pay Rs.5,95,124/. 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 she lent Rs.5,95,124/- to the accused. Her mere evidence is not sufficient to hold that the

complainant paid the above mentioned amount to the accused as alleged by her."

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. She has also let in oral and documentary evidence. In view of the plea taken by the respondent that the cheques were issued as blank cheques for security purpose, the accused ought to have entered the witness box. Further, the respondent did not disown his own signatures in the subject cheques.

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 is. 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 cases 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 CrI.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 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 signatures in the subject cheques were not disputed by the respondent. The complainant also adduced evidence as to the execution of the cheques 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 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).

25. 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 insignificant. 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 assess 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.

P.DEVADASS, J.

krk/sj/vaan

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

07.08.2015

Internet : Yes/No
Index : Yes/No

krk /sj/vaan

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

PRE-DELIVERY ORDER in
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