

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Crl.O.P.No.7301 of 2015
in Crl.A.No.SR56090 of 2014

A.Thiruvasakam .. Petitioner/Appellant
vs
J.Sathyannarayan .. Respondent/Respondent

Prayer in Crl.OP.7301 of 2015: :- This Criminal Original Petition is filed under Section 378(4) Cr.P.C. to grant leave to the petitioner to file an appeal against the judgment of acquittal dated 01.11.2014 passed in C.C.No.3494 of 2012 on the file of the learned Metropolitan Magistrate, Fast Track Court No.IV, George Town, Chennai-1.

Prayer in Crl.A.No.SR.56090/14: Appeal sought to be filed under section 378 Cr.P.C. against the Judgment of acquittal imposed in CC.No.3494/12 on the file of Metropolitan Magistrate, Fast Track Court, IV George, Townm Chennai-1, dated 1.11.2014.

For Petitioner : Mr.C.K.M.Appaji

ORDER

This Criminal Original Petition is filed to grant leave to prefer an appeal against the judgment of acquittal acquitting the respondent under Section 138 of Negotiable Instruments Act.

2.Heard the learned counsel appearing for the petitioner and perused the materials available on record.

3.The learned counsel appearing for the petitioner would submit that the respondent herein borrowed a sum of Rs.2,00,000/- in January 2011 and undertake to repay the same with interest @ 18% per annum and paid Rs.44,800/- as interest. After that, the respondent has not paid any amount. When the petitioner/complainant demanded the repayment of the amount, the respondent issued a cheque/Ex.P.1 on 19.06.2012 for Rs.2,20,000/-. When it was presented for encashment, it was returned as "insufficient funds" as per return memo/Ex.P.2. Hence, the petitioner issued a statutory notice/Ex.P.3 and it was returned as per Ex.P.4. The respondent has sent a reply notice/Ex.P.5. But the respondent has not repaid the amount. Hence,

he preferred a complaint under Section 138 of Negotiable Instruments Act. The Trial Court after considering the oral and documentary evidence, has acquitted the respondent stating that the petitioner/complainant has not proved that the cheque/Ex.P.1 has been issued for discharging legally subsisting liability. Against, which he sought for leave to file an appeal against the judgment of acquittal.

4.The learned counsel appearing for the petitioner would submit that once the issuance of the cheque and the signature in the cheque has been admitted, the petitioner is entitled to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque has been issued for discharging legally subsisting liability. Even though the presumption is a rebuttable presumption, the presumption has not been rebutted by the respondent/accused and that factum was not considered by the Trial Court. Whereas the Trial Court has held that the petitioner has not prove that he has sufficient means to lend a sum of Rs.2,00,000/- which is unsustainable. Hence, he pray to grant leave to prefer an appeal against the judgment of acquittal.

5.Considered the submissions made by the learned counsel appearing for the petitioner and perused the typed set of papers.

6.The case of the petitioner is that the respondent herein has borrowed a sum of Rs.2,00,000/- in January 2011 as hand loan, agreeing to repay the same with interest @ 18% per annum and paid interest to the tune of Rs.44,800/-. When the petitioner request for repayment of the amount, the respondent issued a cheque/Ex.P.1 on 19.06.2012. When it was presented for encashment, it was returned as "insufficient funds". After issuance of statutory notice, complaint has been preferred. It is true that the respondent has raised the defence that the cheque was issued as a security while the petitioner was acted as an agent for obtaining loan from one Gopi and Munusamy and that amount has been repaid but the cheque given to the petitioner has been misused by him.

7.Once the issuance of cheque and the signature in the cheque has been admitted by the respondent, the holder of the cheque have the every right to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque/Ex.P.1 has been issued for discharging legally subsisting liability. The presumption under Section 139 of Negotiable Instruments Act is a rebuttable presumption. So, the respondent/accused has to rebut the presumption by preponderance of probabilities and not by beyond all reasonable doubt.

8.Now this Court has to decide whether the respondent has probablised his defence? It is pertinent to note that as soon as he received the statutory notice, the respondent sent a reply

notice/Ex.P.5. As per the dictum of the Hon'ble Apex Court reported in 2010 (11) SCC 441 (Rangappa vs. Srimohan), wherein it was held that the respondent can rebut the presumption either by way of cross examining the prosecution witness or by way of examining independent witness. Here P.W.1 was cross examined and the respondent examine himself as D.W.1 and in his evidence, he has deposed that he borrowed money in the year 2010 and issued two cheques as security since the petitioner herein acted as an agent for borrowing. The respondent herein has probablised the defence by way of cross examining P.W.1 and in the cross examination, P.W.1 has stated that the respondent borrowed money in the year 2011 for performing the marriage of his son. But whereas the marriage of the respondent's son was in the year 2010. So, the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion that the respondent has probablised his defence. Once the accused has probablised the defence, the onus has been shifted to the complainant/petitioner herein to prove that the Cheque/Ex.P.1 has been issued for discharging legally subsisting liability. Further, except Ex.P.1 to Ex.P.5, the petitioner has not filed any document to show that he has lent Rs.2,00,000/- in January 2011. In such circumstances, I am of the view that the Trial Court has rightly come to the correct conclusion and acquitted the accused. So, I do not find any merits and there is no purpose will be served in granting leave to prefer an appeal.

9. In the result, the Criminal Original Petition is dismissed. Consequently, Crl.A.No.SR56090 of 2014 is rejected.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cse

To

The Metropolitan Magistrate,
Fast Track Court No.IV,
George Town, Chennai-1.

+ 1 cc to Mr.C.K.M.Appaji, Advocate SR.17455

MSM(CO)

EU 11.04.2015

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