

THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:01.11.2016

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

CrI.O.P.No.11292 of 2016 in
CrI.A.Sr.No.51446 of 2014

Rajan Athmaram (deceased)
Proprietor of M/s.Rajan & Co.
rep. By Yogesh Rajan
S/o.Rajan Athmaram,
No.209-A, IInd Floor,
Shivalaya Building, Ethiraj Salai,
Egmore, Chennai - 600 008. ... Petitioner/Complainant

Vs.

- 1.M/s.Celebrate Screens Pvt. Ltd.,
Rep. By its Director,
Roy Augustine Akkapa,
No.89, Airline Building,
Mount Road, Chennai - 600 002.
- 2.Roy Augustine Akkapa,
Director of M/s.Celebrate Screens Pvt. Ltd.,
No.89, Airline Building,
Mount Road, Chennai - 600 002..... Respondents/Respondents

PRAYER: Petition filed under Section 378(4) Cr.P.C. praying to grant leave to file appeal against the judgment of acquittal dated 09.07.2014 made in C.C.No.738 of 2006 on the file of Metropolitan Magistrate (FTC-II), Egmore, Chennai.

PRAYER: Appeal filed u/s.378(4) of Cr.P.C. to set aside the Judgment of Acquitted dt.9.7.14 passed in CC.No.738/06 by the Learned Metropolitan Magistrate (FTC-II) Egmore, Chennai and convict the respondent/Accused with maximum sentence as per section 128 at Negotiable Instruments Act.

For Petitioner : Mr.V.Paul Panneerselvam
for M/s.A.R.Nixon

For Respondents : No Appearance

ORDER

Publication in Tamil Daily viz., 'Makkal Kural' was effected as early as on 12.04.2016. However, the publication in English Daily was effected on 04.10.2016 in News Today paper. The Respondents 1 and 2 were called absent and on their behalf, no one has entered appearance nor filed vakalat.

Resultantly, the service by 'Substituted Service' is held sufficient.

2. Heard Mr.V.Paul Panneerselvam, Learned counsel for the Petitioner/Appellant/Complainant.

3. According to the Learned Counsel for the Petitioner/Appellant/ Complainant, the trial Court had committed an error in arriving at a conclusion that the Petitioner/Appellant/Complainant had not established his case against the Respondents 1 and 2/Accused and ultimately, acquitted them as per Section 255(1) Cr.P.C.

4. Advancing his arguments, the Learned Counsel for the Petitioner/Appellant brings it to the notice of this Court that the Respondents/Accused had issued three cheques to and in favour of the Appellant and in fact, the Respondents/Accused had not explained as to how their cheques were with the Appellant and in this regard, the 'onus' was on them and this aspect of the matter was not appreciated by the trial Court in a proper and real perspective.

5. It is represented on behalf of the Petitioner/Appellant that the Respondents/Accused had admitted their liability, which fact was not taken into account by the trial Court and this has resulted in a serious miscarriage of Justice.

6. The Learned Counsel for the Petitioner/Appellant/Complainant proceeds to take a plea that the Respondents/Accused had not filed any relevant document in 'Rebuttal' under Section 139 of the Negotiable Instruments Act, 1881 and further, no question was raised on behalf of the Respondents as to why they had issued cheques to and in favour of the Petitioner/Appellant/Complainant.

7. At this stage, this Court, on perusal of the complaint filed by the Petitioner/Appellant/Complainant (under Section 200 Cr.P.C. in respect of an offence under Section 138 and 145 of the Negotiable Instruments Act], is of the considered view that the Petitioner/ Appellant/Complainant had clearly averred that he is a 'Finance Agent' and that A1 is a Private Limited Company and its day to day business is looked after by A2 as its Director and that A2 borrowed several lakhs through the complainant from various financiers and executed several promissory notes.

8. At this juncture, this Court aptly refers to the averments made by the Petitioner/Appellant/Complainant, at paragraph 2 to 4 of the compliant, which runs as under:

"2. The second accused towards the repayment of his personal liability issued cheques of the first accused company. The second accused is also a signatory to the

following cheques issues of IDBI Bank, Greams Road, Chennai the details are:

1.Cheque No.172986 dated 7.5.2005 for Rs.75000/-

2.Cheque No.172987 dated 7.6.2005 for Rs.75000/-

3.Cheque No.172988 dated 7.7.2005 for Rs.75000/-

4.Cheque No.172989 dated 7.8.2005 for Rs.75000/-

5.Cheque No.172990 dated 7.9.2005 for Rs.75000/-

3.The complainant submits that the above cheques were presented on 26.9.2005 in Indian Bank, Ethiraj Salai, Chennai. All the cheques were dishonoured on 27.9.2005 for the reasons Funds Insufficient. The complainant was informed on 28.9.2005.

4.The complainant on 15.10.2005 issued legal notice to the accsued as per Sec. 138 and 141 of Negotiable Instruments Act giving 15 days time for the accused to pay the total dishonoured cheques amount. The notice was received by the accused on 19.10.2005. Till date the accused have not paid the cheques amount. Hence they have committed the offence and ought to be punished for the same."

9.It is to be noted that when the cheque is in possession of complainant presumption under Section 139 of the Negotiable Instruments Act would be drawn that the Complainant had discharged his early burden. In fact, the onus to prove that the said cheque was not issued against a legally enforceable Debt was on the Accused. It cannot be forgotten that every 'Debt' or 'Liability' upon which cheque was issued was not enforceable.

10.It is to be borne in mind that when a cheque was issued not for the purpose of discharge of any 'Debt' or other 'Liability', the Maker of the cheque is not liable for prosecution. It is not necessary that a Debt or Liability should be due from the Drawer himself. It may be issued for discharge of other person's Debt or Liability as the case may be. To attract a prosecution under Negotiable Instruments Act, it was necessary that a cheque should have been issued either in respect of past or current existing Debt or other legal Liability. If the factum of execution itself is in simmering doubt/dispute, the complainant/plaintiff is to establish not only the due 'Execution' but also 'Passing of Consideration'.

An offence defined under Section 2(n) Cr.P.C. includes not only the doing of a possible act, by omitting to do something as well. Also that, an offence would be deemed to have been committed only if the 'Drawer' of cheque failed to make the payment within 15 days of receipt of notice.

11. Undoubtedly, Section 138 of the Negotiable Instruments Act, 1881 is a penal provision. Section 141 of the Negotiable Instruments Act pertains to an offence under Section 138 of the Act committed by Company. It is not either a mandatory or an obligatory one on the part of an Accused to enter into a witness box or to let in evidence. However, if he could collect materials from the evidence of complainant which would disprove the presumptive facts in relation to the preexisting of legal Liability or Debt for Discharge of which a cheque was issued. Of course, an 'Existence' of legally recoverable Debt is not a matter of presumption under Section 139 of the Negotiable Instruments Act. No wonder, a presumption has a limitation viz., in exceptional case there will be an irrebuttable presumption. If the execution of a cheque was denied by the Respondent/Accused/Defendant and the evidence of the Prosecution/Plaintiff side was not a satisfactory one, a Court of Law cannot draw a presumption under Section 118 (a) of the Negotiable Instruments Act.

12. In Law, a presumption under Section 118(a) of the Negotiable Instruments Act is against the 'Maker' or 'Drawer' or 'Endorser' and not a presumption specifically in favour of 'Payee', the 'Holder' or 'Holder in Due Course'. Moreover, when Execution of cheque was denied by an Accused, it was for the complainant to prove the same by a positive/ concrete evidence. It cannot be gainsaid that mere 'Admission of Signature' or 'Thump Impression' does not mean an Admission of Execution of a promissory note.

13. It is to be pointed out that Section 91 of the Indian Evidence Act, 1872 pertains to evidence of terms of contract, grants and other disposition of properties reduced to a form of document. This Section forbids establishing the contents of a writing other than by writing itself. In fact, best evidence must be produced by a party and when the contents of writing are to be established, the writing itself must be produced before the Court concerned or its absence accounted for before the testimony to its contents is admitted. Section 91 of the Evidence Act deals with 'Exclusiveness of Documentary Evidence'. But the ingredients of Section 92 of the Act deal with 'Conclusiveness of Documentary Evidence'.

14. To put it differently, Section 91 without the aid of Section 92 is inoperative. Likewise, Section 92 would be inoperative without the support of Section 91. Really speaking, Section 92 of the Act applies to documents which can be termed as 'Dispositive'. Section 91 applies to 'Bilateral and Unilateral Documents'. Section 92 is limited to 'Bilateral

Documents'. Section 92 comes into operative play for excluding evidence of any oral agreement, statement etc. for the purpose of adding, contracting or subtracting from its terms. In short, Sections 91 and 92 of the Indian Evidence Act, 1872, in effect, supplement each other. In Law, the best evidence as to the tenor, spirit and contents of document is the document itself per se, as opined by this Court.

15. In this connection, on perusal of the deposition of P.W.1 (Rajan Atmaram), this Court finds that from different persons, he had received money and given to the Accused and till date he had given a sum of Rs.7,50,000/- to the Accused and towards the said sum, the Accused had given five cheques each for Rs.75,000/- and the same got returned due to 'Insufficient Funds'.

16. It is the evidence of P.W.1 (in cross examination) that he had lent a sum of Rs.7,50,000/- to the Accused and for which, the Accused had given 10 cheques each for Rs.75,000/- and the five cheques were encashed and for the remaining five cheques, he had received money. Further, he had not filed before the Court the promissory notes executed by the Accused and for Rs.75,00,000/- he has 'Income Tax Accounts' and the same was not filed till date, but he is ready to file the same during the period from 2006 till 2007 and during the pendency of the case, the Accused had paid a sum of Rs.75,000/-. Also, he had deposed that between him and the Respondents/Accused, there was no agreement in regard to the receipt of giving or taking money and that he had given the amounts through promissory notes and that the said promissory notes were not filed by him before Court.

17. In the instant case, there was no material to substantiate what was the sum advanced and by whom and this would clearly point out to the fact that who were the financiers who had lent money to the Petitioner/Appellant/Complainant and in fact, the persons who advanced money/purported financiers were either not brought before the trial Court or they remain unidentified. It is the evidence of P.W.1 that a sum of Rs.30,000/- was received from the Respondents/Accused.

18. In the present case, there is no documentary evidence by means of agreement(s), promissory note(s) etc. to prove ex facie that the cheques in question were issued in Discharge of a legally enforceable 'Debt' to and in favour of the Appellant/Complainant. When P.W.1 admittedly had not lent any money to the Accused, he had not also established that an offence under Section 138 of the Negotiable Instruments Act was committed by the Accused. Also that, on the side of the Appellant/Complainant, no statement of account to establish that any amount was paid to the Respondents/Accused.

19.It is to be borne in mind that the Petitioner/Appellant/ Complainant, at paragraph 1 of the complaint, in C.C.No.738 of 2006 before the trial Court, had significantly mentioned the following:

"...The second accused borrowed several lakhs through the complainant from various financiers and executed several promissory notes."

20.Even though the offence under Section 138 of the Negotiable Instruments Act is filed by the Complainant against the Accused for the civil liability, a fastening of criminal liability is made in terms of the Negotiable Instruments Act, 1881. As such, this Court is of the earnest opinion that it is for the Petitioner/Appellant/Complainant to establish his case against the Respondents/Accused beyond all reasonable doubt. If the Respondent/Accused is able to dislodge/disbelieve the story of the prosecution by pressing into service certain facts and circumstances disclosed through Complainant/Plaintiff's evidence, then, it can be taken that an Accused has raised some defences through preponderance of probability. Therefore, the onus would once again shift to the Petitioner /Appellant/Complainant and in short, it is for the Petitioner/Appellant/ Complainant to establish his case to the subjective satisfaction of the Court concerned.

21.As far as the present case is concerned, it is the clear-cut case of the Petitioner/Appellant/Complainant that 'the second accused borrowed several lakhs through the complainant from various financiers and executed several promissory notes'. But the P.W.1, in his evidence, had stated that to the Accused, he had received money from others and paid him a sum of Rs.7,50,000/-, which is a variant one from the stand taken in the complaint and the evidence tendered before the trial Court. Furthermore, the P.W.1 had stated in his evidence that he had himself lent money to the Accused. Also that, the Petitioner/Appellant/ Complainant had not produced any promissory notes before the trial Court in respect of the loan transaction.

22.In reality, P.W.1, (in his cross examination), had tacitly admitted that he had not produced the promissory notes and he had also admitted to a suggestion that in his complaint he had not mentioned the names of persons from whom he had received money and lent the same to the Accused. Also that, P.W.1 had not produced any letter/document before the trial Court to establish that he acted as an 'Agent' between the different financiers and the Accused. Moreover, no letter of permission/authorisation in this regard was also not produced on the side of the Petitioner/Appellant/Complainant before the trial Court.

23.It is an axiomatic principle in Law that any 'Appeal' against acquittal, the High Court has the requisite power to

review at large, the whole gamut of evidence giving necessary weightage to the opinion/ view of the trial Judge as regards the credibility of witnesses. It is true that the High Court has to consider the Judgment of acquittal/Order of acquittal based on material available on record, but while reappraising the evidence, the High Court has the power to reconsider the whole issue and to come to its own conclusion and render its findings, in place of the findings recorded by the trial Court, if the said findings are against the evidence on record or to put it differently, a perverse one.

24.In the instant case on hand, although the Petitioner/Appellant/ Complainant, at paragraph 1 of the complaint in C.C.No.738 of 2006 before the trial Court, had categorically averred that 'the second accused borrowed several lakhs through the complainant from various financiers and executed several promissory notes', significantly, in his deposition, P.W.1 had in a crystalline fashion, mentioned that he had lent money to the Accused, which is a variant/a discrepancy/ contradiction which goes to the foundation of the complaint preferred by the Petitioner/Appellant /Complainant, in the considered opinion of this Court.

25.When that be the fact situation, the trial Court had rightly come to the conclusion that the Petitioner/Appellant/Complainant had not established his case against the Respondents/Accused beyond all reasonable doubt and acquitted them under Section 255(1) Cr.P.C. after finding Respondents 1 and 2 not guilty and the said decision/finding, in the considered opinion of this Court, cannot be construed to be either a perverse or a capricious one. As such, this Court inevitably holds that there is no infirmity in the Judgment/Order of acquittal passed by the trial Court. Viewed in that perspective, the Leave sought for by the Petitioner in CrI.O.P.No.11292 of 2016 fails.

26.In the result, the Criminal Original Petition is dismissed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

The Metropolitan Magistrate (FTC-II) Egmore, Chennai.

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krd 24/11

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CrI.A.Sr.No.51446 of 2014