

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

CORAM:

THE HON'BLE MR.JUSTICE P.N.PRAKASH

Crl.A.21 of 2014

M/s Pechiamman Agency
Rep. by its Proprietor
Mr.Vairavasamy
S/o Easakki Mudaliyar
No.474, Palakkad Main Road
Idayarpalayam Pirivu
Coimbatore.

..Appellant

Vs.

Raja Sathish T.Kumar

..Respondent

Criminal Appeal filed under Section 378 of the Code of Criminal Procedure against the judgment passed in C.C.No.873 of 2004 by the Judicial Magistrate No.I, Coimbatore dated 30.04.2007.

Appellant : Mr.Vairavasamy [no appearance]
For Respondent : Mr.P.Saravana Sowmiyan

J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the judgment dated 30.04.2007 passed in C.C.No.873 of 2004 by the Judicial Magistrate No.I, Coimbatore.

2. For the sake of convenience, the appellant and the respondent will be referred to as the complainant and the accused.

3. It is the case of the complainant that he is the Proprietor of M/s.Pechiamman Agency and is into wholesale rice business. It is his further case that the accused is his relative and he is the Proprietor of M/s Annapoorna Rice Mandi; that the accused had borrowed Rs.4 lakhs as hand loan and at the time of borrowing, he had issued two post dated cheques, one bearing No.075597 dated 10.08.2004 for Rs.3,50,000 [Ex.P.1] and another bearing No.078549 dated 14.08.2004 for Rs.50,000/- [Ex.P.2]; that when the complainant presented the two cheques, the cheque for Rs.50,000/- was dishonoured on the ground "Stopped Payment" and the cheque for Rs.Rs.3,50,000 was dishonoured on the ground "Insufficient Funds"; that the complainant issued a legal notice dated 01.09.2004 [Ex.P.7], which was received by the accused, vide Acknowledgment Card [Ex.P.8]; that since the accused did not make the payment, the complainant initiated a prosecution in C.C.No.873 of 2004 under Section 138 of the Negotiable Instruments Act, 1881, against the accused before the Judicial Magistrate No.I, Coimbatore.

4. On the appearance of the accused, he was questioned about the accusation against him and he denied the same. To prove the case, the complainant examined himself as P.W.1 and marked 8 exhibits. When the accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C., he denied the same. On behalf of the accused, two witnesses were examined, viz., Subramaniam [D.W.1], the Branch Manager of the Bank, in which, the accused was having his account and Sreenivasan [D.W.2], the Branch Manager of the Bank, in which, the complainant was having his account and through them, marked Exs.D.1 to D4, viz., the statement of account of the accused and the statement of account of the complainant.

5. During trial, the accused contended that he had not taken hand loan from the complainant, but the impugned cheques were given only as security to the complainant towards the purchase of rice from him. Therefore, the accused filed C.M.P.No.4045 of 2008 under Section 91 Cr.P.C., calling upon the complainant to produce his account books for showing that the accused was having a running account with the complainant in connection with purchase of rice in wholesale. This petition in CMP No.4045 of 2008 was dismissed by the trial Court. The accused took it up by way of a revision petition in Crl.R.P.No.53 of 2006 to the Sessions Court, where, the learned II Additional

District and Sessions Judge allowed the application with a direction to the complainant to produce his account books before the trial Court. Despite the order of the Sessions Court, the complainant did not produce the account books and took a plea that the account books were lost. The trial Court considered the evidence adduced on record and after hearing either side, acquitted the accused by order dated 30.04.2007 in C.C.No.873 of 2004, aggrieved by which, the complainant has filed the present appeal against acquittal with Special Leave Petition with a delay of 17 days.

6. This Court, in M.P.No.1 of 2007 [condone delay application], condoned the delay of 17 days on 10.12.2013. Thereafter, Special Leave was granted in Crl.O.P.No.32283 of 2013 on 09.01.2014. Thus, an appeal against acquittal that was filed in the year 2007 with a delay of 17 days has been numbered only in the year 2014.

7. When the matter was taken up for final hearing, Mr.Gunalan, learned counsel for the appellant/complainant filed a memo stating that he has no instructions from his client and withdrew his appearance. The name of the complainant/appellant and the respondent/accused are printed in the cause list. The name of the appellant was called thrice by the Court Officer and there was no appearance. Though the learned counsel for the appellant has

withdrawn the memo of appearance, this Court has the power to go into the records and pass orders.

8. It may be necessary to state here that Section 372 Cr.P.C. provides for an appeal by victim of an offence. This amendment came into force on 31.12.2009. In **S.Ganapathy v. N.Senthilvel [(2016) 3 MLJ (CrL.) 641 (FB)]**, a Full Bench of this Court has held that if the accused has been acquitted for an offence under Section 138 of the Negotiable Instruments Act by a Magistrate, the appeal should be filed before the Sessions Court. Following this judgment, hundreds of appeals against acquittals filed in the High Court have been disposed of transferring the cases to the concerned Sessions Court. However, in this case, the cause of action had arisen in the year 2004 and the trial Court had acquitted the accused in the year 2007 and therefore, the amendment which came into force in the year 2009 will not apply to the facts and circumstances of this case, though the appeal was numbered in the year 2014. Hence, this appeal is not transferred to the concerned Sessions Court in terms of the judgment of the Full Bench in **S. Ganapathy (supra)**.

9. On a reading of the evidence of the complainant, it is seen that the complainant has established the fact that the cheques were dishonoured; that the statutory notice was issued; that the statutory notice was received by the

accused and that the accused did not make the payment towards the cheques. However, on a reading of the complaint and the evidence of Vairavasamy [P.W.1], it is seen that he has not even stated the date on which the hand loan of Rs.4 lakhs was given by the complainant to the accused. It is the specific defence of the accused that he had not taken any hand loan from the complainant, but he has been having business dealings with the complainant and had been purchasing rice on credit, for which, he had issued the two impugned cheques only as security and not towards any hand loan.

10. In **Rangappa vs. Sri Mohan [(2010) 11 SCC 441]**, the Supreme Court has held that if the accused admits the issuance of a cheque, the presumption that the cheque was issued towards the discharge of a liability would arise in terms of Section 139 of the Negotiable Instruments Act. However, in the same judgment, the Supreme Court has stated that the accused can discharge the burden by preponderance of probability and not by proof beyond reasonable doubt.

11. In this case, the accused has examined two witnesses, viz., the Managers of the two Banks and vide Exs.D2 and D3, has established that there has been continuous transaction between the complainant and the accused for over a period of time. In the teeth of this evidence, the failure of the

complainant to produce his account books despite the specific order passed by the Sessions Court in Crl.R.P.No.53 of 2006 assumes significance. All these aspects have been thoroughly considered by the trial Court for acquitting the accused.

12. In **Arulvelu and another vs. State rep. by the Public Prosecutor and another [(2009) 10 SCC 206]**, the Supreme Court has held as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

Thus, in an appeal against acquittal, based on the evidence on record, if two views are possible, viz., one in favour of the accused and the other in favour of the complainant, the view that favours the accused would merit consideration. In such view of the matter, this Court does not find any infirmity in the order of acquittal passed by the trial Court, warranting interference by this Court.

P.N.PRAKASH, J.

gms

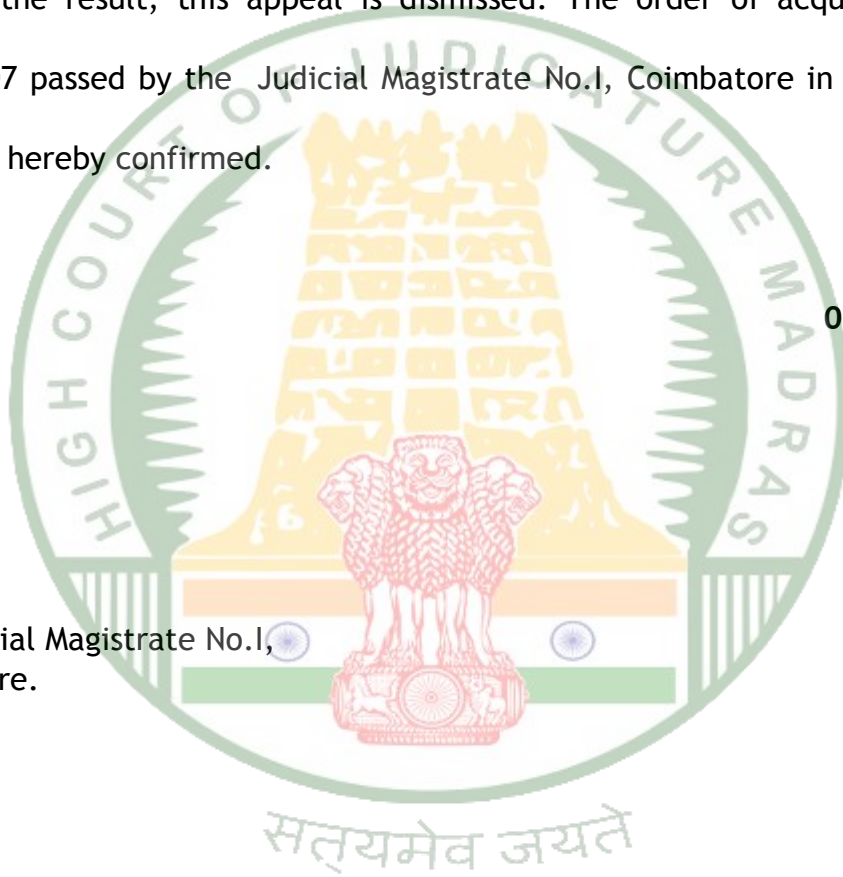
In the result, this appeal is dismissed. The order of acquittal dated 30.04.2007 passed by the Judicial Magistrate No.I, Coimbatore in C.C.No.873 of 2004 is hereby confirmed.

08.12.2017

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To

The Judicial Magistrate No.I,
Coimbatore.



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