

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.352 of 2014

P.Damodaran

... Appellant/Complainant

Vs.

V.Udaya Kumar

.... Respondent/Accused

Criminal Appeal filed under Section 374 (2) of Cr.P.C. against the judgment made in C.A.No.179 of 2011 dated 27.06.2012 on the file of the First Additional District and Sessions Judge, Coimbatore reversing the judgment made in STC No.3370 of 2009 dated 25.07.2011 on the file of the Judicial Magistrate No.I, Pollachi.

For Appellant : Mr.C.Veeraraghavan
For Respondent : Mr.T. Muruganantham
for Ms.L.Srilekha

J U D G M E N T

This appeal has been filed against the judgment dated 27.06.2012 passed in C.A.No.179 of 2011 by the learned First Additional District and Sessions Judge, Coimbatore, reversing the judgment made in STC No.3370 of 2009 dated 25.07.2011 by the Judicial Magistrate No.I, Pollachi.

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 the accused borrowed a sum of Rs.1 lakh on 10.01.2009 and executed a promissory note [Ex.P.1] in favour of the complainant. When the complainant started demanding the amount, the accused issued a cheque dated 10.06.2009 [Ex.P.2], which, when presented by the complainant, was dishonoured for insufficiency of funds on 27.07.2009. The complainant issued a legal notice dated 18.08.2009 [Ex.P.4] calling upon the accused to pay the amount towards the cheque, for which, the accused sent a reply notice dated 28.08.2009 [Ex.P.6] contending that he had not borrowed any money from the complainant; that he had borrowed Rs.1 lakh from one Karthikeyan [D.W.2] under whom the complainant was

working as Accountant; that he had given a blank promissory note and blank cheque to the said Karthikeyan [D.W.2] and that the said Karthikeyan [D.W.2] had handed over the promissory note and the cheque to the complainant for initiating action against accused.

4. The complainant initiated a prosecution in STC No.3370 of 2009 under Section 138 of the Negotiable Instruments Act, 1881 [for short "the NI Act"] against the accused and on the appearance of the accused, he was questioned about the substance of accusation, which he denied. To prove the case, the complainant examined himself as P.W.1 and marked 10 exhibits. When the accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C., he reiterated the stand that he had taken in the reply notice [Ex.P.6]. The accused examined himself as D.W.1 and also summoned Karthikeyan and examined him as D.W.2.

5. The trial Court, after considering the evidence on record and hearing either side, convicted the accused under Section 138 of the N.I. Act and sentenced him to undergo one year Simple Imprisonment and pay a fine of Rs.5,000/-, in default to undergo two months Simple Imprisonment. As against the said conviction and sentence, the accused preferred Crl.A.No.179 of 2011, in which, the learned First Additional District and Sessions Judge, Coimbatore acquitted the accused on 27.06.2012, aggrieved by which, the complainant is before this Court in this appeal.

6. In the appeal against acquittal, special leave has been granted by this Court at the time of admission.

7. Heard Mr.C.Veeraraghavan, learned counsel for the complainant/ appellant and Ms.L.Srilekha, learned counsel for the accused.

8. Learned counsel for the complainant submitted that the First Appellate Court has mis-appreciated the evidence adduced by the complainant and has been carried away by certain extraneous aspects. He also submitted that the accused had not denied the execution of the promissory note and the cheque and therefore, the presumption under Section 139 of the N.I. Act would apply. He further submitted that the accused questioned the financial capability of the complainant to give the loan, for which, the complainant has marked his income tax returns to prove his capability. Despite such evidence having been adduced by the complainant, strangely, the First Appellate Court has acquitted the accused erroneously, which warrants interference.

9. Per contra, learned counsel for the accused refuted the contentions and supported the impugned order of acquittal.

10. Before advertng to the facts of the case, it may be apposite to extract paragraph 36 of the judgment of the Supreme Court in Arulvelu and another vs. State rep. by the Public Prosecutor and another [(2009) 10 SCC 206].

"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."

11. It is true that the trial Court has considered the evidence of the accused to hold that he had not properly discharged the burden under Section 139 of the N.I. Act. It is trite that the burden under Section 139 of the N.I. Act can be discharged by the accused by preponderance of probabilities and not by proof beyond reasonable doubt. In this case, the accused has been taking a consistent stand from the time when the reply notice [Ex.P.6] was issued to the complainant in response to the statutory notice [Ex.P.4] that was issued by the complainant by contending that the loan in question was taken from Karthikeyan [D.W.2], under whom the complainant was working as an Accountant and the promissory note and the cheque were given to Karthikeyan [D.W.2], who, in turn, has handed over the same to the complainant for prosecuting the accused.

12. The accused did not rest with it, but, examined himself as D.W.1 surrendering his right of silence under Section 315 Cr.P.C. On a perusal of the cheque [Ex.P.2], the ink in the body of the cheque differs from the ink in which the signature of the accused has been affixed. This is patent to the naked eye and requires no expert opinion. The complainant has not explained this aspect satisfactorily. That apart, the accused, in his evidence before the Court has reiterated that he had borrowed Rs.1 lakh from Karthikeyan [D.W.2] and he has to repay the said amount to Karthikeyan [D.W.2], but not to the complainant herein. It has been established that the accused is selling groundnuts in the market and Karthikeyan [D.W.2] runs a provision store in the same market. The accused candidly admitted that he would take hand loans from various persons in the market including Karthikeyan [D.W.2] and that when two of them had filed cases against him, he pleaded guilty to the charge and agreed to pay the amount to them. These questions were answered by him not in the chief-examination, but in the cross-examination by the complainant.

13. That apart, the accused summoned Karthikeyan [D.W.2], which is an extreme step that no one would easily venture, because the accused knew that Karthikeyan [D.W.2] and the complainant were in league and that the present prosecution has been engineered by Karthikeyan [D.W.2] through the complainant, who is his Accountant. Despite this, he took the risk of examining Karthikeyan as D.W.2 and naturally, Karthikeyan did not support the case of the accused. Had Karthikeyan supported the case of the accused, then, there would have been reasons for this Court to believe that the accused had deliberately set up a defence in league with Karthikeyan [D.W.2] and had issued the reply notice. Admittedly, neither Karthikeyan [D.W.2] nor the complainant filed any civil suit against the accused for the recovery of the amount.

14. Learned counsel for the complainant submitted that the accused also did not take any action against Karthikeyan [D.W.2] and therefore, the defence raised by the accused is also improbable. In the cross-examination of the accused, he has clearly stated that he had not taken any action against Karthikeyan [D.W.2], because Karthikeyan has already set up the complainant to initiate this prosecution against him, despite the fact that he owes a sum of Rs.1 lakh to Karthikeyan. This explanation offered by the accused in his cross-examination sounds reasonable. Thus, when there are two views possible, this Court should accept the view that favours the case of the accused and not the one that favours the case of the prosecution. Under such circumstances, this Court does not find any infirmity in the order of the First Appellate Court acquitting the accused, warranting interference.

In the result, this appeal is dismissed as being devoid of merits.

s/d-

Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

To

1. The First Additional District and Sessions Judge, Coimbatore.

2. Do Thro The Principal Sessions Judge, Coimbatore

3. The Judicial Magistrate No.I, Pollachi.

4. Do Thro The chief Judicial Magistrate
Pollachi.

5. The Section Officer
Criminal Section, High Court, Madras.

+1 CC to Mr.T. Muruganantham , Advocate sr 81572.

+1 CC to Mr.C. Veeraraghavan, Advocate sr 81299.

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SP(08/12/2017)



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