IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2017

CORAM:

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

Crl.O.P.No.27336 of 2017
in
Crl.A.No.SR.26418 of 2017

K.Sivaraj ...Petitioner/Appellant/Complainant

versus

V.Andal Vinayagam ...Respondent/Accused

Criminal Original Petition filed under Section 378 (4) of the Criminal Procedure Code to grant Leave to file an appeal to this Court against the judgment dated 03.03.2017 passed in Criminal Appeal No.40 of 2013 on the file of the Additional District Judge (Fast Track Court), Vellore, Vellore District.

WEB COPY

For Petitioner : Mr.V.R.Karthikeyan

ORDER

This Criminal Original Petition has been filed to grant leave to file

http://www.judis.nic.in

an appeal against the judgment dated 03.03.2017 passed in Criminal Appeal No.40 of 2013 by the learned Additional District Judge (Fast Track Court), Vellore, Vellore District.

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

3. The complainant and the husband of the accused are friends and on account of that, the accused borrowed money from the complainant to the tune of Rs.9,00,000/- on the following dates:

i)	10.04.2007	---	Rs.3,15,000/-
ii)	11.04.2007	---	Rs.1,00,000/-
iii)	23.03.2007	---	Rs.1,75,000/-
iv)	28.03.2007	---	Rs. 50,000/-
v)	17.04.2009	---	Rs.2,60,000/-
	Total		Rs.9,00,000/-

4. It is the case of the complainant that towards the discharge of the said liability, the accused came to the house of the complainant at

WEB COPY

http://www.judis.nic.in

Vellore on 04.07.2011 and handed over the cheque bearing No.027860 for Rs.9 lakhs (Ex.P.1). The complainant presented the cheque in his Bank viz., Andhra Bank, Bhagayam Branch on 07.07.2011. However, the cheque was dishonoured on the ground "Funds Insufficient". The complainant was informed about this on 08.08.2011 vide return memo (Ex.P.3). The complainant issued a legal notice dated 08.09.2011 (Ex.P.4) to the accused. The accused, through reply notice dated 21.09.2011 (Ex.P.6) denied the liability. Therefore, the complainant initiated a prosecution in C.C.No.750 of 2011 under Section 138 of the Negotiable Instruments Act, 1881 against the accused before the learned Judicial Magistrate (Fast Track Court), Vellore.

5. On the appearance of the accused, she was questioned about the accusation against her, which she denied. In order to prove the case, the complainant examined himself as P.W.1 and marked ten exhibits. When the accused was questioned about the incriminating circumstances appearing against her under Section 313 Cr.P.C., she denied the same. On behalf of the accused, one Ramya, Branch Manager, District Co-operative Bank, Kancheepuram was examined as

WEB COPY

http://www.judis.nic.in

D.W.1 and no exhibit was marked.

6. After analysing the evidence on record and hearing either side, the trial Court, by judgment dated 29.04.2013 in C.C.No.750 of 2011, convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced her to undergo six months Simple Imprisonment and pay a fine of Rs.5,000/-, in default to undergo three months Simple Imprisonment. Challenging the said conviction and sentence, the accused filed Criminal Appeal No.40 of 2013 and aggrieved by the quantum of sentence, the complainant filed Criminal Revision No.25 of 2016 before the learned First Additional District Judge (Fast Track Court), Vellore, Vellore District. The First Additional District Judge (Fast Track Court), Vellore, after hearing the Criminal Appeal No.40 of 2013 by judgment dated 03.03.2017, allowed the Criminal Appeal filed by the accused and acquitted the accused and by order dated 03.03.2017, dismissed the Criminal Revision No.25 of 2016 that was filed by the complainant.

7. Aggrieved by the judgment of acquittal in Criminal Appeal

WEB COPY

No.40 of 2013, the complainant has preferred the present appeal with a delay of 99 days in Crl.M.P.No.11122 of 2017 in Crl.A.No.SR 26418 of 2017 under Section 5 of the Limitation Act. This Court by order dated 13.11.2017, condoned the delay of 99 days. Hence, the Special Leave Petition has been numbered and posted for admission.

8. Heard Mr.V.R.Karthekeyan, learned counsel for the complainant.

9. It is trite that the grant of Special Leave is not automatic and that Special Leave can be granted only if the Court is satisfied that there are prima facie materials to show that the order of acquittal of the trial Court suffers from infirmities.

सत्यमेव जयते
WEB COPY

10. Before deciding the issue at hand, it may be necessary to extract the following passage from the judgment of the Supreme Court in **Arulvelu & another vs. State rep. by the Public Prosecutor and another [2009 (10) SCC 206]:**

*"**36**.Careful scrutiny of all these*

http://www.judis.nic.in

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. Even according to the complainant, three loans were given to the accused in the year 2007, viz. Rs.3,15,000/- on 10.04.2007, Rs.1,75,000/- on 22.03.2007 and Rs.50,000/- on 28.03.2007. Those loans themselves were not discharged by the accused. The complainant, in the cross-examination, has admitted that he issued an advocate's notice to the accused calling upon him to repay the cheque amount. But, the

WEB COPY

complainant has not produced even a shred of documentary evidence like promissory note or any other document to show that he had given loan to the accused. Of course, it is not necessary that in every case, such document should be obtained. A prosecution under Section 138 of the Negotiable Instruments Act can be based on a hand loan also.

12. It is the case of the accused that in response to the statutory notice (Ex.P.4) that was issued by the complainant, she sent a reply notice Ex.P.6 wherein, she has completely denied the debt and has stated that the cheques were given for security purpose. Thus, the loans that were availed in the year 2007 were time barred in 2010. Only the loan for Rs.2,60,000/- said to have been given on 17.04.2009 will not be time barred.

13. As stated above, when the accused had not returned Rs.6,40,000/- for the alleged loan that was taken by her in 2007, it is very surprising as to how the complainant could have given her further loan of Rs.2,60,000/- on 17.04.2009 even without obtaining any document from her. In such view of the matter, the contention of the complainant that he gave a loan at Rs.2,60,000/- on 17.04.2009 appears

WEB COPY

http://www.judis.nic.in

doubtful.

14. The learned Counsel for the complainant submitted that when once the accused admits his signature, the presumption under Section 139 of the Negotiable Instruments Act, 1881, will apply and that presumption will cover the debt also.

15. There can be no quarrel with the said proposition. However, even from a reading of the averments made in the complaint, it is clear that loan for Rs.6,40,000/- that was given in 2007 became time barred in 2010.

16. In **Rangappa vs. Sri Mohan [(2010) 11 SCC 441],** the Supreme Court has held that the burden under Section 139 of the Negotiable Instruments Act, 1881 can be discharged by the accused by preponderance of probabilities.

WEB COPY

17. Bearing this principle in mind, it may be relevant to extract the following passage from the judgment of the first appellate Court:

"Further more, on perusing Ex.P.1, though

http://www.judis.nic.in

the debt has been mentioned as 04.07.2011, this is a printed cheque and on the head of it, it can be seen with bare eye that "19" is printed in that cheque. Whileso, the probability is, it might have got printed before 2000. If this accused would have handed over that cheque in the year 2011 to this complainant, is it not the duty of the complainant to ask the accused this has been printed in the year 19 century, while so without checking out whether her account is still in existence or not, would a prudent man will accept the cheque in the year 2011 creates suspicion over this transaction. When this Court has come to the conclusion that the cheque for Rs.6,40,000/- is barred by limitation and through the above said discussions, there won't be any possibility for producing the cheque by the accused to the complainant on 04.03.2011 when it is admitted that she has left from Vellore and stayed at Chennai even in the year 2005, though he has stated that she is also living in Vellore, this Court feels that it has been averred only to pacify the Court."

18. Therefore, this Court does not find any infirmity in the

WEB COPY

findings of the first appellate Court and when there are two views possible, one in favour of the accused and the other in favour of the complainant, the view favouring the accused merits consideration in an appeal against acquittal.

19. In such view of the matter, the judgment of the first appellate Court does not warrant interference and accordingly, this Court is of the opinion that this is not a fit case to grant leave to appeal.

Resultantly, this Criminal Original Petition stands dismissed, Consequently, connected Criminal Appeal is rejected at the S.R. stage itself.

14.12.2017

HIGH COURT OF JUDICATURE MADRAS
सत्यमेव जयते
WEB COPY

Index :Yes/No

Speaking/Non speaking Order

cla

http://www.judis.nic.in

To

1. The Judicial Magistrate
   (Fast Track Court),
   Vellore.

2. The Additional District Judge,
   (Fast Track Court),
   Vellore District,
   Vellore.

3. The Public Prosecutor,
   High Court, Madras.

WEB COPY

http://www.judis.nic.in

P.N.PRAKASH,J.

cla

Crl.O.P.No.27336 of 2017
in
Crl.A.No.SR 26418 of 2017

सत्यमेव जयते
WEB COPY

14.12.2017