

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2017

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl.O.P.No.23257 of 2016 in
Crl.A.Sr.No.43569 of 2016

R.Dhanpani

.. Petitioner/Complainant

.. Vs ..

Vimal Anandan

.. Respondent/Accused

Criminal Original Petition filed under Section 378(4) of the Code of Criminal Procedure to grant leave to file the Appeal against the Judgment of the learned I Additional District and Sessions Judge, Tiruppur, made in C.A.No.77 of 2015 dated 19.08.2016 reversing the order passed in C.C.No.24 of 2013 on the file of the learned Judicial Magistrate cum Fast Track Court, Tiruppur, dated 07.07.2015.

For Petitioner : Mr.N.Umapathy

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JUDGMENT

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

2.It is the specific case of the complainant that the accused was his neighbour and that on 14.06.2012, the accused approached the complainant and obtained a loan of Rs.1,00,000/- for urgent business and family expenses and for discharge of the said liability, he had issued a cheque for Rs.1,00,000/- dated 20.09.2012, which was presented by the complainant in his bank on 20.09.2012 and the same was dishonoured for "*insufficiency of funds*" on 20.09.2012.

3. The complainant issued a statutory notice dated 25.09.2012 [Ex.P3], calling upon the accused to pay the amount and in response to the said notice, the accused replied by notice dated 09.10.2012 [Ex.P5], in which, the accused had taken a defence that he had borrowed Rs.50,000/- from the complainant's daughter and he had given two cheques to her and that he had not borrowed any amount from the complainant on 14.06.2012.

4.The complainant initiated a prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") in C.C.No.24 of 2013 on the file of the Judicial Magistrate-cum-Fast Track Court, Tiruppur.

5. On receipt of summons, the accused appeared before the trial Court and when he was questioned about the substance of accusation, he denied the same. The complainant examined himself as PW1 and marked Exs.P.1 to P.5.

6. After the evidence of prosecution was over, when the accused was questioned under Section 313 Cr.P.C to explain the incriminating circumstances appearing in evidence against him, he denied the same. On behalf of the accused, two exhibits viz., D1 and D2 were marked in the cross-examination of the complainant and no one was examined on the side of the accused.

7. After considering the evidence on record and hearing either side, the trial Court convicted the accused under Section 138 of Negotiable Instruments Act and sentenced him to undergo 6 months Rigorous Imprisonment and to pay a fine of Rs.1000/-, in default, to undergo one month Rigorous Imprisonment.

8. Aggrieved by the conviction and sentence, the accused filed an appeal in C.A.No.77 of 2015, which was heard by the learned I Additional District and Sessions Judge, Tiruppur, who acquitted the accused by order dated 19.08.2016, challenging which, the complainant

is before this Court with the present Special Leave Application to prefer an appeal.

9. Heard the learned counsel appearing for the complainant.

10. Mr. Umapathy, learned counsel for the complainant submitted that the First Appellate Court has grossly erred in acquitting the accused, by holding that the complainant had not proved his stand beyond reasonable doubt. Mr. Umapathy, learned counsel placed reliance on the judgment of the Supreme Court in **Rangappa v. Sri Mohan** [2010 (11) SCC 441], wherein, the Supreme Court has specifically overruled the earlier judgment of the two Judge Bench rendered in **Krishna Janardhan Bhat v. Dattatraya G. Hedge**, [(2008) 4 SCC 54] and the Supreme Court has held that the presumption under Section 139 of the NI Act will also apply to the debt in question. Therefore, Mr. Umapathy, learned counsel for the complainant submitted that the accused had failed to discharge the burden under Section 139 of the NI Act and therefore, the order of acquittal passed by the I Appellate Court deserves to be set aside.

11. This Court gave its anxious consideration to the submissions made by Mr. Umapathy, learned counsel appearing for the complainant.

12. It is trite that Special leave to appeal against acquittal should not be mechanically granted and only when it is shown that the acquittal of the accused was passed by mis-appreciation of evidence or law, can the Court grant special leave.

13. At this juncture, it may be necessary to extract the following passage from the judgment of the Honourable Supreme Court in **Arulvelu & 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."

14. This Court has no quarrel with the submissions of Mr. Umapathy that the presumption under Section 139 of the NI Act would also extend to the debt and that when the accused had admitted the execution of the cheque, the burden is on him to rebut the presumption under Section 139 of the NI Act. However, in Rangappa

(supra), the Supreme Court has held as follows:

“Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.”

15.From the above statement of law, it is clear that if the accused is able to show from the evidence of the complainant himself that there was no legally enforceable debt, then, the prosecution has to fail.

16.In this case, the complainant has admitted in his cross-examination that his wife viz., Rathinam had issued a legal notice dated 06.07.2012 to the accused, wherein, she has stated that the accused had borrowed Rs.1,00,000/- on 06.07.2012 and had failed to repay the amount. That apart, the accused has contended that the complainant's son-in-law viz., Bhuvanesh and his relative Gunasekaran have also initiated prosecution under Section 138 of the NI Act in C.C.Nos.74 of 2014 and 39 of 2013 on the file of the Judicial Magistrate, Fast Track Court, Tiruppur, against the accused.

17. Thus, when the accused was not able to pay the sum of Rs.1,00,000/-, which was borrowed from the complainant's wife on 06.07.2011, it sounds improbable for the complainant to give a loan of Rs.1,00,000/- to the accused on 14.06.2012. Admittedly, the loan of Rs.1,00,000/- was given by the complainant's wife as early as on 06.07.2011, which remains unpaid by the accused till 06.07.2012. Viewed from this angle, a bona fide doubt arises in the mind of this Court as to whether there was any legally enforceable debt payable by the accused to the complainant.

18. 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 should be considered in an appeal against acquittal. Hence, this is not a fit case to grant special leave.

19. Accordingly, this petition is dismissed. Connected Crl.A.Sr.No.43569 of 2016 is closed.

10.11.2017

Index : Yes/No
Internet : Yes/No

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P.N.PRAKASH, J.

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To

1. The I Additional District and Sessions Judge,
Tiruppur.
- 2.The Judicial Magistrate cum Fast Track Court,
Tiruppur

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