

**Crl. O.P.No.24153 of 2016 in
Crl.A.No.SR46197 of 2016**

M.VENUGOPAL,J.,

Heard both sides.

2. The Petitioner / Appellant / 1st Respondent / Complainant has filed the present Criminal Original Petition seeking 'Grant of Special Leave' to prefer an Appeal as against the 'Judgment of Acquittal' passed in Crl.Appeal No.153 of 2015 dated 01.09.2016 passed by the Learned II Additional Sessions Judge, Erode.

3. The Learned II Additional Sessions Judge, Erode, while passing the impugned Judgment in Crl.Appeal No.153 of 2015 preferred by the Respondent (As an Appellant) had ultimately set aside the Conviction and Sentence passed by the Learned Judicial Magistrate, Fast Track Court No.I, Erode in S.T.C.No.466 of 2013 dated 02.11.2015 and consequently allowed the Crl.A.No.153 of 2015 by acquitting the Accused.

4. Earlier, the Learned Judicial Magistrate (FTC No.I), Erode in S.T.C No.466 of 2013 had delivered Judgment on 02.11.2015 (Filed by the

Appellant / Complainant) by holding the Respondent / Accused guilty in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 and imposed a punishment of Six Months Simple Imprisonment. That apart, it directed the Respondent / Accused to compensate a sum of Rs.6,44,550/- (being the cheque amount) and in default of payment of compensation amount, awarded the default sentence of One Month Simple imprisonment.

5. According to the Learned Counsel for the Petitioner / Appellant, the present Appeal is filed by the Petitioner / Appellant / Complainant in Sr.No.46197 of 2016 (As an affected party) as against the 'Judgment of Acquittal' dated 01.09.2016 in CrI.A.No.153 of 2016 passed by the First Appellate Court. In this connection, the Learned Counsel for the Petitioner / Appellant takes a plea that the First Appellate Court should have seen that the Petitioner / Appellant / Complainant had paid a sum of Rs.3,12,750/- on 08.12.2010 and further, a sum of Rs.28,800/- to the Respondent / Accused in order to arrange for 'VISA' to go to Australia.

6. Advancing his arguments, the Learned Counsel for the Petitioner / Appellant / Complainant submits that the Petitioner / Appellant / Complainant had paid a further sum of Rs.3,03,000/- to the Respondent /

Accused on 16.08.2012 and in fact, the First Appellate Court should have taken into account a prime fact that the Respondent / Accused had received money from the Petitioner / Appellant, but, he had not arranged for VISA as promised by him.

6. The Learned Counsel for the Petitioner / Appellant / Complainant projects an argument that the Appellant / Complainant had raised funds by pledging the Jewels of his wife in Tamilnadu Industrial Co-operative Bank and by means of borrowal from his friends and family members in order to pay the aforesaid sum to the Respondent / Accused.

7. The Learned Counsel for the Petitioner / Appellant brings it to the notice of this Court that the First Appellate Court ought to have seen that in order to repay the aforesaid sum, the Respondent / Accused had issued the following Cheques:-

1. Cheque No.005274 dated 09.09.2012 drawn on Axis Bank Limited, Coimbatore for Rs.3,41,550/-
2. Cheque No.005275 dated 05.12.2012 drawn on Axis Bank Limited, Coimbatore for Rs.3,03,000/-

In all totalling a sum of Rs.6,44,550/-

8. The Learned Counsel for the Petitioner proceeds to point out that indeed, the cheques when presented for encashment by the Appellant / Complainant on 06.12.2012 and 07.12.2012 respectively in Punjab National Bank, Erode, R.G.Salai Branch, the same got returned with an endorsement 'Account Closed'.

9. The Learned Counsel for the Petitioner / Appellant draws the attention of this Court that the Respondent / Accused had not replied to the Lawyer's Notice issued on behalf of the Petitioner / Appellant dated 22.12.2012, which was received by the Respondent on 24.12.2012.

10. The Learned Counsel for the Petitioner / Appellant takes a stand that when the execution of cheque was accepted by the Respondent / Accused, there is a presumption under Sections 118 and 139 of Negotiable Instruments Act, 1881 namely, that the cheques in question were issued for consideration. Moreover, it is represented on behalf of the Petitioner / Appellant that the Respondent / Accused had not entered into box nor let in any evidence to discharge the 'Onus of Proof' on his side.

11. Per contra, it is the submission of the Learned Counsel for the Respondent / Accused that the First Appellate Court in CrI.Appeal No.153

of 2015 had passed a Judgment on 01.09.2016 by upsetting the Judgment of trial Court in S.T.C.No.466 of 2013 dated 02.11.2015 by allowing the Appeal and acquitting the Accused.

12. In this connection, the Learned Counsel for the Respondent / Accused submits that the First Appellate Court at Paragraph No.6 of its Judgment in Crl.Appeal No.153 of 2015 dated 01.09.2016 had among other things observed that '.... When it is seen that the cheque is not proved to be issued for the discharge of a legally enforceable debt, the dishonour of the same cannot fasten criminal liability upon the drawer of the cheque is the settled position of law laid down in **C.T.THANGARAJ Vs. MURUGESAN, LAWS (MAD) 1999 4 34....'** and therefore on an independent reappraisal of oral and documentary evidence produced before the trial Court, the First Appellate Court came to the correct conclusion in setting aside the Judgment of the trial Court in S.T.C. No.466 of 2013 dated 02.11.2015 and in short, the Judgment of the First Appellate Court in Crl.A.No.153 of 2015 is free from any flaw.

13. It is to be noted that the Appellate Court has the widest power in Appeal against the 'Judgment of Acquittal'. It cannot be gainsaid that the Appellate Court has the requisite power to review the evidence once again

and come to an independent conclusion, of course, based on the facts and circumstances in question. In case, an admissible evidence is brushed aside by the concerned Court and also if the concerned Court had acted based on surmises, conjectures, then, undoubtedly a primordial duty is cast upon the trial Court to review / re-appreciate the evidence when an Accused was acquitted by the concerned Court.

14. In Law, an Appellate Court is to take into account an important fact that the paramount consideration is to avoid 'Miscarriage of Justice. If the Judgment of the concerned Court is cemented on hypothesis and not rested on 'Legal Evidence', duty is showered upon the High Court to review the evidence in 'Acquittal Appeal for the purpose of ascertaining as to whether the Concerned Court had committed any offence or not. If the view taken by the trial Court is based on legal and admissible evidence, then, the same may not be disturbed in an Appeal.

15. It cannot be lost sight of that the Court of Law when it grants Leave to prefer an Appeal, then, it is always open to the opposite party to raise all factual and legal pleas even with regard to the 'Maintainability of an Appeal', at the appropriate time.

16. It may not be out of place for this Court to make a significant mention that at the time of hearing an Appeal against the 'Judgment of Acquittal' passed by the concerned trial Court, the High Court, as an Appellate Court, is always empowered to look into the entire gamut of materials, namely, oral and documentary materials on record and come to an independent conclusion whether the concerned Court was justified in passing the 'Judgment of Acquittal'.

17. Be that as it may, in view of the fact that the Petitioner / Appellant / Complainant has preferred the instant Criminal Original Petition in CrI.A.No.Sr. 46197 of 2016 and this Court on taking note of the contentions advanced on behalf of the Petitioner / Appellant / Complainant is of the considered view that they require detail rumination in the hands of this Court at the time of hearing of the main Appeal. Viewed in that perspective, this Court holds that the Leave, sought for by the Petitioner in Criminal Original Petition is prima facie based on legal grounds and accordingly grants Leave to the Petitioner / Appellant to prefer an Appeal.

18. In fine, the Criminal Original Petition is allowed.

06.06.2017

Index: Yes/No
Internet: Yes/No
ssd

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