

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.O.P.No.25226 of 2016 in
Crl.A.SR48767 of 2016

Thiraviyam ... Petitioner / Appellant

Vs.

Thangamariyappan ... Respondent / Accused

PRAYER: Criminal Original Petition is filed under Section 378 (4) of the Code of Criminal Procedure to grant Special Leave to file the Criminal Appeal against the Order of Acquittal passed by the Learned Judicial Magistrate, (Fast Track Court - Magisterial Level II), Poonamallee in S.T.C.No.153 of 2014 dated 18.10.2016

For Petitioner : Mr.A.M.Venkata Krishnan

For Respondent : Mr.K.Thirumalai

O R D E R

Heard both sides.

2. The Petitioner / Appellant / Complainant has preferred the instant Criminal Original Petition (as an aggrieved person) praying permission of this Court to grant him Special Leave to prefer an Appeal under Section 378(4) of Cr.P.C., as against the Judgment dated 18.10.2016 in S.T.C.No.153 of 2014 passed by the Learned Judicial Magistrate (Fast Track Court, Magisterial Level II), Poonamallee.

3. The trial Court while passing the Impugned 'Judgment of Acquittal' dated 18.10.2016 in S.T.C.No.153 of 2014 at Paragraph No.21 had interalia observed that '---there is no evidence on the part of the complainant to show the existing liability as on date of issuance of cheque' and further at Paragraph No.22 had proceeded to observe that '....defence has raised a probable defence that the cheque was given as security towards chit transaction' and finally came to the consequent conclusion that the evidence of P.W.1, Ex.P.1 to Ex.P.4 were insufficient and that the evidence of D.W.1, D.W.2, Ex.D1 to Ex. D3 were

sufficient to disprove the case of complainant and consequently found the Respondent / Accused not guilty in respect of an offence under Section 138 of Negotiable Instrument Act, 1881 and acquitted him under Section 255(1) of Cr.P.C.,

4. Questioning the legality, validity of the Impugned Judgment of Acquittal in S.T.C.153 of 2014 passed by the trial Court, the Petitioner / Appellant / Complainant has preferred the present Criminal Appeal in SR48767 of 2016 as an affected person primarily by taking a plea that the trial Court had failed to consider that the Respondent / Accused had not denied the issuance of cheque to the Appellant / Complainant.

5. Advancing his arguments, the Learned Counsel for the Petitioner / Appellant submits that the Respondent / Accused had admitted his signature in the cheque, but this aspect of the matter was not looked into by the trial Court in a proper and real perspective.

6. The Learned Counsel for the Petitioner / Appellant proceeds to take a plea that the Respondent / Accused had admitted his liability to repay the amount to the Appellant / Complainant. However, the trial Court had failed to consider this aspect, which had ultimately resulted in 'Miscarriage of Justice'.

7. The Learned Counsel for the Petitioner / Appellant urges before this Court that the trial Court should have considered the evidence of D.W.1, who had admitted that he is bound to pay a sum of Rs.1,50,000/- to Rs.2,00,000/- to the Appellant / Complainant. Even D.W.2 in his evidence had stated that the Respondent / Accused is liable to pay around a sum of Rs.2,00,000/- to Rs.3,00,000/- to the Appellant / Complainant, but the trial Court had failed to consider the same in a proper manner.

8. The Learned Counsel for the Petitioner / Appellant projects an argument that the Respondent / Accused had not issued any reply to the Ex.P.3, Statutory Legal Notice dated 19.08.2014 and the non issuance of reply to Ex.P.3 is certainly an adverse circumstance, not favourable to the Respondent / Accused.

9. The Learned Counsel for the Petitioner / Appellant contends that the 'Onus of Proof' is on the Respondent / Accused to establish that the Petitioner / Appellant / Complainant was not issued with cheque or in the alternative, the Petitioner / Appellant / Complainant had misused the cheque.

10. The Learned Counsel for the Petitioner / Appellant takes a plea that originally there was a chit transaction between the Appellant / Complainant and the Respondent / Accused in the year 2012 and later, after completion of the said transaction, the Respondent / Accused had borrowed a sum of Rs.15,00,000/- as loan from the appellant / complainant on 01.04.2004 etc.,

11. Finally, it is the submission of the Learned Counsel for the Petitioner / Appellant that the Respondent / Accused had not corroborated his case either through oral or documentary evidence and in fact based on the available material on record, the trial Court should have convicted the Respondent / Accused.

12. Conversely, it is the stand of the Respondent / Accused that he had not borrowed any money from the Petitioner / Appellant / Complainant and it is only a pure chit transaction and that the complainant had initially denied the said transaction (during his cross examination) but, later, admitted that it was connected with S.R.Y. Chits Fund and that he is one of the bidder in that chit.

13. On behalf of the Respondent / Accused, a plea is taken that the complaint was a false one and that the blank signed cheque was fabricated and moreover, the blank signed stamp papers were given for security purpose and in short, the blank signed cheque was not given against any liability or debt.

14. The Learned Counsel for the Respondent / Accused draws the attention of this Court to the fact that the Respondent / Accused was examined as D.W.1 and as D.W.1, he had deposed before the trial Court that the Ex.P.1- Cheque was not given in respect of any debt or liability and that the cheques were given for security purpose to the chit amount.

15. The Learned Counsel for the Respondent / Accused in his counter at Paragraph No.12 has also taken a plea that the Appellate Jurisdiction for the trial Court's case in S.C.No.153 of 2014 is only the Principal District and Sessions Court at Thiruvallur and further, the trial Court upon analysis of entire gamut materials available on record came to the resultant conclusion that the Ex.P.1 - Cheque was given security deposit and found him / Respondent / Accused not guilty in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 and consequently, acquitted him which is free from any flaw.

16. It is to be noted that the Petitioner / Appellant / Complainant in his complaint before the trial Court (which was taken on file in S.T.C. No.152 of 2014) had categorically

averred that the Respondent / Accused had borrowed a sum of Rs.15,00,000/- on 01.04.2014 as hand loan from him and agreed to repay the same within two months and that for discharging the Respondent / Accused's liability, towards the same, the Respondent had issued a cheque in his favour for the said sum of Rs.15,00,000/- vide Cheque No. 453103 dated 02.05.2014 drawn on Indian Bank, Tirumazhisai Branch.

17. It comes to be known that the Petitioner / Appellant / Complainant had deposited the aforesaid cheque based on the instructions of the Respondent / Accused with his Banker, City Union Bank Limited, Maduravoyal Branch for collection on 25.07.2014 and the same got returned with an endorsement 'Exceeds Arrangement' vide Return Memo dated 26.07.2014 by Indian Bank, Tirumazhisai branch, Chennai - 602 107.

18. The Petitioner / Appellant had also averred in his complaint that Ex.P.3- Legal Notice dated 19.08.2014 was issued to the Respondent / Accused and the said notice was duly acknowledged as per Ex.P.4 - Acknowledgement, but there was no reply to the said notice. Therefore, the Petitioner / Appellant, as complainant, was performed to prefer a complaint before the trial Court, which was taken on file in STC No.153 of 2014.

19. P.W.1 (the Appellant / Complainant) in his evidence (cross examination) had deposed that in one instalment a sum of Rs.15,00,000/- was given to the Respondent / Accused and the said amount was given to the Respondent / Accused towards 'Loan' and that on 4th Month during the year 2014, money was given to the Respondent / Accused and that the Respondent / Accused issued a cheque in the 5th Month of 2014 by mentioning the 7th Month date.

20. It is the further evidence (cross examination) of P.W.1 that the Respondent / Accused had filled up the Ex.P.1 - Cheque and he is running a provision store and also doing the business of CocaCola Distribution ship and apart from that he is also doing transport business and before that he had conducted the chit business and the name of the chit company is 'Diraviyam' and that in the S.R.Y. Chit Firm, the Respondent / Accused had joined as a member and in how many chits he is member, this could be answered only after looking into the accounts.

21. P.W.1 in his cross examination had specifically denied that the cheque which was given as security for the chits was utilised in the present case and the case was filed against the Respondent / Accused.

22. D.W.1 (the Respondent / Accused) in his evidence had stated that he is running a Rice Mill and he got acquaintance with the Petitioner / Appellant / Complainant through his Rice Mill business and later, that the Petitioner / Appellant had asked him whether he would join a chit in his chit fund and for that he had agreed and for a sum of Rs.5,00,000/- in 'A' Group, for a sum of Rs.5,00,000/- in 'B' Group and for a sum of Rs.5,00,000/- in 'D' Group he is paying the amount and the said three chits are May auction chits and that P.W.1 himself had received the chit amount and later through Men he had collected the chit amount and apart from that even through Men daily he had collected the chit amount.

23. D.W.1 had added in his evidence that at the time of himself joining each chit, the Petitioner / Appellant had asked for his signature in his blank cheque and also in the blank papers he had asked for his signature and when he asked for the reason, P.W.1 had informed him that the amount was a big one and only if you give documents affixing your signature, others would join the chit and therefore, before joining the three chits, he had handed over the blank cheques with his signatures and also the blank documents with his signature to him.

24. Furthermore, it is the evidence of D.W.1 that he had paid the full amount for three auction chits and for 'A' Group chit and in 'B' Group chit, he had paid 60% sum and in 'D' Group, he had paid only a small amount and in the meanwhile, the Petitioner / Appellant / Complainant or his Men had not come for collecting the amount properly and that he was ready to pay the balance amount for the two discontinued chit transaction.

25. It is the evidence of D.W.2 that P.W.1 is running a provision store and also S.R.Y.Chit Agency and he is also paying the chit amount for the chit fund run by the complainant and 'A', 'B' group, the Respondent / Accused is a Member and in 'C' Group he is also a member and that he had paid continuously the chit amount for 18 months and since he met with an accident, he had not paid the amount. Continuing further, D.W.2 in his evidence had stated that it is the habit of P.W.1 (Appellant) to obtain a signature in the unfilled cheque and that the P.W.1 had used the unfilled cheque where the signature was affixed. Besides this, it is the evidence of D.W.2 that the Petitioner / Appellant had filed a cheque case against him before the trial court for a sum of Rs.3,00,000/-.

26. Before the trial Court the stand of the Respondent / Accused was that there was no 'Debt' or any 'Legally Enforceable Debt' or 'Liability' on his part to pay the purported amount claimed by the Petitioner / Appellant/ Complainant in the

complaint. Also the stand of the Respondent / Accused was that the Ex.P.1 -Cheque was not issued towards any 'Liability' or 'Debt'.

27. Ex.D.1 was marked before the trial Court on behalf of the Respondent / Accused. In fact, Ex.D1 relates to S.R.Y. Chits and Jewel Loan. Ex.D.2 pertains to Receipts (8 series) Admittedly, in the instant case, apart from Ex.P.1- Cheque dated 02.05.2014, there is no document to show that a sum of Rs.15,00,000/- was given to the Respondent / Accused as hand loan. The Petitioner / Appellant, as P.W.1 in his evidence had deposed that he used to lend money to known persons and in fact P.W.1 (Petitioner / Complainant) had not denied that D.W.1 (Respondent / Accused) is also the subscriber of chits. Although, he does not know about the details of chits. It appears that the Respondent / Accused had obtained the loan for construction.

28. P.W.1 (Appellant) had deposed that he was connected with S.R.Y. Agencies and that chit calculation were provided for 01.05.2012, 11.06.2012, 10.07.2012, 01.8.2012. In reality, Ex.D.2 - Series contain receipts (8) pertaining to 10.04.2012, 10.04.2012, 10.07.2013, 10.07.2013, 10.07.2013, 10.03.2013, 10.03.2013 and 10.03.2013. As a matter of fact, Exs.D.1 and D.2 documents unerringly point out that the Respondent / Accused is subscriber of chits under different groups and that the Petitioner / Appellant / Complainant is connected with the said chits.

29. The Respondent / Accused (D.W.1) had raised a probable defence by coming out with a plea that Ex.P.1- Cheque dated 02.05.2014 was issued to and in favour of the Petitioner / Appellant / Complainant towards the chit transaction and in fact, evidence of D.W.2 strengthens the defence of the Respondent / Accused as regard to the chit transaction. As a matter of fact, D.W.2 had categorically deposed in his evidence that the Petitioner / Appellant, as P.W.1, was in the habit of obtaining the blank cheques in chit transaction.

30. The Petitioner / Appellant in CrI.O.P.No.25226 of 2016 has sought permission of this Court to grant him 'Special Leave to prefer an Appeal' before this Court as against 'Judgment of Acquittal' dated 18.10.2016 in S.T.C.No.153 of 2014 passed by the trial Court. In this connection, this Court pertinently points out that there is no two opinion of a primordial fact that the High Court possess all the requisite powers to

reconsider the whole issue and to reappraise the evidence available on record and to arrive at its own conclusion. In fact, the High Court can substitute its finding replacing the one recorded by the trial Court especially, if the findings of the trial Court are perverse, arbitrary and capricious one.

31. Ordinarily, an 'Order of Acquittal' / 'Judgement of Acquittal' ought not to be interfered with because of the fact that the presumption of the innocence of an accused is strengthened by acquittal. However, the High Court, as an Appellate Court for compelling reasons ought not to hesitate to reverse the 'Judgment of Acquittal' passed by the trial Court, if the trial Court had arrived at a conclusion which was based on available material on record. Even after the conclusion arrived at by the trial Court is patently an illegal and unreasonable one or even rested on wrong appreciation of Law and facts of the case, then, also the High Court can interfere with the impugned 'Judgment of Acquittal'.

32. It cannot be brushed aside a very important fact that the High Court must be very circumspect in exercising the option of admitting Appeals against Acquittal. If the prosecution had failed to establish its case beyond reasonable doubt, by and large, appellate court could not interfere with the acquittal passed by the trial Court. If the evidence available on record was not properly analysed or if the trial Court had acted based on surmises or conjectures, presumptions or assumptions, then it is the duty of the High Court, as an Appellate Court to set out wrong committed by the trial Court concerned. After all, the prime consideration of the Court is that there should be an avoidance of miscarriage of justice. The miscarriage of justice may arise from the acquittal of guilty is no less than from the conviction of an innocent.

33. Coming to the aspect of the stand taken on behalf of the Respondent / Accused that the appellate jurisdiction for the trial Court Judgment in S.T.C.No.153 of 2014 dated 18.10.2016 is only Learned Principal District and Sessions Judge, Thiruvallur and further that the Ex.P.1 - Cheque drawn on Indian Bank, Tirumazhisai Branch comes within Thiruvallur District and therefore the First Appellate Court is Principal District and Sessions Judge, Thiruvallur.

34. From the aforesaid ingredients of Section 378(4) of Cr.P.C., this Court is of the considered view that Section 378 (4) of Cr.P.C., speaks of the term 'Complaint' and also deals with 'in any case instituted upon the complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of

acquittal, the complainant may present such an appeal to the High Court'. As a matter of fact, Section 378 Cr.P.C., was substituted by the code of Criminal Procedure Code (Amendment) Act, 2005 (25 of 2005) Section 32 (with effect from 23.06.2006 vide Notification No.SO 923(E) dated 21.06.2006).

35. In this regard, this Court on perusal of Section 372 of Cr.P.C., is of the earnest view that it speaks of the term 'Victim'. In fact, Section 372 Cr.P.C., Proviso was inserted by Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) Section 29 (with effect from 30.12.2009) and it is not is not retrospective in operation, as per decision of the Hon'ble Supreme Court reported in National Commission of Women V. State of Delhi, (2010) 12 SCC 599.

36. It is to be borne in mind that merely because a 'Leave' is granted, it would not preclude the Court when real facts are brought to its knowledge from coming into the question whether an 'Appeal' is competent or maintainable in Law. Mere admission of an Appeal or the grant of permission by this Court to prefer an Appeal does not conclude the matter in favour of an individual to whom the Leave is granted. Certainly, 'Maintainability of an Appeal' can be argued at any stage and the accord of permission to file an Appeal earlier by this Court cannot be pleaded as a bar at the time of final hearing of main Criminal Appeal, in the considered opinion of this Court.

37. Besides the above, it is to be mentioned that the ingredients of Section 378(4) of Cr.P.C., places no restriction on the complainant either in express or implied manner.

38. At this stage, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court (Three Judge Bench) in Damodar S.Prabhu V. Sayed Babalal H. reported in ARI 2010 Supreme Court 1907 wherein at Paragraph No.14 it is observed as follows:

"14. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

In the case of conviction, an appeal would lie to the Court of Sessions under Section 374 (3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case

of conviction there will be four levels of litigation.

In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings."

39. The complainant can file an Appeal in cases of acquittal by the Judicial Magistrate of First Class before the High Court under Section 378 (4) of Cr.P.C., later, a Special Leave to Appeal can be filed before the High Court under Article 136 of the Constitution of India. As per Article 141 of the Constitution of India, the decision of the Hon'ble Supreme Court is binding on all the Courts in the Country.

40. It is to be pointed out that ultimately, the duty of the Court of Law is to expound the Law as it stands and to 'Leave the Remedy' (if one resolved upon) to others as per decision Sutters V. Briggs, 1922(1) AC 1 at Page 8 (Per Lord Birkenhead)

41. Further, in the decision South Asia Industries Private Limited V. S.Saroop Singh and Others, reported in AIR 1966 at Page 346 it is held that 'the object of interpreting a statute is to ascertain the intention of Legislature enacting it'.

42. Also in the decision Mohammed Sher V. Raja Seth Swami Daval reported in AIR 1922 Privy Council 17, it is held that "one section a statute cannot be used to defeat another section unless it is impossible to effect a reconciliation between them'.

43. That apart, in the decision of Hon'ble Supreme Court in Union of India V. Elohistone Spinning and Weaving Co. Ltd., and others, AIR 2001 SC at page 724 it is observed as under:-

"The duty of Judges is to expound and not to legislate is a fundamental rule. There is no doubt a marginal area in which the Courts mould or creatively interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further proceeding (See: Corocraft Ltd. V. Pan American Airways Inc. 1968 (3) WLR 714; State of Haryana v. Sampuran Singh, 1975 (20 SCC 810: AIR 1975 Sc 1952). But by no stretch of imagination a Judge is entitled to add something more than what is there in the Statute by way of a supposed

intention of the legislature. It is, therefore, a cardinal principle of construction of statute that the true or legal meaning of an enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

44. As a matter of fact, the consent cannot confer jurisdiction, as per decision Heyting V. Dupont, (1963) 1 W.L.R. Page 1192 (Per Blowman J.,) Of course, in law there can be no waiver of a statutory requirement.

45. In terms of Section 378(4) of Cr.P.C., a private party can assail an acquittal by way of an Appeal to the High Court after securing 'Special Leave to Appeal' as per decision N.G.Taya Wade (1958) 60 Bom. LR Page 1339. Section 378(4) of Cr.P.C., applies to cases preferred on complaints in respect of I.P.C. offences, as it does to complaints invoking any other offence under any special enactment. When there is a miscarriage of Justice a 'Leave' can be granted in respect of filing of an Appeal against 'Judgment of Acquittal' as opined by this Court.

46. It is to be pointed out that the word 'Offence' is to be read and understood in the context as mentioned under Sections 40,41,42 of IPC which covered offence punishable under Indian Penal Code or under Special Law or Legal Law or as initiated under Section 2(n) of Cr.P.C., or under Sections 3(38) of the General Clauses Act, 1897. Really speaking, a 'Crime' is essentially wrong against the 'Society' and the 'State'.

47. Section 378 of Cr.P.C., speaks of filing of an Appeal in cases of 'Acquittal orders' passed by the Subordinate Courts by virtue of amendment provision for the year 1978, in case of acquittal order passed by the Court of Sessions in Revision an Appeal can be filed . Further, by means of an Amendment Act, 2005, an Appeal against an Order of Acquittal passed by the Learned Judicial Magistrate in respect of cognizable or non-cognizable or non bailable offence filed on a police report can be filed before the Court of Session and the District Magistrate / District Collector is empowered to direct the Public Prosecutor to prefer such Appeals.

48. In fact, sub-section (4) of Section 378 of Cr.P.C., refers to 'Filing of Appeal' in cases instituted upon complaints. But the condition is that a complainant is to secure necessary orders for the grant of Special Leave from the court concerned as per decision Subbaiah Gowdar V. Kandasamy Gounder reported 1970 L.W. (CrL) page 208. Under Section 378 of Cr.P.C., the State or Complainant can file an Appeal against an

order of acquittal in terms of the decision Mohammad Daood Qureshi V State, 1993 (1) Crimes at Page 1037 at Page 1039.)

49. It cannot be ignored that the word 'Victim' as per Section 372 Cr.P.C., does not in any way supersede the ingredients of Section 378(4) of Cr.P.C., (relating to filing of an Appeal against the order of acquittal, in any case instituted upon complaint) (especially, in the absence of definition of 'Victim' and 'Complainant' under the Negotiable Instruments Act, 1881). As a matter of fact, the complainant who is a 'Payee' under Section 7 of the Negotiable Instruments Act or a 'Holder in Due Course' under Section 9 of the Act, is entitled to seek 'Leave' under Section 378(4) of Cr.P.C., and bringing a Miscellaneous Petition in this regard seeking a prior permission from the High Court is perfectly maintainable in Law. Looking at from any angle, if the Judgment of Acquittal / Acquittal Order is passed 'in any case instituted upon a complaint', a Petition filed under Section 378(4) of Cr.P.C., seeking 'Grant of Leave' before the Hon'ble High Court is clearly maintainable in the eye of Law.

50. It is to be pointed out that an offence under Section 138 of Negotiable Instruments Act, 1881 is not a Regular / Ordinary Crime like 'Murder' 'Grievous Hurt' or 'Simple Hurt' or other criminal case. To put it precisely, the offence under Section 138 of Negotiable Instruments Act, undoubtedly is a civil liability dressed in a criminal colour.

51. Be that as it may it is to be pointed out that the burden is on the complainant in respect of an offence under Section 138 of Negotiable Instruments Act to establish his case against the Respondent / Accused beyond shadow of doubt. But at the same time, it cannot be slightly ignored that the Respondent / Accused is entitled to shake or affect the credibility of the prosecution story by bringing in certain facts / circumstances which point out about his probabilities of the case. In short, an accused in respect of offence under Section 138 of Negotiable Instruments Act is entitled to maintain silent. He need not enter into the box to dislodge the case of a complainant. It is just enough that if he is able to make an inroad into the evidence depositions of witnesses / witnesses of the prosecution side.

52. In view of the qualitative and quantitative discussions as afore stated and also this Court on a careful consideration of the attendant facts and circumstances of the instant case in a cumulative manner is of the earnest view that the Petitioner / Appellant / Complainant has not made out a prima facie case to interfere with the 'Judgment of Acquittal' dated 18.10.2016

passed by the trial court in S.T.C.No.153 of 2014. Per contra, the Judgment of Acquittal passed by the trial Court in S.T.C. No.153 of 2014 is free from any legal infirmities. Viewed in that perspective, the 'Grant of Special Leave' sought for by the Petitioner / Appellant / Complainant is not acceded to by this Court.

In fine, the Criminal Original Petition is dismissed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

ssd
To

1. The Learned Judicial Magistrate,
(Fast Track Court - Magisterial Level II),
Poonamallee.
2. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.A.M.A.MVenkatakrishnan, Advocate Sr.22201

Crl.O.P.No.25226 of 2016 in
Crl.A.SR48767 of 2016

rj[co]
srg 24/04/2017

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