

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.03.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.O.P.No.25972 of 2016

in

Crl.A.Sr.No.50519 of 2016

G.S.Gunasekar ...Petitioner/Appellant/Complainant

Vs

1.Vinayaga Trading Company,
No.16-C, Dharapuram Road,
Udumalpet.

2.A.Ravichadran

3.A.Ramesh ... Respondents/Accused

Prayer: Petition filed under Section 378 (4) Cr.P.C., praying to grant leave to prefer an Appeal against the Judgment acquitting all the accused in C.C.No.13 of 2008 dated 27.09.2016.

For Appellant :Mr.M.Sivavarthanah

For Respondent : Mr.D.R.Arunkumar

ORDER

Heard the Learned Counsel for the Petitioner/Appellant and the Learned Counsel for the Respondents.

2.The Petitioner/Appellant/Complainant has filed the instant Criminal Appeal in Sr.No.50519 of 2016 as against the Judgment of the Learned Judicial Magistrate No.I, Udumalaipet in C.C.No.13 of 2008.

3.The trial Court, while passing the impugned Judgment of Acquittal in C.C.No.13 of 2008, on 27.09.2016, at paragraph 22, had, inter alia, observed that '... the Complainant, in the evidence adduced to the effect that in between him and the Accused there was no business transaction, had admitted that the signature in invoices and receipts given to the Respondent/Accused through Aditya Agro Services belonged to him' and therefore, it concluded that already there was a business connection between the Respondents/Accused and the Complainant

and this fact was suppressed and that the Complainant had given a false evidence. Finally, the trial Court came to the consequent conclusion that the charge levelled against the Respondents/Accused in respect of an offence under Section 138 of Negotiable Instruments Act was not proved on the side of the Appellant/Complainant beyond reasonable doubt and acquitted them under Section 255(1) Cr.P.C.

4.Assailing the 'Judgment of Acquittal' passed by the trial Court in C.C.No.13 of 2008 dated 27.09.2016, the Petitioner/Appellant/Complainant has filed the CrI.A.Sr.No.50519 of 2016 by contending that the Respondents 2 & 3/A2 & A3 on 25.03.2007 borrowed a sum of Rs.20 Lakhs from the Petitioner/Appellant/Complainant for the purpose of developing their business and for personal reason.

5.The Learned Counsel for the Petitioner/Appellant/Complainant submits that the Respondents 2 & 3/A2 & A3 had executed a Pronote evidencing the aforesaid borrowal and in fact, they had agreed to pay an interest of 12%. Besides this, it is represented on behalf of the Petitioner/Appellant that the Respondents/Accused had not repaid the amount and on 22.11.2007, a cheque bearing No.354649 for Rs.20 Lakhs was issued (drawn on M/s.Tamil Nadu Mercantile Bank, Udumalpet) to discharge the loan obtained from the Petitioner/Appellant.

6.The Learned Counsel for the Petitioner/Appellant brings it to the notice of this Court that the Petitioner/Appellant had deposited the cheque in his Bank Account at ICICI Bank, Udumalpet for encashing the amount, but the cheque was returned for the reason that 'Stop Payment', issued by the Respondents. Subsequently, the Petitioner/Appellant had issued a Lawyer's Notice - Ex.P3 dated 28.11.2007 and the same was replied by the Respondents through Notice dated 12.12.2007. Inasmuch as the Respondents had not repaid the cheque amount, the complaint was filed before the trial Court, which was taken on file in C.C.No.13 of 2008.

7.The Learned Counsel for the Petitioner/Appellant proceeds to take a stand that the trial Court had wrongly opined that the non-production of the pronote dated 25.03.2007 had raised suspicion, especially when the cheque was issued in the name of the Complainant.

8.At this stage, it is represented on behalf of the Petitioner/Appellant that the specific case of the Petitioner/Appellant/Complainant before the trial Court was that the promissory note was taken back by the Respondents/Accused after issuance of cheque.

9.The Learned Counsel for the Petitioner/Appellant/Complainant, in his evidence, had stated that he is a 'Man of Means' and engaged in Motor Transport Business, besides having vast extent of agricultural lands and sufficient income to lend a sum of Rs.20 Lakhs to the Respondents/Accused.

10.The Learned Counsel for the Petitioner/Appellant submits that the trial Court had acquitted the Respondents/Accused based only on assumptions and that too without any basis.

11.Per contra, it is the submission of the Learned Counsel for the Respondents/Accused that in the complaint, the Appellant/ Complainant had stated that a hand loan of Rs.20 Lakhs was given to the Respondents/Accused and that when the Appellant/ Complainant exhibits the said pronote as evidence for the entire transaction, he should have produced atleast a photocopy of the same, which is a prima facie evidence.

12.The Learned Counsel for the Respondents/Accused proceeds to take a plea that the Petitioner/Appellant/Complainant (as P.W.1) had deposed that on 22.11.2007 the interest was paid and since the Respondents/Accused had paid the interest for the principal amount, the pronote was returned to the Respondents/Accused. But, P.W.1, in his cross examination, had stated that he did not know the date on which the pronote was returned to the Respondents. Therefore, it is quite clear that the Appellant/ Complainant (P.W.1) had taken a U turn against the statement made by him in his own complaint.

13.The Learned Counsel for the Respondents contends that P.W.1 (Appellant/Complainant), in his evidence, had admitted the number of invoices between the year 2002 to 2006 produced by the Respondents and in fact, he had admitted that the signatures found in the invoices were signed by him.

14.Lastly, it is the stand of the Respondents that the complaint filed by the Appellant/Complainant was a malafide one and the last cheque was misused by him for unlawful gain.

15.At this juncture, this Court significantly points out that P.W.1 (Appellant/Complainant), in his cross examination, had deposed that it was correct to state that either in the complaint or in his proof affidavit, he had not stated on what date the loan was asked for from him and further, he had admitted that on the date when money was demanded from him, he was not in possession of total loan for a sum of Rs.20 Lakhs.

16.That apart, P.W.1 had proceeded to depose, in his evidence, that he does not remember exactly as to how much amount below Rs.20 Lakhs he was in possession and that he had informed that after a sum of Rs.20 Lakhs was being raised, he

would pass on the information. Moreover, he had stated that from their coconut grove, he received the coconut money and after adding the said amount, gave a total sum of Rs.20 Lakhs. He had also admitted that amount, there was no document to show on what date and how much he had received the amount.

17.P.W.1, in his cross examination, had proceeded to state that other than looking after the bus and agriculture, he has no income resources and for the past 12 years, he is paying the income tax, because for the said years, he is running the bus and that for the loan lent for a sum of Rs.20 Lakhs, he had obtained a pronote, but not filed either the original of the same or its copy and that the pronote was received by the Respondents/Accused after they handed over the cheque to him.

18.It is to be noted that even though an offence under Section 138 of the Negotiable Instruments Act is a civil liability, a criminal colour is clothed with it. Yet, it is the primordial duty on the part of the Appellant/Complainant to prove his case against the Respondents/Accused beyond all reasonable doubt.

19.In fact, it is not obligatory on the part of an Accused to separately adduce evidence or to enter the witness box, it would suffice if he can successfully gather enough materials from the evidence of the Complainant which would sufficiently disprove the presumptive facts especially in relation to the pre-existence of legal liability or the debt. For rebuttal of presumption arisen in favour of prosecution the principle of 'Preponderance of Probability' squarely applies. But to establish a criminal charge a strict proof applies.

20.In the instant case, a complaint dated 27.06.2007 Ex.D7 was given by the 2nd Respondent/A2 of 1st Respondent/A1's Company stating that his Firm's Cheque No.354649 got lost. A perusal of Ex.D9 shows that it is only a certificate issued by the Sub Inspector of Police, Udumalaipet stating that the cheque was not to be found out inspite of a charge made at the Udumalpet Police ... town and in the nearby rural areas.

21.P.W.1 (the Appellant/Complainant), in his cross examination, before the trial Court had stated that he had lent the money, by means of an amount, at his house on 25.03.2007, but there was no witness who had seen the fact of money being paid and he was alone present and since he received money from his coconut grove after including the said amount had lent the amount and the rest of the amount, he had obtained the same from his father and given the same. Further, he had admitted to a suggestion that from the loan amount what was the amount given by his father and what was that belonged to him.

22. In this connection, this Court pertinently points out that although Section 91 Cr.P.C. Petition was filed before the trial Court for production of the income tax account for the year 2006 to 2008 relating to the Appellant/Complainant, yet, the same was not produced before the trial Court.

23. It cannot be brushed aside that P.W.1 (Appellant/Complainant), in his evidence, had stated that it was wrongly mentioned that in the complaint for the loan received on 22.11.2007 on that date interest alone was obtained and for the balance, a cheque was issued and the pronote was received back. He had also stated in his evidence that on the date when the Accused had given the cheque they had not given any interest amount. But, before the trial Court P.W.1 had given a contradictory/ variant evidence which is not a favourable circumstance in his favour, in the considered opinion of this Court.

24. Before the trial Court, the Appellant/Complainant as P.W.1 had admitted in his evidence that in 'Invoices and the Receipts' given to the Accused through Adhitya Agro Services, his signature was found and the very fact that P.W.1's signature is found in the aforesaid invoices, it is candidly clear that the Petitioner/Appellant/ Complainant had suppressed the factum of 'Business connection' between him and the Respondent/Accused.

25. As regards the plea of the Petitioner/Appellant/Complainant that before realisation of the loan amount, since the Respondent/Accused had paid the interest amount, the pronote was handed over to them, it is to be pointed out that it is very difficult to believe that before the realisation of the purported loan amount, the Appellant/Complainant had returned the promissory note because of the reason that the Respondents/Accused had paid the interest amount.

26. In the instant case, the Petitioner/Appellant/Complainant had failed to establish to the subjective satisfaction of this Court that on the date of purported loan, he had the requisite financial capacity/wherewithal to lend such a hefty sum of Rs.20 Lakhs. Besides this, it is the evidence of D.W.2 that even after filing of a Petition under Section 91 Cr.P.C. before the trial Court, the Petitioner/Appellant had not produced the income account. Moreover, if really the pronote was handed over by the Petitioner/ Appellant [P.W.1] to the Respondents/Accused, then, certainly, he should have known the date on which he handed over the pronote to them. In fact, in his evidence, P.W.1 (the Appellant/Complainant) had stated that when the cheque was given to him on that date, the Respondents/Accused had not paid any amount. This evidence of P.W.1 before the trial Court is very much contra to the averment made by him in the complaint that on 22.11.2007 for the loan received, for the principal amount, the

interest was paid and a cheque was issued and the pronote was got back from him.

27.P.W.1 (Appellant/Complainant), in his cross examination, had also stated that it was correct to state that who had filled up the recitals in the cheque. P.W.1 in his evidence had deposed that he had not done any business with the Respondents directly, but he had stated in his evidence that there was no business connection between him and the Respondents/Accused and he had also stated in his evidence that the relationship between him and the Respondents/Accused was only that of acquaintance. Surprisingly, in the 35 invoices, the signature of the Appellant/P.W.1 is seen. Therefore, here again also the Petitioner/Appellant had not come out with a true version.

28.In a criminal case, the contents of the complaint [especially in regard to an offence under Section 138 of the Negotiable Instruments Act, 1881], one has to stand or fall based on the averments so made. In other words, the averments so made in the complaint form a foundation/cementing platform for the complaint in question.

29.Under Section 378 Cr.P.C., the High Court has the requisite power to review the entire evidence on which the Judgment of Acquittal was founded and to arrive at a conclusion as to whether the 'Judgment of Acquittal' should be reversed or otherwise. If the reasoning of the trial Court is unreasonable and further is based on wrong conception of Fact and Law, then also, the High Court with its wide power as an Appellate Authority can very well interfere to set right the miscarriage of Justice that has crept in the subject matter in issue.

30.It is to be relevantly pointed out by this Court that the presumption under Section 139 of the Negotiable Instruments Act, 1881, extends only to the issuance of cheque towards discharge of a 'legally enforceable debt' or liability and it has to be raised only after the complainant establishes that such 'Debt' or 'Liability', in fact, exists as on the date of cheque in question and further that, the cheque was given to him by the Accused. Indeed, an offence under Section 138 of the Negotiable Instruments Act is created mainly by a legal fiction. Moreover, when a cheque is issued not for discharge of any debt or other liability, the Maker of cheque is not liable for any prosecution.

31.To put it precisely, the well settled legal position is that an Appellate Authority/an Appellate Court should not hesitate to reverse the Judgment of Acquittal passed by the trial Court if the findings arrived at are contrary to evidence on record etc.

32.At the same time, it is to be borne in mind that the finding of an acquittal by the trial Court of course based on appreciation of evidence may not be interfered with either on flimsy reasons/ vexatious grounds. Unless there is an absolute assurance of guilt, the Appellate Court would not interfere with the order of an 'Acquittal'. Even if the approach of the trial Court is patently an erroneous one, as a result of which, the wrong findings were arrived at, of course based on misreading of evidence, then also, the High Court can interfere.

33.It is to be remembered that a miscarriage of Justice which may arise from the acquittal of guilty is no less than from the conviction of commencement. Moreover, even a Judgment of trial Court suppose it is based on surmises, presumptions, assumptions, conjectures and hypothesis, then also, the power of the High Court is that of plenitude, as opined by this Court.

34.In view of the foregoing detailed qualitative and quantitative discussions and also this Court, considering the entire attendant facts and circumstances of the present case in an encircling manner, is of the earnest opinion that the Respondents/ Accused had shaken the case of the Petitioner/Appellant/ Complainant. Furthermore, the Petitioner/Appellant/Complainant had not established his case to the subjective satisfaction of this Court to the effect that 'the Respondents/Accused had committed an offence under Section 138 of the Negotiable Instruments Act, 1881'. In this regard, on perusal of the Judgment of Acquittal passed by the trial Court, this Court does not find any material irregularities or patent illegalities in the eye of Law. In short, the Judgment of the trial Court in C.C.No.13 of 2008 dated 27.09.2016 is free from any legal flaw. Consequently, the 'Grant of Special Leave' sought for by the Petitioner/Appellant/Complainant is not acceded to by this Court.

35.In fine, the Criminal Original Petition is dismissed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

Sgl

To

1. The Judicial Magistrate No.I,
Udumalpet.

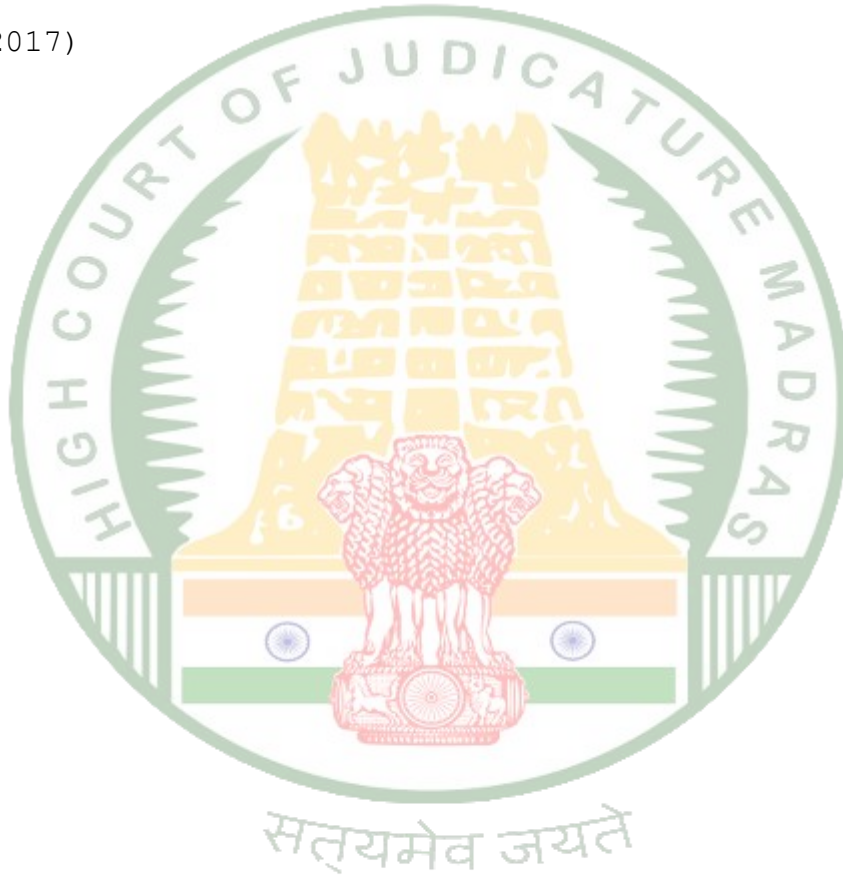
2.-do- thro' the Chief Judicial Magistrate,
Tiruppur District

+1cc to Mr. D.R. Arun Kumar, Advocate Sr. 18415

+1c to M/S.M. Sivavarthanam, Advocate Sr. 18501

CrI.O.P.No.25972 of 2016 in
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