

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.04.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.O.P.No.26616 of 2016
in
Crl.A.Sr.No.51436 of 2016

P.Jayamadha ... Petitioner/Appellant/Complainant

Vs

L.Kumar ... Respondent/Accused

Prayer: Petition filed under Section 378 (4) Cr.P.C., praying to grant leave to file an Appeal against the Judgment passed in C.C.No.246 of 2015 dated 28.09.2016 on the file of the Judicial Magistrate No.II, Chengalpattu.

For Appellant : Mr.P.G.Perumal Pandian

For Respondent : Mr.J.Franklin

ORDER

Heard the Learned Counsel for the Petitioner and the Learned Counsel for the Respondent.

2.The Petitioner/Appellant/Complainant has filed the instant Criminal Original Petition seeking 'Grant of Special Leave' to prefer an Appeal as against the 'Judgment of Acquittal' dated 28.09.2016 in C.C.No.246 of 2015 passed by the Learned Judicial Magistrate No.II, Chengalpattu.

3.It transpires that the trial Court, in its Judgment at paragraph 11, among other things, had observed that '.. The Complainant (Petitioner/Appellant) either in her Legal Notice or in her Complaint or in her Proof Affidavit had not mentioned as to who made the corrections in Ex.P1 - Cheque' and ultimately, came to the conclusion that in the present case, it was a question mark as to who made the aforesaid corrections in the cheque and opined that the cheque was a void one.

4.Moreover, the trial Court, at paragraph 14 of its Judgment, had proceeded to state that the averment to the effect

that as per Sale Agreement, the Complainant gave a cheque for a sum of Rs.3,00,000/- to the Respondent/Accused and also paid a sum of Rs.1,00,000/- in cash for which no documents or evidence were produced/filed and therefore, the said fact was not proved and held that the Presumption under Section 139 of the Negotiable Instruments Act could not be raised in the present case. Therefore, the trial Court came to the consequent conclusion that the offence against the Respondent/Accused under Section 138 of the Negotiable Instruments Act was not established beyond reasonable doubt and finally acquitted him under Section 255(1) Cr.P.C.

5.Assailing the legality of the Judgment of Acquittal dated 28.09.2016 in C.C.No.246 of 2015 passed by the trial Court, the Learned Counsel for the Petitioner/Appellant/Complainant submits that the trial Court had failed to appreciate an admitted fact that the transaction was entered into between the Petitioner/Appellant's wife and the Respondent's (Accused) wife.

6.The Learned Counsel for the Petitioner/Appellant urges before this Court that the trial Court had misreading the evidence of P.W.1 and the averments of the Complaint. In fact, there appears to be a non-application of mind by the trial Court in acquitting the Respondent/Accused.

7.It is represented on behalf of the Petitioner/Appellant/Complainant that the ingredients of Section 87 of the Negotiable Instruments Act, 1881 were not properly construed by the trial Court in a real perspective, which has finally resulted serious miscarriage of Justice.

8.The Learned Counsel for the Petitioner/Appellant/Complainant, in regard to the plea of 'Material Alteration', contends that the trial Court should have perused the conspicuous signature of the Respondent/Accused in a proper fashion.

9.According to the Learned Counsel for the Petitioner/Appellant, the trial Court immaterially perceived the significance of an Agreement of Sale entered into between the Petitioner/Appellant and the Respondent's wife extensively attracts the existence of the legally enforceable debt or liability and that apart, the trial Court was not correct in assuming that there is no legally enforceable debt or liability in the absence of any substantial evidence produced and established by the Respondent/Accused.

10.In response, the Learned Counsel for the Respondent/Accused submits that the subject matter of Ex.P1 - Cheque in issue itself is a fabricated one and before the trial Court, the Petitioner/ Appellant/Complainant (during her cross examination)

had admitted that Ex.P1 - Cheque was altered by her with regard to the amount and also clearly admitted in her proof affidavit that the cheque was issued on 11.02.2016 itself and the same was in her possession from 11.02.2015 to 11.04.2015.

11.The Learned Counsel for the Respondent/Accused projects an argument that the Petitioner/Appellant/Complainant had stated that in her Complaint, she paid a sum of Rs.3,00,000/- towards advance for a sale consideration which was not established by her.

12.Finally, it is the stand of the Respondent/Accused that the trial Court in the main case in C.C.No.246 of 2015 after scrutinising the entire oral and documentary evidence available on the side of the Petitioner/Appellant and also by looking into Ex.P1 to Ex.P4 and Ex.D1, came to the consequent conclusion that the Petitioner/ Appellant/Complainant had not established her case against the Respondent/Accused in respect of an offence under Section 138 of the Negotiable Instruments Act and resultantly acquitted him, which does not suffer from any legal infirmities.

13.It is to be noted that in Ex.P1 - Cheque in the 'Date Column' after 11, the 'Numerical No.2' was written; the year was mentioned as '2015'. But, a perusal of the Ex.P1 - Cheque indicates that the 'Numerical No.2' was scored out and above the said Numerical No.'2', Numerical No.'4' was written and over and above '4', a short initial is seen. Ex.P1 - Cheque was for Rs.3,80,000/- and the Payee was mentioned as 'P.Jayamatha' (Petitioner/Appellant/ Complainant). That apart, the next to the words 'Three', the writing "Thousand" was scored out and over and above that, it was written as 'LAKs' and next to that on the right hand side, there was short initial affixed. Therefore, it is latently and patently evident that Ex.P1 - Cheque was originally written for Rs.3,80,000/- only. Subsequently, the words 'Thousand' was struck off and over and above it, the 'LAKs' was written. However, in the figure column in Ex.P1 - Cheque, it is clearly written as '3,80,000/-'.

14.A cursory glance of the contents of Complaint (filed by the Petitioner/Appellant) in C.C.No.246 of 2015 before the trial Court unerringly points out at para 9 that 'The cause of action for the complaint arose on 06.11.2012 when one K.Komathi had entered into an agreement of sale with the complainant for a sale consideration for a sum of Rs.7,50,000/- (Rupees Seven Lakh and Fifty Thousand Only) out of which the complainant herein had paid Rs.3,00,000/- (Rupees Three Lakh Only) by way of a cheque dated 7.11.2012 drawn on City Union Bank, Maraimalai Nagar Branch Cheque No.001602 and Subsequently a sum of Rs.1,00,000/- (Rupees One Lakh Only) in cash was duly received by Mrs.K.Komathi towards the sale consideration with the

complainant respectively and on 11.04.2015 when the accused herein had voluntarily with free consent issued Cheque No.691770 dated 11.04.2015 drawn on Canara Bank, Chengalpattu Branch for Rs.3,80,000/- (Rupees three lakh and eighty thousand only) affirming to discharge the part liability payable by his wife Mrs.K.Komathi and when the complainant had deposited the cheque in her banker namely Indian Bank, Maraimalai Nagar branch and the same was returned on 09/07/2015 with a return memo stating as "funds insufficient" and on 03.08.2015 when the complainant caused a legal notice to the accused and on 04.08.2015 when the accused had received the same and had not issued any suitable reply to the aforesaid legal notice and subsequent dates thereon.'

15.Significantly, P.W.1 (in her cross examination) to a suggestion to the effect that in her proof affidavit and in the Complaint, it was mentioned that the cheque was given on 11.04.2015, she had replied that the cheque was given by the Respondent/Accused on 11.02.2015 itself and further, she had deposed that he gave a part sum out of a sum of Rs.1,00,000/-, but the said part payment viz., the payment of Rs.1,00,000/- was not mentioned by her either in her proof affidavit or in the complaint.

16.In this connection, it may not be out of place for this Court to make a pertinent mention that P.W.1 (Appellant/Complainant) in her evidence had clearly deposed that the Respondent/Accused gave Ex.P1 - Cheque by mentioning the date as '11.2.2015' and later he corrected the same as '11.4.2015'. Really passes beyond one's comprehension as to how the Ex.P1 - Cheque which was admittedly in possession/custody of P.W.1 (Petitioner/Appellant/ Complainant) from 11.2.2015 till 11.4.2015 was altered suddenly on 11.4.2015 by the Respondent/Accused.

17.Besides the above, a perusal of the Complaint of the Petitioner/Appellant at paragraph 4 points out that the Petitioner/ Appellant had made several requests to Mrs.K.Komathi in executing the Sale Deed in connection with the transaction in question. But the said Komathi had dishonestly refused to execute the Sale Deed in favour of the Complainant on the existence of the Sale Agreement.

18.The clear-cut case of the Petitioner/Appellant is that one Mrs.K.Komathi, being an absolute owner of the property bearing Survey No.21/2 covering an extent of 0.56 cents situated at Pandavakkam Village, Uthiramerur Taluk, Kancheepuram District, had voluntarily approached the Petitioner/Appellant/Complainant in the month of October 2012 for the purpose of selling the aforesaid property on account of her family requirements. Pursuant to which, she had willfully

with free consent entered into a Sale Agreement on 06.11.2012 for the aforesaid land measuring an extent of 0.50 cents for a sale consideration of Rs.7,50,000/- out of which the Petitioner/Appellant/Complainant had paid a sum of Rs.3,00,000/- through Cheque bearing No.001602 dated 07.11.2012 drawn on City Union Bank, Maraimalai Nagar Branch. Later, the said Komathi had received a sum of Rs.1,00,000/- in cash towards the sale consideration from the Petitioner/Appellant/Complainant.

19.The grievance of the Petitioner/Appellant/Complainant is that the Cheque dated 11.04.2015 (bearing No.691770) drawn on Canara Bank, Chengalpattu Branch for Rs.3,80,000/- given by the Respondent/Accused affirming the discharge of part liability payable by his wife Mrs.K.Komathi, was deposited in the Indian Bank, Maraimalar Nagar Branch by the Petitioner/Appellant and the same was returned on 09.07.2015 with a memo stating as "Funds Insufficient". Later, the Petitioner/Appellant/Complainant had issued Ex.P1 - Legal Notice dated 03.08.2015 to the Respondent/Accused which was received on 04.08.2015. But the Respondent/Accused had not issued any reply. Therefore, the Petitioner/Appellant had filed a Complaint before the trial Court praying for taking cognizance of the Complaint on file and to issue summons to the Respondent/Accused and to conduct an enquiry into the Complaint etc.

20.It is to be borne in mind that Section 87 of the Negotiable Instruments Act, 1881 speaks of 'Material Alteration'. It cannot be lost sight of that every unsubstantial alteration is not a material alteration. But, it is only such alteration(s) as would adversely affect the interests of the other side which can be called material; where in a promissory note, the rate of interest is left blank and it was filled up later without the consent of promisor, it will be a Material Alteration invalidating the instrument, as per decision Mysore State Road Transport Corporation V. Somashankar reported in AIR 1982 Karnataka 226 (D.B.).

21.A reading of the ingredients of first paragraph of Section 87 of the Negotiable Instruments Act makes it clear that if a person who consents to the alteration as well as the individual who made the alteration are disentitled to complain against such alteration, i.e. if the Drawer of the cheque himself altered the cheque for validating or re-validating the same instrument, he cannot take advantage of it later by saying that the cheque became void as there is material alteration thereto. That apart, even if the 'Holder of the Cheque' or 'Payee' made the alteration with the consent of the Drawer thereof, such alteration also cannot be employed as a ground to resist the right of Payee or the holder thereof. An important aspect is that it is always a question of fact whether the alteration was made by the Drawer himself or whether it was made

with the consent of the Drawer. In reality, it requires evidence to establish the aforesaid issue/question whenever it is disputed.

22. In the present case, in the Complaint, the Petitioner/Appellant/Complainant had stated that the Respondent/Accused as Surety for the amount to be paid by his wife, had issued a cheque. But before the trial Court, on behalf of the Petitioner/Appellant/Complainant, it was not established that the Respondent/Accused wife was paid with a sum of Rs.3,00,000/- through cheque based on Sale Agreement. Further, for the alleged payment of Rs.1,00,000/- in cash by the Petitioner/Appellant/Complainant to the Respondent/Accused wife, no document or evidence was produced in the main case. Apart from that, the big question revolves around the Petitioner/Appellant/Complainant is that when he was in possession of Ex.P1 - Cheque from 11.2.2015 till 11.4.2015, how the Respondent/Accused (husband of the Komathi) had made correction or alteration in Ex.P1 - Cheque. Moreover, P.W.1, in her cross examination, had tacitly admitted that the Respondent/Accused gave Ex.P1 - Cheque on 11.2.2015, but he corrected/alterd the same on 11.4.2015. She had also proceeded to state in her cross examination in emphatic terms that the Respondent/Accused on 11.2.2015 itself had handed over the cheque to her. Further, in her evidence, P.W.1 had stated that on what date, she had paid a part sum of Rs.1,00,000/- to the Respondent/Accused wife, which fact was also not mentioned either in her proof affidavit or in the complaint.

23. Indeed, Section 138 of the Negotiable Instruments Act is a Penal Provision which incorporates strict liability and therefore, it has to be construed strictly. In Law, a Cheque can be presented for payment repeatedly any number of times within six months from the date of drawing of cheque or within the period of its validity, whichever expires earlier. The requirement for an offence under Section 138 of the Negotiable Instruments Act is that the cheque must be drawn 'for the discharge, in whole or in part, of any debt or other liability'. However, the Section does not say that the cheques should have been drawn for the discharge of any debt or other liability of the Drawer towards the Payee.

24. In fact, Section 139 of the Negotiable Instruments Act creates a legal presumption and as a matter of fact, the Parliament had only determined the presumption that the cheque was issued towards discharge, in whole or any part, or any debt or other liability. This would mean that the debt or other liability includes the due from any other individual. Therefore, it is not essential that the debt or liability must be due from the Drawer himself. To put it precisely, it can be issued for the discharge of other persons debt or liability. Strictly

speaking, a legally enforceable debt or liability would have a reference to the nature of debt or liability and not the person against whom the debt or liability can be enforced, in the considered opinion of this Court.

25. Moreover, Section 138 of the Negotiable Instruments Act does not in any way preclude power of an individual from owning up other person's liability or insist that the cheque should be one drawn to discharge the liability of the Drawer. As per Section 139 of the Negotiable Instruments Act, there is a presumption, unless the contrary is established, that the Holder of the cheque received the cheque for the discharge in entirety or in part of any debt or other liability.

26. In so far as the Leave sought for under Section 378(4) Cr.P.C. is concerned, it is to be pointed out that the 'Grant of Special Leave' to prefer an Appeal is not an automatic or routine one. Indeed, the Petitioner/Appellant must make out a case before the Hon'ble High Court by pointing out necessary materials that the conclusion/findings arrived at by the trial Court are perverse, capricious and an arbitrary one. As a matter of fact, the High Court has the requisite power to 'Review' the entire gamut of evidence, of course, giving necessary weightage to the views of the trial Court in regard to the credibility of the witnesses concerned. By and large, the 'Judgment of Acquittal' shall not be interfered with because of the simple reason that a presumption of innocence of an Accused get strengthened by means of an acquittal. Furthermore, reappraising the evidence, reconsidering the entire gamut of the issue and to substitute its own view are possible only if the findings reached by the trial Court or against the weight of evidence on record or there is even a misreading of evidence or erroneous appreciation of Fact and Law as the case may be.

27. Also, in exceptional circumstances, an Appellate Court by ascribing reasons should not be hazy to upset the Judgment of Acquittal passed by the concerned Court, if the findings recorded by it are contrary to the evidence on record or if the entire approach of the trial Court is patently an illegal one. Moreover, even if the Judgment of the trial Court is based on wrong appreciation of Law and of the Facts of the case and an unreasonable one, then also, the High Court, to avoid miscarriage of Justice, can interfere. Even the Judgment of the trial Court if it was based on conjectures, hypothesis and not on legal plane/evidence, a primordial duty is cast on the High Court to re-appreciate the evidence of Judgment of Acquittal in Appeal for the purpose of ascertaining as to whether the Respondent/Accused has committed an offence or not. If a probable view based on legal and admissible evidence is arrived at by the trial Court, then, the High Court would not interfere with the Judgment of Acquittal passed by the trial Court

concerned.

28.In the upshot of detailed discussions and also this Court, on going through the Judgment of Acquittal passed by the trial Court in C.C.No.246 of 2015 dated 28.09.2016, is of the considered view that the Judgment of Acquittal passed by the trial Court is free from any flaw. Consequently, the 'Grant of Special Leave' sought for by the Petitioner/Appellant/Complainant by means of filing the present Criminal Original Petition before this Court under Section 378 (4) Cr.P.C. is devoid of merits. Consequently, the Criminal Original Petition fails.

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

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

To

1. The Judicial Magistrate II,
Chengalpattu.
2. The Section Officer,
Record Section, (Criminal)
High Court, Madras.

+1 CC to Mr.P.G.Perumal Pandian, Advocate sr 28622

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CrI.A.Sr.No.51436 of 2016

MP (CO)
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