

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.04.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.O.P.No.27587 of 2016 in
Crl.A.SR54064 of 2016

A.Karunamoorthy ... Petitioner / Appellant/Complainant

Vs.

S.V.Vijayakumar
Proprietor Saravana Dying
Sarvarayampatti (Post)
Bhavani Taluk,
Erode District ... Respondent/Respondent / Accused

PRAYER: Criminal Original Petition is filed under Section 378 of the Code of Criminal Procedure to grant Special Leave to Appeal against the Order of Acquittal passed by the Learned Judicial Magistrate / II Additional District Munsif, Bhavani against the Respondent / Accused in S.T.C.No.32 of 2015 dated 24.10.2016.

For Petitioner : Mr.P.R.Shankar

For Respondent : Mr.N.Manokaran

O R D E R

Heard the Learned Counsel for the Petitioner / Appellant / Complainant. No counter is filed on behalf of the Respondent / Accused. However, this Court has heard the Learned Counsel for the Respondent / Accused.

2. The Petitioner / Appellant / Complainant has preferred the instant Criminal Original Petition 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 of Acquittal' dated 24.10.2016 in S.T.C.No.32 of 2015 passed by the Learned II Additional District Munsif, Bhavani.

3. The Learned II Additional District Munsif, Bhavani while passing the Impugned Judgment in S.T.C.No.32 of 2015 on 24.10.2016 at Paragraph No.12 had among other things observed that '----- In the instant case, admittedly, except the cheque in question, no other documents were produced by the complainant. Even the complainant has not produced the chit book, jewellery receipts before this Court. Therefore, the complainant failed to establish the source of income etc.....', and further opined that '....the Accused (Respondent) had established his valuable defence during the trial that the

cheque in question was not issued by him for legally enforceable debt...' and finally found him not guilty in respect of an offence under Section 138 of the Negotiable Instruments Act and acquitted him under Section 255(1) of Cr.P.C.,

4. Questioning the validity and correctness of the 'Judgment of Acquittal' dated 24.10.2016 in S.T.C.No.32 of 2015 passed by the trial Court, the Petitioner / Appellant / Complainant has preferred an instant Appeal by taking a plea that the Respondent / Accused had not issued any reply and further, he had not denied the signature contained in the cheque.

5. That apart, it is represented on behalf of the Petitioner / Appellant that in the instant case, the Respondent / Accused had not denied that the cheque does not belong to him, also the Bank accounts and the Serial Number of the cheque and other aspects were not denied by him. Unfortunately, the trial Court had not looked into these vital aspects in a proper and real perspective.

6. The Learned Counsel for the Petitioner / Appellant urges before this Court that the trial Court approached in acquitting the Respondent / Accused was not proper and in reality, the trial Court had failed to bear in mind a very vital fact that the cheque was issued by the Respondent / Accused to discharge his legal liability.

7. The Learned Counsel for the Petitioner / Appellant projects an argument that the trial Court had acquitted the Respondent / Accused in the main case based on irrelevant consideration and facts of the case. In short, the clear cut stand of the Petitioner / Appellant is that the trial Court had failed to consider the documents filed by the Petitioner / Appellant / Complainant and the evidence adduced on his side.

8. Per contra, it is the stand of the Respondent / Accused before the trial Court that he never borrowed the hand loans from the Petitioner / Appellant / Complainant and never issued the cheque in question in favour of the complainant for the 'Legally Enforceable Debt'.

9. Further, the Learned Counsel for the Respondent / Accused proceeds to take a plea that the Petitioner / Appellant / Complainant had not produced the chit book, jewel receipts before the trial Court in the main case and in short, the Petitioner / Appellant / Complainant had failed to establish the 'Sources of Income' and the trial Court after analysing the available material evidence on record finally came to the conclusion that the Petitioner / Appellant / Complainant had not established his case against the Respondent / Accused, in respect of an offence under Section 138 of Negotiable Instruments Act and acquitted him under Section 255(1) of Cr.P.C., which does not suffer from any legal infirmities.

10. At this stage, this Court on perusal of the contents of the complaint in S.T.C.No.32 of 2015 filed by the Petitioner / Appellant / Complainant before the trial court indicates in lucid terms that the Petitioner / Appellant / Complainant had averred that on 27.09.2014, the Respondent / Accused had borrowed a sum of Rs.5,00,000/- from the Complainant for his urgent business expenses promising to repay the same within a month. Further, in respect of a said borrowal, the Respondent / Accused had issued a post-dated cheque bearing No.928959 dated 27.10.2014 for Rs.5,00,000/- drawn on the South Indian Bank Ltd., Bhavani Branch towards the proper discharge of the aforesaid 'Legally Enforceable Debt'.

11. The Petitioner / Appellant / Complainant's case is that he presented the cheque in question for collection on 27.10.2014 through his Banker, viz., Karur Vysya Bank Limited, Kavindapady Branch, but the said cheque was dishonoured on 13.11.2014 with a cover note specifying 'Funds Insufficient'. As a matter of fact, the Petitioner / Appellant / Complainant had received Return Memo on 13.11.2014 itself.

12. It transpires that the Petitioner / Appellant / Complainant had issued Lawyer's Notice, Ex.P.3 dated 25.11.2014 to the Respondent / Accused calling upon him to pay the aforesaid sum of Rs.5,00,000/- due under the cheque within 15 days from the date of receipt of the notice and the same was received on 26.11.2014, as per Ex.P.4 - Acknowledgement Card. In as much as the Respondent / Accused had not paid the cheque amount inspite the receipt of the Ex.P.3 Lawyer's Notice dated 25.11.2014, the Petitioner / Appellant / Complainant was constrained to file the complaint before the trial Court against the Respondent / Accused in respect of an offence under Sections 138 and 142 of Negotiable Instruments Act and the said complaint was taken on file by the trial Court in S.T.C.No.32 of 2015.

13. In the instant case, it is true that no reply was given by the Respondent to Ex.P.3- Lawyers Notice. P.W.1 (Appellant / Complainant) in his evidence (cross examination) had deposed that he is engaged in the production of Mat and presently he is not doing any business because of the reason that he had sustained a loss and that he is not doing the money lending business and presently he is running a Provision Store, but had not filed any document to show about the same.

14. It is the further evidence of P.W.1 that he is not paying the income tax and he is well acquainted with the Respondent / Accused, but the Respondent / Accused is not his relative. Furthermore, he had deposed that in his complaint he had stated on what date and where the Respondent / Accused had asked for money from him but he does not exactly know the date on which the Respondent / Accused had asked for money and he paid the money to the Respondent / Accused on his demand and that the Respondent / Accused had demanded for a sum of Rs.5,00,000/- from him.

15. P.W.1 adds in his evidence that he used to receive

Rs.1,50,000/- every week and he waited for 2 or 3 weeks and paid the amount to the Respondent / Accused, but, he had not mentioned about this fact in his Petition.

16. Besides this, P.W.1, had deposed that he had paid the sum of Rs.5,00,000/- to the Respondent / Accused by taking Chit, keeping his jewels and also the money that was in his possession and that he does not remember from whom he had taken the chit. In this connection, this Court relevantly points out that it is the evidence of P.W.1 that he had mortgaged the Jewels for a sum of Rs.1,25,000/- and presently the said Jewel Loan was not redeemed.

17. P.W.1 had stated in his evidence that for lending the money to the Respondent / Accused, he had not mortgaged his jewels. presently he could not tell as to how he had managed to raise a sum of Rs.5,00,000/- and gave it to the Respondent / Accused and further that he had paid the said sum of Rs.5,00,000/- after raising the said sum from his savings. That apart, P.W.1 had stated in his evidence that he does not know about one Sidhivinayagar advancing loan of Rs.5,00,000/- to the Respondent / Accused and further he does not know for the said amount, loan document was prepared and a case was filed before the Sub Court, Bhavani. Also, he had denied a suggestion that because of his acquaintance with Sidhivinayagar, the said persons had filed the present case in S.T.C No.32 of 2015 against the Respondent / Accused in his name.

18. D.W.1 (the Respondent / Accused) in his evidence had stated that he does not know the Petitioner / Appellant / Complainant and only after receipt of Lawyer's Notice (Ex.P.3), he came to know as to who is the Complainant and further he came to know that the Petitioner / Appellant / Complainant had filed the instant case against him at the instigation of one Sidhivinayagar.

19. D.W.1 proceeds to utter in his evidence that he took loan of Rs.3,00,000/- from the said Sidhivinayagar in the last month of the year 2010 and towards security for the said loan he gave One blank document, Five South Indian Bank Cheques, Three Blank Documents and Two Pro-notes. Further, he had paid the interest for one year and that Sidhivinayagar had filed a Civil Case in O.S.No.17 of 2012 as per Ex.D-1 (Certified copy of the Complaint) against him for non payment of the loan received by him and only based on the property mentioned in the sale deed shown to him, a case was filed by Sidhivinayagar before the Sub Court, Bhavani and Certified copy of the Sale Deed dated 25.05.1998 was Ex.D.3.

20. D.W.1 in his evidence had stated that later, a cheque case was filed by the Petitioner / Appellant in the name of Periyasamy before the Learned Judicial Magistrate, Bhavani and the present case was filed in the name of the Petitioner / Appellant / Complainant against him and that the Petitioner / Appellant had stated that if Sidhivinayagar pays a sum of Rs.7,00,000/- then, all the cases would be withdrawn for which

he had agreed and prayed time to repay the amount. But the said Sidhivinayagar had demanded the payment of Rs.7,00,000/- immediately only then he informed that he would withdraw the cases and on that day he paid a sum of Rs.1,50,000/- to Sidhivinayagar and asked for withdrawal of cases against him etc.,

21. D.W.1 in his evidence had also stated that the Petitioner / Appellant / Complainant has no capacity / wherewithal to advance a sum of Rs.5,00,000/-.

22. D.W.2 (Karur Vysya Bank - Kavunthambadi Branch Manager) in his evidence (cross examination) had deposed that the said cheque dated 11.11.2014 came to their Bank for the purpose of collection and the said cheque no.928959 was returned on 11.11.2014, since there was no sufficient funds in the Respondent / Accused's account with their bank. On behalf of the Respondent / Accused before the trial Court, Account Statement of the Respondent was marked as Ex.D.4.

23. A perusal of the Ex.P.1 - Cheque dated 27.10.2014 shows that the Respondent / Accused had signed has proprietor of Saravana Dyeing. The said Ex.P.1 - Cheque is for Rs.5,00,000/- to and in favour of the Petitioner / Appellant / Complainant.

24. It is to be remembered that Section 138 of Negotiable Instruments Act speaks of 'Dishonour of Cheque for insufficiency, etc., of funds in the Account'. Indeed Section 139 of the Negotiable Instruments Act refers to 'Presumption in favour of Holder'.

25. The fact that cheque was issued towards discharge of entire debt or a portion of debt or liability is a rebuttable one. But, the said rebuttal can be proved with necessary facts before the trial Court based on 'Preponderance of Probabilities'. It cannot be brushed aside that the offence under Section 138 of the Negotiable Instruments Act although it is a civil liability, it is tainted with a criminal tinge. Even then it is the duty of the Petitioner / Appellant / Complainant's side to establish his / its case against the Respondent / Accused beyond doubt.

26. As far as the present case is concerned, at one stage, (in cross examination) P.W.1 had stated that he had raised a sum of Rs.5,00,000/-, which was lent by him to the Respondent / Accused by taking a chit, by keeping jewels and from the money that was in his possession, significantly in his evidence P.W.1 / Complainant had stated that he does not remember from whom he had taken the chit. Also he had stated that he had kept the jewels for Rs.1,25,000/- and presently the said loan was also wiped out, but strangely he had stated in his evidence that he had not mortgaged the jewels for the purpose of advancing this money to the Respondent / Accused.

27. At the risk of repetition, this Court aptly points out that P.W.1 in his evidence (during cross examination) had stated that he had given the money of Rs.5,00,000/- from his savings which he saved in a small manner. P.W.1 also had stated in his evidence that the Respondent / Accused had filled up the details in Ex.P.1 Cheque and when it was handed over to him, the cheque was filled up, but he does not know that the Respondent / Accused was not knowing English and further he also does not know as to whether the details in the cheque were filled up by the Respondent / Accused.

28. In the present case, it is to be pointed out by this Court that for a large sum of Rs.5,00,000/- purportedly lent by the Petitioner / Appellant to the Respondent / Accused, no pro-note was taken by the Petitioner / Appellant / Complainant from the Respondent / Accused. Even in the absence of pro-note, except Ex.P.1, Cheque there appears to be no document in the form of receipt or in any other manner to and in favour of the Petitioner / Appellant / Complainant evidencing the payment of loan amount in question. In Law, the Respondent / Accused need not enter into the Witness Box and in fact he can maintain silence. The 'Onus of Proof' to establish a case lies on the Petitioner / Appellant and in fact the Respondent / Accused can pick holes or gather sufficient materials from the evidence of the complainant witnesses and is entitled to shake their evidence.

29. The Respondent / Accused in his evidence, as D.W.1, had stated that the Petitioner / Appellant / Complainant is running a small provision store and the value of items in his shop would be Rs.25,000/- and it was false to state that he issued cheque for Rs.5,00,000/- and obtained a loan on 27.09.2014. Moreover, it is the evidence of P.W.1 that presently through Periyasamy, a cheque case was filed against him for Rs.10,00,000/- on the file of Learned Judicial Magistrate, Bhavani and the same is pending. Apart from that, the Respondent / Accused had raised a plea that through Periyasamy, the Petitioner / Appellant had filed the present case before the trial Court.

30. On a careful consideration of the respective contentions and also this Court on going through the impugned Judgment of the trial Court dated 24.10.2016 in S.T.C.No.32 of 2015, this Court comes to an irresistible conclusion that the Petitioner / Appellant / Complainant had failed to establish that Ex.P.1, Cheque was issued by the Respondent / Accused for a 'Legally Enforceable Debt'. Per contra, this Court is of the considered opinion that the Respondent / Accused had shaken the evidence of P.W.1 by gathering materials from his evidence. Moreover, P.W.1 had given a contradictory evidence during the trial in regard to

the payment of loan amount to the Respondent / Accused. Looking at from any angle, the Judgment of the trial Court dated 24.10.2016 in S.T.C No.32 of 2015 is free from any flaw. Therefore, the Leave sought for by the Petitioner / Appellant / Complainant to prefer an Appeal in present Criminal Original Petition is not acceded to by this Court.

In fine, the Criminal Original Petition is dismissed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

To

1. The Learned Judicial Magistrate /
II Additional District Munsif, Bhavani

2 The Public Prosecutor,
High Court, Madras

3. The Section Officer,
Criminal Section,
High Court, Madras

+1 cc to M/s.P.R.Shankar,advocate,sr.20946.

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