IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.04.2018

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl.A.No.279 of 1998
and Crl.M.P.No.1218 of 2018

G.S.Rajasekaran ... Appellant/Complainant

Vs.

1 R.Ramakrishnan

2 M.Bhoopathy ... Respondents/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C. Against the judgment dated 29.07.1997 of the V Judge Metropolitan Magistrate Court, Egmore passed in C.C.No.111 of 1992.

For Petitioner : Mr.G.S.Rajasekaran, Party-in-person

For R1 : Mr.V.Karthick, Senior Counsel for M/s.T.S.Gopalan & Co

For R2 : No appearance

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JUDGMENT

Heard the appellant who appeared in person and the learned Senior counsel appearing for the first respondent/accused No.3.

2 The appellant herein had deposited a sum of Rs.75,000/- in Tapoban Housing Finance Limited. It was the margin money for the purpose of availing housing loan. But the loan was never disbursed. Therefore, the company was obliged to refund the amount deposited by the appellant. Hence, the company issued the cheque bearing No.248782 dated 09.07.1991 for a sum of Rs.75,000/- in favour of the appellant. The appellant presented the cheque for collection. It was returned unpaid on 18.11.1991. After issuing statutory notice and fulfilling the usual formalities, the appellant filed C.C.No.111 of 1992 on the file of the V Metropolitan Magistrate Court, Egmore, Chennai against accused Nos. 1 to 5.

3 The appellant had shown not only the company, but also its President, Zonal Manager, Branch Manager and the authorized signatory as accused. The first respondent herein was shown as accused No.3. He was the Zonal Manager who had been given the power of signing the company cheques. The accused pleaded not guilty and after trial, the respondents herein were acquitted vide judgment dated 29.07.1997. Questioning the same, this appeal has been filed.

4 During the pendency of this appeal, an application for impleading the other accused was also taken. The appellant would strongly contend that this Court must dispose of the pleading application first, before taking of the main appeal. He also pointed out that since the original record is not available before this Court, the appeal cannot be disposed of.

5. This Court is conscious that the appellant is a victim of real fraud. He was assured that if he paid the margin money of Rs.75,000/- he would be granted the loan amount. The loan amount was neither disbursed nor the margin money returned. The company officials kept doling out false promises to the appellant, even as they were drawing their salaries. But then, what this Court must see is whether the impugned judgment of acquittal is liable to be interfered with.

6. It is not in dispute that the dishonored cheque was issued by the first accused Company. It is true that the complainant initially arrayed the Company as the first accused and since in spite of his best efforts, accused Nos.1,2 and 5 did not appear before the trial Court, he made an oral statement that he was not pressing the complainant against them. It is true that no written endorsement was made. But then, in the impugned judgment at page No.8, the Court below has specifically noted that the complainant had given up the case against accused Nos.1, 2 and 5. It is settled law that the finding of a Court rendered in respect of what happened inside the Court is conclusive and cannot be controverted. The only remedy open to the aggrieved person is to go before the very same Judge and ask for recall of the finding concerned. Since the appellant did not take any such step, this Court will have to necessarily proceed on the footing that the appellant had confined his prosecution only against the respondents herein and gave up the prosecution against accused Nos.1, 2 and 5. This is all the more so because, even in the grounds of appeal, the appellant had not challenged the said finding of the trial Court that he had withdrawn the complaint against accused Nos.1,2 and 5.

7. When the prosecution had been given up against the accused in a private complaint and the trial concluded in his

absence, in the appeal against acquittal, the accused who was given up cannot be impleaded. Hence, the application filed by the appellant for impleading accused Nos. 1,2 and 5 has to be necessarily dismissed. Accordingly, it is dismissed.

8. The appellant is right in his contention that a criminal revision case and a criminal appeal cannot be disposed of in the absence of the original record. But in this case, the records pertaining to C.C.No.111 of 1992 were destroyed on 28.07.2010 itself. In fact the same has been duly notified in Tamil Nadu Gazatte Notification No.10 dated 18.03.2009. A copy of the Destruction Register has also been placed before this Court for perusal. Hence the appellant's request is like asking for the Moon. The Court below could not have destroyed the original records, when this appeal is very much pending. I fail to understand as to how the records came to be destroyed. Of course in this case, non-availability of the original records is not going to cause prejudice to the appellant. But then, henceforth, trial Courts ought not to go in for destruction of the original records without fully assuring themselves that no appeal or revision arising out of the case on hand is pending. The Registry may consider issuing appropriate guidelines in this regard.

9. The appeal has to suffer a dismissal on a short ground. It has been authoritatively held in Aneeta Hada Vs. Godfather Travels and Tours Pvt.Ltd [2012 (5) SCC 61] that when the complaint cheque was issued by a Company, the primary liability is only on the Company and the Directors or the officials who signed the cheque would face penal liability only in their vicarious capacity. Unless the Company which issued the cheque is found guilty, others cannot be fastened with criminal or vicarious liability. In this case, the cheque issuing Company though was originally made an accused was subsequently given up. Since they were no longer arrayed as accused, the prosecution has to necessarily fail against accused Nos.3 and 4 also. The appellant of course valiantly contended that the said decision will not apply to the present case in view of what was laid down in paragraph No.51 of the said Judgment. Paragraph No.51 read as follows:-

“We have already opined that the decision in Sheoratan Agarwals Ve. State of M.P., [(1984) 4 SCC 352] runs counter to the ratio laid down in State of Madras Vs.C.V.Parekh [(1970 3 SCC 491] which is by a larger Bench and hence, is a binding precedent. On the aforesaid reatiocination, the decision in Anil Hada Vs.Indian Acrylic Ltd., [(2000) 1 SCC 1] has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasis, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted."

The appellant's contention is that since in spite of his best efforts, the Company could not be made to appear, there was an impediment and that therefore the deletion of the accused Company should not make any difference to the prosecution of the remaining accused. I am afraid that I cannot agree with the said submission of the appellant. The observations of the Hon'ble Supreme Court laid down in paragraph No.51 will apply only in those cases where there is some legal impediment in impleading the Company. One can conceive of a situation where the Company itself had already been liquidated or wound up. Then obviously, it could not be impleaded. But in the case on hand, there was no such legal impediment. Difficulty in serving summons on the Company is not a legal impediment but a practical impediment. Therefore, the appellant cannot call in aid the observations made in paragraph No.51 of Aneeta Hada Judgment.

10. That apart in this case, the complainant after impleading the Company chose to consciously give it up during the course of trial. Therefore, I am of the view that the appellant by his own conduct was responsible for the eventual acquittal of the respondents herein.

11. Applying Aneeta Hada Judgment, I hold that the acquittal of the respondents herein does not call for any interference.

12. The appellant finally contended that since Aneeta Hada Judgment was rendered only in the year 2012, this Court should not retrospectively apply the same to the events that happened earlier in point of time. In spite of my best efforts, I could not convince the appellant that while any legislation is prospective, unless specifically made retrospective, the declaration of law made through Judgments is invariably retrospective.

13. The Criminal Appeal stands dismissed. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

rpl/pmu

To

1.The V Judge,
Metropolitan Magistrate Court,
Egmore,
Chennai.

2.Do Thro Chief Metropolitan Magistrate,
Egmore.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.G.S.Rajasekaran, Advocate, S.R.No.29882
+1cc to Mr.T.S.Gopalan & Co Advocate, S.R.No.29760

KS(CO)
CB(19/09/2019)

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