

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.01.2019

PRONOUNCED ON : 16.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A.No.532 of 2009

Srinivasan ... Appellant/Respondent/Complainant

Vs

1.M/s.Diamond Packaging Industries,
Rep. by its Partner
M.Mohammed Ismail

2.M.Mohammed Ismail ... Respondents/Appellant/Accused
(Crime No.205 of 2008)

PRAYER: Appeal filed under Section 378 of the Code of Criminal Procedure against the order of acquittal of the respondents passed by the learned 5th Additional Sessions Judge, City Civil Court, Chennai, in C.A.No.13 of 2007, dated 25.06.2009.

For Appellant : Mr.B.Ullasavelan

For Respondents: Mr.P.M.Duraisamy
(Legal Aid Counsel suo-motu
appointed)

JUDGMENT

This appeal is filed by the complainant in C.C.No.595 of 2004 as against the order of acquittal passed by the learned 5th Additional Sessions Judge, City Civil Court, Chennai, in C.A.No.13 of 2007, dated 25.06.2009.

2. For the sake of convenience and clarity, the appellant is referred to as 'complainant' and the respondents are referred to as 'accused'.

3. Though this appeal was filed in the year 2009, notice to the accused could not be served for a long time and therefore, the matter is pending before this Court right from the year 2009. Perusal of record shows that this Court, by order dated 20.04.2018, directed the Registry to send a letter to the High

Court Legal Services Committee with a request to appoint an Advocate to defend the accused. Again, on 20.06.2018, fresh notice to the correct address of the accused through City Civil Court, Chennai was ordered. Even then, notice could not be served upon the accused. The complainant had also made a submission before this Court that the address of the accused is not traceable. Since this appeal is of the year 2009, it is listed today in the Special Sitting for disposal of old appeals, as directed by the Hon'ble Apex Court. Even today, there is no representation for the accused. Therefore, this Court, as per the provisions under Section 386 of the Code of Civil Procedure, appoints Mr.P.M.Duraisamy [Enrol.No.225/1993], who is having a standing of more than fifteen years of service as Advocate in the Bar to assist the Court on behalf of the accused.

4. The case is arising out of a complaint filed by the complainant under Section 138 of the Negotiable Instruments Act. The brief facts of the case, in a nutshell, are as follows:

4.1. The first accused is a partnership concern and the second accused is the Partner, who is responsible for the day-to-day affairs of the firm. On 14.02.2002, the second accused borrowed a sum of Rs.65,000/- from the complainant towards his business expenses and issued two Cheques bearing no.807228, dated 26.04.2002 for a sum of Rs.40,000/- and bearing no.509831, dated 10.07.2002 for a sum of Rs.25,000/-. When both these Cheques were presented for collection on 08.12.2003, the same were returned for the reason 'insufficient funds' on 09.12.2003. The complainant, thereafter, caused a legal notice as required under the second clause to Section 138 of the Negotiable Instruments Act. As the accused failed to make the payment within the stipulated time limit, the complainant has filed the complaint before the learned VIII Metropolitan Magistrate, George Town, Chennai, in C.C.No.595 of 2004.

4.2. Before the trial Court, the complainant examined himself, besides marking eight documents. The second accused examined himself as DW1. The Assistant Manager of George Town Co-operative Bank, one Mr.Govindan was examined as DW2 and the Accounts Manager of the first accused Company was examined as DW3. On the side of the accused, Exs.D1 to D4 were marked. In conclusion of the trial, the learned VIII Metropolitan Magistrate, George Town, Chennai, vide order dated 16.12.2006, found the accused guilty for the offence under Section 138 of the Negotiable Instruments Act; convicted and sentenced the second accused to undergo six months simple imprisonment (since the first accused is a firm) and the accused were directed to pay a sum of Rs.32,500/- as compensation to the complainant.

4.3. As against the order of conviction passed by the learned VIII Metropolitan Magistrate, George Town, Chennai, in

C.C.No.595 of 2004 dated 16.12.2006, the accused have preferred an appeal before the Court of Session, Chennai, in C.A.No.13 of 2007 and the learned Sessions Judge, Chennai, by order dated 25.06.2009, allowed the appeal in favour of the accused and the judgment of conviction imposed against the accused was set aside. Aggrieved over the same, the complainant has filed this instant appeal.

5. Heard the learned Counsel appearing on either side and perused the documents placed on record.

6. The learned Counsel for the appellant / complainant has raised the following grounds for consideration of his case:

6.1. When the second accused has admitted the receipt of amount and the issuance of Cheques [Exs.P1 & P2], the lower appellate Court ought to have confirmed the conviction and sentence imposed by the trial Court.

6.2. The lower appellate Court erred by acquitting the accused by relying upon the reply notice of the accused dated 27.12.2003 [Ex.P7] that they have been objecting the re-validation of the Cheques dated 01.08.2003 and that a sum of Rs.1,70,762/- has been paid by the accused to the complainant in discharge of their liability, but failed to note that it was on 01.08.2003, the accused has re-validated the two Cheques, after the alleged payment of Rs.1,70,762/- (of which, the last two dues of Rs.6,575/- & Rs.5,000/- were made after 01.08.2003).

6.3. The accused, who denied the re-validation made in the Cheques [Exs.P1 & P2] did not take any steps to send the same for handwriting expert and therefore, the lower appellate Court ought not to have allowed the appeal in favour of the accused.

7. Per contra, Mr.P.M.Duraisamy, learned Counsel for the accused would submit that the legally enforceable liability for the discharge of Exs.P1 & P2 has not been established by the complainant. Admittedly, the accused borrowed a sum of Rs.65,000/- and made a payment of Rs.1,70,762/-, which were established by the accused through the documents Exs.D3 & D4. The accused has also stated the same in the reply notice dated 27.12.2003 [Ex.P7]. But, the complainant has not come forward to give any palpable evidence for this payment and for the other transactions, if any. In the absence of any materials that there were some other transactions between the complainant and the accused apart from the sum of Rs.65,000/- which was borrowed by the accused from the complainant, there is no error in the order of acquittal, as such, the learned Counsel prays for dismissal. He also pleaded that while considering the case of an appeal against acquittal, when there are two views are possible, the view which is in favour of the accused alone has to be given importance.

8. This Court has considered the rival submissions made by the learned Counsel on either side and perused the documents carefully.

9. Since the appeal is filed as against an order of acquittal, it is necessary to bear in mind the principles governing the appeal against acquittal, as laid down by the Hon'ble Supreme Court in V.Sejappa v. State [(2016) 12 SCC 150], in which, it has been held as under:

"23. In Muralidhar alias Gidda and Anr. v. State of Karnataka (2014) 5 SCC 730, this Court noted the principles which are required to be followed by the appellate court in case of appeal against order of acquittal and in paragraph (12) held as under:-

"12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu AIR 1954 SC 1, Madan Mohan Singh AIR 1954 SC 637, Atley AIR 1955 SC 807, Aher Raja Khima AIR 1956 SC 217, Balbir Singh AIR 1957 SC 216, M.G. Agarwal AIR 1963 SC 200, Noor Khan AIR 1964 SC 286, Khedu Mohton (1970) 2 SCC 450, Shivaji Sahabrao Bobade (1973) 2 SCC 793, Lekha Yadav (1973) 2 SCC 424, Khem Karan (1974) 4 SCC 603, Bishan Singh (1974) 3 SCC 288, Umedbhai Jadavbhai (1978) 1 SCC 228, K. Gopal Reddy (1979) 1 SCC 355, Tota Singh (1987) 2 SCC 529, Ram Kumar (1995) Supp 1 SCC 248, Madan Lal (1997) 7 SCC 677, Sambasivan (1998) 5 SCC 412, Bhagwan Singh (2002) 4 SCC 85, Harijana Thirupala (2002) 6 SCC 470, C. Antony (2003) 1 SCC 1, K. Gopalakrishna (2005) 9 SCC 291, Sanjay Thakran (2007) 3 SCC 755 and Chandrappa (2007) 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of

the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."

10. The case of the complainant is that the accused borrowed a sum of Rs.65,000/- on 14.02.2002 and in discharge of the said liability, the accused had issued two Cheques Exs.P1 & P2 in favour of the complainant. Both the Cheques, on presentation, were returned for 'insufficient funds' on 09.12.2003 and therefore, after issuing the statutory notice as required under the second Clause to Section 138 of the Negotiable Instruments Act, the complainant has filed the complaint.

11. The accused, on receipt of the statutory notice, has issued a reply notice dated 27.12.2003 [Ex.P7] setting out the details of payment made by them from 21.02.2002 to 02.12.2003. The accused, by way of Cheque and Cash, has paid a sum of Rs.1,70,762/- towards the liability for the sum of Rs.65,000/- received by them. It is also the case of the accused that the complainant has assured them to return the Cheques after the payment of entire loan and the complainant refused to return the same even after the receipt of the last due of Rs.5,000/- as full and final settlement on 02.12.2003. The accused had also lodged a complaint before the Chief Minister's Cell on 27.12.2003 in this regard.

12. The second accused examined himself as DW1 before the trial Court and his complaint dated 27.12.2003 has been marked as Ex.D1. His Bank statements have been marked as Ex.D2, wherein certain payments have been made to the complainant as stated in the reply notice. Apart from the second accused, the Assistant Manager of George Town Co-operative Bank and the Accounts Manager of the first accused Company have been examined as DWs 2 & 3.

13. Through the cross examination of DW1, the complainant has marked a Pronote [Ex.P8] and has taken a plea that apart

from this transaction, the accused has also borrowed a sum of Rs.2,40,000/- from the complainant and his wife and the complainant's wife has also filed a separate suit for the said sum of Rs.2,40,000/- before the Civil Court. According to the complainant, both Exs.P1 & P2 were re-validated by the accused on 01.08.2003 and though the accused had questioned the re-validation in Exs.P1 & P2, he has not taken any steps to refer the signatures in the re-validation dated 01.08.2003 for any handwriting expert, however, the lower appellate Court acquitted the accused.

14. The Cheques [Exs.P1 & P2] were issued on 26.04.2002 & on 10.07.2002, respectively, for a sum of Rs.40,000/- & Rs.25,000/-, respectively. Both the Cheques were said to be re-validated on 01.08.2003. The Cheques were presented for collection on 08.12.2003 and returned on 09.12.2003. The complainant has taken notice under Section 138 of the Negotiable Instruments Act on 12.12.2003. The accused had sent the reply notice [Ex.P7] on 27.12.2003, wherein, the accused had taken a specific plea that for the said sum of Rs.65,000/- received from the complainant, they had paid a sum of Rs.1,70,762/- towards Principal and Interest from 21.02.2002 to 02.12.2003. The said sum of Rs.1,70,762/- was also paid by way of Cheque and Cash, which was established by the accused through his Bank statement [Ex.D1]. Thus, the accused has rebutted the presumption made against him. Once the presumption has been rebutted by the accused, the onus would automatically shift on the complainant to establish his case beyond reasonable doubt.

15. The accused had specifically established their case that he has discharged the liability by making the payment of Rs.1,70,000/- to the complainant between 21.02.2002 and 02.12.2003. But, only during the cross examination of the accused, the complainant has come forward with a pronote, said to have been issued by the accused to the wife of the complainant and marked the same as Ex.P8, through DW1. Till such time, it is not the case of the complainant that there were some other transactions existing between the complainant and the accused, apart from this transaction of Rs.65,000/- on 14.02.2002. Neither in the complaint nor in the notice, the complainant has stated about the other transactions pending between him and the accused.

16. The complainant has not approached the Court with clean hands. Even after a specific stand has been taken by the accused in the reply notice dated 27.12.2003, the complainant has not come forward to refer to those other transactions in his complaint filed on 05.01.2004.

17. In view of these discrepancies found in the case of the complainant and in view of the principle laid down by the

Hon'ble Apex Court in deciding the cases of appeal against acquittal, this Court does not find any perversity or illegality in the judgment passed by the learned 5th Additional Sessions Judge, City Civil Court, Chennai, in C.A.No.13 of 2007, dated 25.06.2009 and the same is accordingly confirmed.

18. In the result, this Criminal Appeal stands dismissed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1.The V Additional Sessions Judge,
City Civil Court, Chennai.

2.The VIII Metropolitan Magistrate,
George Town, Chennai.

3.The Public Prosecutor,
Madras High Court,
Chennai.

Copy to

The Section officer
Criminal Section
High Court, Madras 104.

Cr1.A.No.532 of 2009

PVS (CO)
SP(25/11/2019)

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