BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT
DATE : 24.09.2019

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THE HONOURABLE MR. JUSTICE V.PARTHIBAN

CRL. R.C.(MD) NO. 447 OF 2019

G.Selvam .. Petitioner/Appellant/ Complainant

- Vs -

R.Gopalakrishnan .. Respondent/Respondent/ Accused

Criminal Revision Case filed u/s 397 r/w 401 of the Code of Criminal Procedure, against the order dated 11.1.2019, passed by the learned IV Addl. District Judge, Madurai, in C.A. No.89/2017.

For Petitioner : Mr. N.Sundaresan

For Respondents : Mr. N.Ananthapadmanabhan, for M/s. APN Law Associates

ORDER

The present revision has been filed against the dismissal of the appeal by the lower appellate court confirming the order passed by the learned Judicial Magistrate, Fast Track Court No.1, Madurai, in S.T.C. No.622/14, vide order dated 8.8.17.

2. The facts leading to the filing of the present appeal, in a nutshell are as hereunder :-

The case of the complainant before the trial court was that he had executed a power of attorney in favour of one Kannan, S/o Rajendran and the complaint was preferred by the power of attorney holder. The accused/respondent herein was working as Sub Divisional Engineer and was also a sleeping partner of Indian Organic Agri Foundation. On 27.12.13, the accused had visited the office of the complainant and after discussing about the affiairs of Indian Organic Agri Foundation, he requested the complainant for a loan of Rs.5 Lakhs for construction of his house. According to the complainant, the amount was given as hand loan to the accused in the presence of one Basheer Hussain and one Amarlal. After receipt of the amount, the accused appears to have agreed to repay the same within a period of six months with interest being charged on bank rates. On the same day, the accused issued a cheque dated 10.9.14 drawn on Canara Bank, Tallakulam Branch, Madurai, in favour of the complainant with an assurance that the amount would be repaid within six months, failing which he asked the complainant to present the cheque for collection.

3. The accused failed to repay the amount as promised and, therefore, the complainant presented the cheque on 17.9.14 with his bankers, viz., Central Bank of India, Tallakulam Branch, Madurai, which was dishonoured and returned with an endorsement "Funds Insufficient". Thereafter, a lawyer notice was issued for honouring of the cheque and on behalf of the accused, a reply notice was issued on 11.10.14 containing counter allegations. Having failed to repay the amount in terms of the statutory notice, a private complaint was filed before the jurisdictional Magistrate. After completion of the initial formalities, the complaint was taken on file by the learned Judicial Magistrate.

4. On behalf of the complainant, the complainant's power of attorney was examined as P.W.1 and another witness was examined as P.W.2 and Exs.P-1 to P-17 were marked. On the side of the accused, D.W.s 1 to 3 were examined and Exs.D-1to D-10 were marked. After considering the materials placed before the Court and the evidence adduced, the learned Judicial Magistrate found that no legally enforceable debt as against the accused has been established in the trial and, therefore, acquitted the accused of the charges levelled against him. As against the acquittal by the trial court, an appeal was preferred by the complainant before the lower appellate court.

5. A number of grounds have been raised assailing the conclusion arrived at by the trial court. The lower appellate court, on consideration of the grounds raised in the appeal, dismissed the appeal vide the impugned judgment, which is the subject matter of the present revision.

6. Learned counsel appearing for the revision petitioner submitted that preponderance of probability alone is not sufficient for rebutting the evidence and the trial court, on the said count alone got carried away to acquit the appellant, which aspect has not been considered in proper perspective by the lower appellate court as well to dismiss the appeal and, therefore, the impugned order is liable to be set aside.

7. Per contra, learned counsel appearing for the respondent submitted that the lower appellate court, properly evaluating the materials relied on by the trial court to acquit the accused, has rightly confirmed the order passed by the trial court and, therefore, this Court, sitting in revision shall not reappraise the evidence, unless it is shown that the order passed by the courts below are perverse and not on the basis of the materials available on record. It is therefore submitted that no interference is called for with the orders passed by the courts below.

8. This Court gave its anxious consideration to the submissions advanced by the learned counsel on either side and also perused the materials available on record as also the reasoning given by the courts below for coming to the conclusion.

9. A perusal of the order passed by the trial court reveals that the trial court was particularly guided by the fact that there were many contradictions in the theory of the complainant, for which there was hardly any explanation in order to prove that there was a legally enforceable debt due to the complainant by the accused. In fact, the power of attorney holder, Kannan, was admittedly not privy to the transaction and, therefore, his evidence is not worthy of consideration and, therefore, the same was not relied upon, which finding of fact was also upheld by the lower appellate court. The trial court, going through the materials placed on record and the evidence of the parties had come to the definite conclusion that just two months prior to the date on which the alleged loan has been given to the complainant, I.e., 27.12.13, Exs.P-4 and D-3, which are pivotal documents on which the entire complaint has been premised, would reveal that there was disharmony between the complainant and the accused as disclosed in Ex.D-3 and both the complainant and the accused were at loggerheads with regard to the business transaction between them. Therefore, the trial court was not convinced and in view of the inimical nature of the relationship between the complainant and the accused just prior to the date of the so called extension of loan of Rs.5 Lakhs to the accused, was of the view that the complainant would not have given a huge amount of Rs.5 Lakhs to the accused on 27.12.13.

10. Although u/s 139 of the Negotiable Instruments Act, there could be a presumption in favour of the complainant, the holder of the cheque in due course, the said presumption was rebutted sufficiently by the accused stating that the cheque was given for the amount of Rs.5 Lakhs only as a security towards tenancy lease of the house occupied by the accused and owned by the complainant. This fact was also admitted by the witnesses before the trial court. In fact, the fact about the tenancy of the accused in the house of the complainant at the relevant point of time was also recorded by the trial court. Both P.W.s 1 and 2 vouch for the said fact in their deposition.

11. Moreover, the trial court found that different dates were mentioned at different points of time about the date of the cheque and the handwriting in the cheque did not tally with the writing of the accused. The said finding has been upheld by the lower appellate court. The trial court has ultimately found that there were lot of lose ends and missing links in order to establish the factum of legally enforceable debt as against the complainant by the accused and, therefore, finally held that the presumption in favour of the complainant was successfully rebutted by the accused stating that there was no debt due to the complainant and, therefore, eventually acquitted the accused of the charges.

12. The lower appellate court, which dealt with the appeal at the instance of the complainant, has in fact, gone one step further and held that the evidence of P.W.1 is legally not sustainable in the absence of any specific pleading in regard to his presence during the loan transaction. According to the lower appellate court, the above fact was not specifically pleaded by the complainant and, therefore, the evidence of P.W.1 has to be eschewed completely.

13. This Court does not find anything wrong with such finding by the lower appellate court since the power of attorney holder, who was not at all privy to the transaction cannot depose on behalf of the complainant for establishing a transaction which is the most crucial factor in raising a presumption in favour of the complainant. Once that premise is removed from consideration, the presumption in favour of the complainant will automatically fall to the ground.

14. Further, the appellate court has also found that in the complaint, it was stated that on the very same day when the loan was extended on 27.12.13, the cheque was issued, but actually it was dated 10.9.14. When the statutory notice was issued, the date has been mentioned as 15.6.14. Therefore, a valid doubt has been raised, both by the trial court as well as the appellate court as to the issuance of the cheque in question to the accused at the relevant point of time. Moreover, when the proof affidavit was filed before the trial proceedings, it was stated that Rs.5 Lakhs was paid in the presence of all staff attached to the office, whereas in the statutory notice, it was only mentioned that the loan was given in the presence of one Basheer Hussain and Amarlal who were alone present at the time of the alleged transaction. Such material contradiction definitely casts a doubt on the version of the complainant about the alleged transaction. In the face of such contradiction, according to the lower appellate court, the trial court was right in coming to the conclusion in favour of the accused.

15. Moreover, P.W.s 1 and 2 have categorically admitted the signature and handwriting found in Exs.P-4 and D-3 and, therefore, in such circumstances, the trial court had no option except to entertain a doubt in regard to the alleged transaction. This was coupled with the fact that the tenancy of the accused in the house owned by the complainant was also admitted and established. Further, the trial court has also found that the writing of date and letters on the cheque does not at all tally with the handwriting of the accused. Such finding of fact by the trial court was also reaffirmed by the lower appellate court. Further, P.W.2, who was examined on the side of the complainant had also deposed admitting the variation of ink between the writings on the cheque, which further raised a legitimate doubt in the mind of the court over the legally enforceable debt and the veracity behind the cheque in question.

16. On the whole, the findings of the trial court in favour of the accused were completely upheld by the lower appellate court by giving its own findings, which, in the opinion of this Court does not call for any interference. Unless the findings of the trial court, as confirmed by the lower appellate court, is found to be perverse or legally unacceptable, the same does not call for interference by this Court dealing with revision at the second appellate stage.

17. Learned counsel for the revision petitioner relied on a decision of the Hon'ble Supreme Court in ***Rohitbhai Jivanlal Patel – Vs – State of Gujarat & Anr. (2019 SAR Crl. 558)*** and emphasised the fact that mere denial of creation of doubt is not enough to rebut the presumption. It is further submitted that mere presumption of innocence in favour of the accused cannot tilt the preponderance of probabilities.

18. This Court, after careful analysis of the above decision, is of the considered view that the above decision, relied on by the learned counsel for the appellant cannot be applied to the factual matrix of the present case, since the presumption is not on the basis of mere surmises or conjectures and such presumption of innocence is on the basis of concrete rebuttal set up by the accused. As per the above narrative, it could be seen that there were several material contradictions in the case of the complainant and the version of P.W.s was also discountenanced for the simple reason that being a power of attorney holder, he was not admittedly privy to the subject transaction. Moreover, the evidence of the petitioner's witnesses as well as the defence witnesses would show the tenancy of the accused during the relevant time was established with the complainant and also contradiction in mentioning different dates of cheque in question were all glaring to be ignored by the trial court. Further the ink and handwriting in the cheque did not

tally with the handwriting of the accused, besides both the complainant and the accused were at loggerheads just prior to the so called loan transaction, I.e., on 27.12.13.

19. All the above facts cumulatively put together raise a serious doubt in regard to the existence of legally enforceable debt in favour of the complainant and the trial court has correctly held that the complaint was without merits and acquitted the accused of the charges and the lower appellate court, which has gone into the findings of the trial court in detail, has endorsed the findings of the trial court by passing a detailed order in appeal, which in the considered opinion of this Court, is perfectly in order and does not call for any interference.

20. For the reasons aforesaid, this revision petition is devoid of merits and, accordingly, the same is dismissed.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

GLN

To

1. The IV Additional District Judge
Madurai.

2. The Judicial Magistrate
Fast Track Court No.1
Madurai.

CRL. R.C. (MD) NO. 447 OF 2019
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JM/18.10.2019/6P/3C