IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
29.04.2024	03.06.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. O.P. NOS. 10078, 10101, 10103 & 10105 OF 2024
IN
CRL. A. SR NOS. 11306 TO 11309 OF 2024

M.Arumugham .. Petitioner in all petitions

- Vs -

B.Prakash Kumar .. Respondent in all petitions

Criminal Original Petitions filed filed u/s 378 (4) Cr.P.C. praying this Court to grant leave to file appeal against the order of acquittal dated 21.12.2023 passed in S.T.C. Nos.54 to 57 of 2016 ((C.N.R. No.TNKPOA-000075-2016), (C.Np.R. No.TNKPOA-000076-2016), (C.Np.R. No.TNKPOA-000076-2016), (C.Np.R. No.TNKPOA-000077-2016) and (C.No.R. No.TNKPOA-000078-2016) on the file of the Judicial Magistrate No.II, Kanchipuram.

For Petitioner/Appellant	:	Mr. J.R.K.Bhavananthan

COMMON ORDER

The unsuccessful complainant, having lost before the trial court, has assailed the said order, passed in S.T.C. Nos.54 to 57 of 2016 on the file of the Judicial Magistrate No.II, Kanchipuram, dated 21.12.2023, in and by which the respondent herein was acquitted in the case u/s 138 of the Negotiable Instruments Act (for short 'the Act'), has filed the present appeals.

2. It is the case of the petitioner that the respondent/accused is doing real estate business and in order to purchase certain properties and expansion of business, the respondent borrowed a sum of Rs.20,00,000/- from the complainant on 20.06.2015 and to that end he executed a promissory note in his letter head in favour of the complainant agreeing to repay the amount together with interest at 30% p.a., on demand. It is the further case of the petitioner that at the time of borrowal on 20.6.2015, the respondent paid three months interest in advance for the abovesaid promissory note amount and that the respondent paid interest upto November, 2015.

3. It is the further case of the petitioner that during the first week of December, 2015, the petitioner approached the respondent seeking repayment on the above amount and the respondent issued four post dated cheques, each for a sum of Rs.5,00,000/-, dated 25.12.2015, 30.12.2015, 5.1.2016 and 8.1.2016 respectively and upon the request of the respondent, the cheques were deposited for collection on 19.2.2016 through the petitioner's bankers, which were returned dishonoured on 1.3.2016 with endorsement 'Funds Insufficient'.

4. It is the further case of the petitioner that upon dishonour of the cheques, the petitioner caused a legal notice calling upon the respondent to pay the entire amount covered by the respective dishonoured cheques through notice dated 4.3.2016, which was received by the respondent on 8.3.2016, but inspite of the same, the respondent failed to pay the amount. It is the further case of the petitioner that the details about the promissory note obtained by the petitioner to the tune of Rs.20,00,000/- was not mentioned to his counsel due to ignorance which was not mentioned in the legal notice.

5. It is the further case of the petitioner that the respondent without paying the amount towards the dishonoured cheques, issued false and frivolous reply and that the respondent in his reply notice has misrepresented and made some false allegations against the petitioner as if the petitioner is making false claims with regard to amount to the tune of Rs.10,00,000/- through his notice, which notice, the petitioner claims ignorance and has not issued such a notice. Since the respondent failed to pay the amount of the dishonoured cheques, the petitioner filed the complaint u/s 138 of the Act.

6. Upon examination of the complainant on oath u/s 200 Cr.P.C. and perusing the records, the court below, finding a prima facie case being made out, issued summons to the respondent and upon appearance, was provided with a copy of the complaint and the respondent pleaded not guilty.

7. On the side of the petitioner, the petitioner examined himself as P.W.1 and one other witness as P.W.2 and marked Exs.P-1 to P-10. On the side of the respondents, the respondent examined himself as D.W.1 and marked Exs.D-1 to D-7. The trial court, appreciating the materials available on record, held that the

petitioner has not established that there was a legally enforceable debt and for which towards its discharge the cheques were issued, which were dishonoured and also failed to prove that the cheques were issued by the respondent for discharging a legally enforceable debt and, accordingly, acquitted the respondent, aggrieved by which the present petitions have been filed craving the leave of this Court to file the appeal.

8. Learned counsel appearing for the petitioner submitted that the four cheques, which were issued by the respondent, pertains to a single transaction in which the petitioner had lent a sum of Rs.20,00,000/- to the respondent and towards the discharge of the said amount, the cheques, which were issued, stood dishonoured. It is the further submission of the learned counsel that the respondent has not disputed his signature in the cheques, which clearly shows that there is no denial of the loan obtained from the petitioner and, therefore, there is a legally enforceable debt, which has not been discharged by the respondent warranting invocation of Section 138 of the Act.

9. It is the further submission of the learned counsel that it is admitted by the respondent in his deposition in chief that he had given the signed cheques to one Pannerselvem, which proves beyond reasonable doubt that the cheques were issued to clear a legally enforceable debt. The liability for payment having accepted by the respondent, the dishonour of the cheques would entail an action u/s 138 of the Act. It is the further submission of the learned counsel that the presumption u/s 139 of the Act would squarely stand attracted in favour of the petitioner and unless the respondent rebutted the said presumption through proper evidence, which has not been done in the present case, the court below has miserably failed to consider the same and had erroneously acquitted the accused. When the respondent has not disputed his signature in the cheque and the cheque had been given to the petitioner, which has since been deposited, the deposition of D.W.1 that the cheque was given to Pannerselvam is a concocted story to defeat the legitimate claim of the petitioner. The aforesaid facts have not been properly considered by the court below while acquitting the accused, which requires interference at the hands of this Court.

10. The present petitions have been filed seeking leave of this Court to file appeal as against the respondent herein for failing to discharge a legally enforceable debt, which attracts offence u/s 138 of the Act. However, for granting leave to file appeal, necessarily the petitioner has to prove that there exists a prima facie case and the materials on record reveals that such a case exists, which has not been properly considered by the Court below while negativing the case of the petitioner.

11. Time and time again, the scope and power of the High Court to interfere with an order of acquittal recorded by the trial court has been highlighted by the Supreme Court and recently in ***Babu Sahebagouda Rudragoudar & Ors. – Vs – State of Karnataka (C.A. No.985/2010 – Date – 19.04.2024)***, the Supreme Court had captured the ratio succinctly, which have to be followed in an appeal against an order of acquittal and for refreshing the law, the same is quoted hereunder :-

> *37. This Court in the case of **Rajesh Prasad v. State of Bihar and Anr. (2022 (3) SCC 471)** encapsulated the legal position covering the field after considering various earlier judgments and held as below: -*

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: ***(Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]***

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the

reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

38. Further, in the case of ***H.D. Sundara & Ors. v. State of Karnataka (2023 (9) SCC 581)*** *this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -*

"8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappreciate the oral and documentary evidence;

8.3. <u>The appellate court, while deciding an appeal against acquittal, after reappreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record</u>;

8.4. <u>If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible</u>; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

39. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

(a) That the judgment of acquittal suffers from patent perversity;

(b) That the same is based on a misreading/omission to consider material evidence on record;

(c) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

40. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court."

(Emphasis Supplied)

12. Thus, from the aforesaid proposition of law, it is beyond a cavil of doubt that the power of this Court is not curtailed or limited, as it is within its realm to reappreciate the evidence available on record to render a finding. However, in reappreciating the evidence, this Court has to see whether the view taken by the trial court could not be taken by any prudent man on appreciating the materials available before it. If the view taken by the trial court, considered overall on the materials placed, is just and reasonable that the view taken by the trial court is on proper appreciation of the materials, the High Court cannot interfere with the acquittal on the ground that another view is possible.

13. In light of the above legal principles enunciated by the Apex Court, this Court will now proceed to analyse the evidence on record to find out whether the view arrived at by the trial court is based on the materials available on record or whether there are materials, which warrants grant of leave by this Court.

14. Ex.P-1 is the cheque in the respective cases, which are alleged to have been issued by the respondent towards the discharge of the liability to the petitioner. However, it is the case of the respondent that the cheques, in blank, were given to one Pannerselvam and not to the petitioner. But the petitioner claims that the cheques were given towards the discharge of a legally enforceable debt, which is borne out by the promissory note.

15. However, the fact remains that the promissory note, which has been alleged to have been obtained by the petitioner from the respondent while allegedly parting with the amount by way of loan has not been shown either in the legal notice nor any action has been taken on the said promissory note by the

petitioner. But for the dishonour of the cheques alleged to have been given by the respondent, the complaint has been lodged u/s 138 of the Act.

16. In the aforesaid factual scenario, Sections 138 and 139 of the Act, which are material to find out the legal presumption, which is casted on the accused/respondents with regard to the cheque being issued for discharging a legally enforceable debt, which ought to be rebutted through materials to absolve the respondent, the said provisions are quoted hereunder for better appreciation:-

*"**138. Dishonour of cheque for insufficiency, etc., of funds in the account.***

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of *this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b)the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

139. Presumption in favour of holder.

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred *to in section 138 for the discharge, in whole or in part, of any debt or other liability.”*

17. The petitioner is drawing inspiration from the presumption provided for u/s 139 of the Act to impress upon this Court that it is for the respondent to prove that the cheques, which are the subject matter of the present petitions seeking grant of leave were not issued towards the discharge of any debt or liability and in the absence of such proof, necessarily, the rigours of Section 138 of the Act would stand attracted.

18. In this regard, a careful perusal of the order passed by the court below reveals that the court below had embarked upon a careful analysis of the materials placed before it and had come to the conclusion that though the cheques were claimed to have been issued by the respondent, however, the respondent, who examined himself as D.W.1 had deposed that the cheques were not issued to the petitioner, but were given to one Pannerselvam. Therefore, there is a complete denial not only with regard to the issuance of the cheques, but even with regard to the loan alleged to have been obtained from the

petitioner. When there is a flat denial of the cheques by D.W.1, necessarily it is incumbent on the petitioner to prove that indeed he had given the loan to the respondent towards which the cheques were issued.

19. In this backdrop, a careful perusal of the proof affidavit of the petitioner, examined on oath, reveals that the petitioner had alleged to have given the amount to the respondent at the office of the respondent in cash. It is the further deposition of P.W.1/petitioner that there were no witnesses to the transaction with regard to the passing of the amount from the petitioner to the respondent.

20. In the absence of any witness to the passing of the amount from the petitioner to the respondent, even to aver that such a transaction could have taken place, it is incumbent on the petitioner to prove that he had the wherewithal to lend the said amount as loan to the respondent. In this regard, a perusal of the order of the court below reveals that the petitioner has not established as to where from he had the amount to be given as loan to the respondent. The petitioner merely claims that it came from his wife's side

towards sale of some properties. However, there are no materials to establish the same.

21. Further, even according to the petitioner, a promissory note was obtained from the respondent while the amount was given to the respondent. Ex.P-7 is the said promissory note in which two persons, viz., Thirunavukkarasu and Munusamy have affixed their signatures as witnesses. Yet, P.W.1 had not examined any one of the witness to show that the promissory note was signed by the respondent to show that he had obtained loan from the petitioner. Further, the petitioner though claims that three months interest was paid in advance, however, no such recording is found in the promissory note nor any receipt with regard to the same is produced by the petitioner.

22. The court below has given a lengthy analysis as to the capacity of the petitioner to lend the amount towards which extensive cross examination has been made in which the petitioner has deposed that he is a agriculturist doing coolie work and that he was not paying any income tax nor has any PAN card in his name and that the amount, which is alleged to have been lent as loan to the

respondent was given to his wife from his in-laws side, which was inturn given to the respondent as loan. Even to that end, the petitioner has not examined either his wife or his in-laws to show that such amount was given to his wife, which was given to the respondent as loan.

23. Though the respondent has not disputed his signature in the cheques, but it is the case of the respondent that the cheques were given to one Pannerselvam and not to the petitioner and in the light of the fact that the petitioner has not proved that he had lent the amount due under the cheques to the respondent, which is reflected in the promissory note, the stand of the respondent deserves to be accepted as the respondent has rebutted the presumption u/s 139 of the Act and it becomes incumbent on the petitioner to prove that the cheques were given towards the discharge of a legally enforceable debt.

24. Further, it is the case of the petitioner that the alleged loan carried interest at 30% p.a. and three months interest were paid in advance. However, no notings to the said effect is filed as document. Further, the petitioner had

sought return of the amount after six months and, necessarily the respondent, is bound to pay interest for the balance period, if he had really taken the loan. However, the cheques are alleged to have been issued only towards the principal and there is no material with regard to the interest for the balance period.

25. Further, there is no whisper from the petitioner as to why he has not pursued his remedy under the promissory note by trying to enforce the same before the civil court. This clearly shows that all is not well with the petitioner and the petitioner has not come to court with clean hands.

26. Though the cheques are claimed to be with regard to the discharge of a legally enforceable debt, as alleged by the petitioner, which has been disputed, however, as stated above, the petitioner has not proved that there is a subsisting legally enforceable debt towards which the cheques were given. In the absence of there being a legally enforceable debt, the rigours of Section 138 of the Act would not come into play and, therefore, taking recourse of Section 138 would be impermissible. It has been the consistent ratio laid down by the Apex Court that the dishonour of the cheque alone cannot be the criteria to invoke Section

138 of the Act, but the cheque, which stood dishonoured should be against a legally enforceable debt. However, as stated above, there are no materials to show that the amount, which is shown in the cheques is a legally enforceable debt, as no materials to substantiate the lending, either in the form of documentary evidence or in the form of oral evidence has been adduced to establish the receipt of the amount by the respondent. Such being the case, the debt or liability has not been established by the petitioner.

27. First of all, the presumption available u/s 139 has to be rebutted by the accused, whereinafter, a duty is cast on the complainant to establish that the cheque, which stood dishonoured, was issued for the purpose of discharging a legally enforceable debt. In the case on hand, the respondent, through the evidence of D.W.1 and other documentary evidence has established that the cheques had not been issued to the petitioner by the respondent and such being the case, the petitioner having failed to establish that there is a legally enforceable debt, towards which the cheques were issued, the leave sought for by the petitioner to file the appeal could only be termed to be an exercise in futility as nothing could be established in the appeal and the petitioner having

miserably failed to establish that he had advanced loan to the respondent, cannot seek to file the appeal praying the leave of this Court.

28. For the reasons aforesaid, the impugned orders passed by the court below do not deserve any interference and the same stands affirmed. Accordingly, all the petitions to grant leave are dismissed and the criminal appeal is rejected in the SR stage itself.

03.06.2024

Index : Yes / No
GLN

To

Judicial Magistrate No.II
Kanchipuram.

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY ORDER IN
CRL. O.P. NOS. 10078, 10101,
10103 & & 10105 OF 2022**

Pronounced on
03.06.2024