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Crl.O.P.No.766 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.06.2024

CORAM:

**THE HONOURABLE MR. JUSTICE
M.DHANDAPANI**

Crl.O.P.No.766 of 2024
in Crl.A.SR.No.63345 of 2023

A. Nallathambi

...Petitioner

Vs.

S.Ganesan

...Respondent

Prayer in Crl.O.P.No.766 of 2034: Criminal Original Petition filed under Section 378 of Cr.P.C. to grant leave to the petitioner to prefer appeal against the impugned judgment of acquittal passed in S.T.C.No.339 of 2016 on the file of the District Munsif cum Judicial Magistrate, Kodumudi.

Prayer in Crl.A.SR.No.63345 of 2023 : Criminal Appeal filed under Section 378(4) Cr.P.C. to set aside the judgment of acquittal passed in S.T.C.No.339 of 2016 dated 26.10.2023 on the file of District Munsif cum Judicial Magistrate, Kodumudi by acquitting the respondent.

For Petitioner : Mr.K.Govi Ganesan

ORDER

This Criminal Original Petition has been filed to grant leave to the petitioner to file the above appeal against the judgment of acquittal passed in S.T.C.No.339 of 2016 dated 26.10.2023 on the file of the learned District Munsif

Page No:1/10



Crl.O.P.No.766 of 2024

cum Judicial Magistrate, Kodumudi.

WEB COPY

2. The case of the petitioner is that, the respondent approached the petitioner on 27.01.2013 and borrowed a sum of Rs.9,00,000/- for his urgent expenses from the petitioner. To discharge the said liability, the respondent issued a post dated cheque bearing No.833914 drawn on Indian Bank, Tiruppur Branch dated 27.02.2013 for a sum of Rs.9,00,000/-. As per the instructions of the respondent, the petitioner presented the aforesaid cheque for collection through his banker on 04.03.2013 and the cheque was unpaid for the reason “ Payment stopped” vide return memo dated 23.03.2013. Thereby, the petitioner sent a legal notice to the respondent on 22.04.2013 and the same was received and returned by the respondent on 27.04.2013. Further the respondent did not pay any amount nor any reply and failed to make payments. Therefore, left with no other alternative, the complaint was filed by the petitioner for an offence u/s 138 of the NI Act before the trial court in STC.No.339 of 2016.

2.1 Upon issuance of summons, the respondent appeared and was served with the copies of the documents and as the respondent pleaded not guilty, the court below proceeded with the trial of the case. At the time of trial, on the side of the petitioner, P.W.1, P.W.2 and P.W.3 were examined and Exs.P1 to P9 were



Crl.O.P.No.766 of 2024

marked. On the side of the respondent, D.W.1 and D.W.2 were examined and Exs.D-1 to D-5 were marked. On the basis of oral and documentary evidence, the court below found the respondent not guilty of the offence and, accordingly, acquitted the respondent, aggrieved by which the present petition has been filed seeking leave to appeal to prefer an appeal against the said order.

3. Learned counsel appearing for the petitioner submitted that the Trial Court has failed to take into consideration that the petitioner cannot be expected to initially lead evidence to show that he had financial capacity unless such a case was set up by the respondent and the trial Court failed to see that the respondent has not sent any reply to the statutory notice issued by the appellant and erroneously relied on Ex.D1,D2, D3 and D5 which were not proved by the respondent. Moreover, the respondent did not deny his signature nor rebutted the presumption for the legally enforceable debt and erroneously shifted the burden on the petitioner. Without going into the merits of the complaint and corroborative evidence and without following the procedures as contemplated under law, the learned Trial Judge had acquitted the respondent, which is wholly unsustainable and therefore, interference is warranted with the findings recorded by the court below.



WEB COPY



Crl.O.P.No.766 of 2024

4. This Court gave its anxious consideration to the submission advanced by the learned counsel for the petitioner and perused the materials available on record.

5. It is the consistent ratio laid down that grant of leave is not a matter of right; rather it is the edifice on which the liberty of the person, who has seen accused of a crime rests and where a person, who had been accused of a crime had been acquitted by the court below, a presumption follows the golden rule that a person is presumed innocent until proven guilty and on that basis the second presumption on the basis of the acquittal necessitates the appellate court to scrutinize the materials more carefully. Further, grant of leave to the prosecution should not be as a matter of routine, but should be on just and equitable basis, when materials reveal that the court below has not appreciated the materials in proper prospective.

6. Grant leave provided for u/s 378(4) is not an empty formality,



Crl.O.P.No.766 of 2024

but has been brought into the statute only to safeguard the interests of the persons accused of a crime, who have since been acquitted, as otherwise, they would be put through the rigours of continuous litigation even after their innocence has been accepted by the trial court.

7. It is the case of dishonour of cheque given by the accused to the complainant towards discharge of legally enforceable debt due and payable by the accused for which the complaint was filed under Section 138 of Negotiable Instruments Act which came to be dismissed.

8. It is not in dispute that the dishonoured cheque belongs to the accused. A perusal of the documents placed on record particularly the impugned judgment reveals that, the version of the petitioner in his argument had insisted the Court that the version of the respondent that the cheque in dispute was given to one Kumarasamy and the same was misused by the petitioner. Further, the petitioner has no source to lend the loan amount Rs.9,00,000/- was not at all established except by the mere oral evidence of D.W1 and it does not inspire confidence and the same is rejected. When the respondent had raised a serious doubt in respect of the version of the petitioner by way of cross examination, then the burden of proof



Crl.O.P.No.766 of 2024

would shift back upon the petitioner to explain the facts and circumstances in which he had parted such a hug amount directly, without getting any supportive

documents. Therefore, the petitioner has failed to prove that the received money for what purpose and whether the cheques were given for legally enforceable debt or liability. Hence, the petitioner failed to prove that the cheque was issued for legally enforceable debt or liability. The learned Trial Judge had rightly held that the inherent weakness in the case of the petitioner and which goes to the root of the case and the respondent is liable to raise a probable defence and had created a serious doubts with regard to the very maintainability of the case by the petitioner and that the cheque in dispute was not supported by any legally enforceable debt in respect of the petitioner and therefore, the respondent is not legally enforceable. Accordingly, the respondent created valid doubt and rebutted the presumption in favour of the petitioner and the petitioner has miserably failed to establish his case.

9. Further, there is no material to show the payment made to the accused so as to claim that the cheques were issued which stood dishonoured



Crl.O.P.No.766 of 2024

and, therefore, there is a legally enforceable debt which subsists. Thus, the trial court, on appreciating the materials available on record, had rightly dismissed the

petitioner's complaint as he failed to establish that there was a legally enforceable debt for which the dishonoured cheque was issued by the accused and therefore, the said finding of the trial court cannot be interfered with.

10. In order to grant leave, a case should be made out, but the present case bristles with infirmities which strikes at the root of the findings recorded. Further, in the case on hand, the petitioner, has not made out a case, where the findings are so very perverse that there has been miscarriage of justice warranting this Court to grant leave to set right the wrong that has been committed by the court below.

11. No infirmities or other materials are placed which necessitates relook into the findings recorded by the court below and granting leave to appeal would be nothing but a travesty of justice insofar as the respondent are concerned, who had been acquitted through a well considered judgement passed by the court



Crl.O.P.No.766 of 2024

WEB COPY

12. In the aforesaid circumstances, no case is made out by the petitioner for grant of leave and accordingly, this Criminal Original Petition stands dismissed. Consequently, the Criminal Appeal is rejected at the SR stage itself.

10.06.2024

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Index	: Yes/No
Speaking Order	: Yes/No
NCC	: Yes/No



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Crl.O.P.No.766 of 2024

M.DHANDAPANI, J.

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Crl.O.P.No.766 of 2024
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WEB COPY



Crl.O.P.No.766 of 2024

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