(2024) ibclaw.in 522 HC

IN THE HIGH COURT OF MADRAS

R.Prakash
v.
T.Sivakumar and Anr.

CRL. A. No. 439 of 2024
Decided on 03-Jun-24

Coram: Mr. Justice M.Dhandapani

Add. Info:

For Appellant(s): Mr. V.Raghavachari, SC, for Mr. C.Parthiban

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Brief about the decision:

Facts of the case

- The petitioner joined the 2nd respondent of which the 1st respondent is the Managing Partner and was working in the 2nd respondent as Project Manager & Working Partner during the period 2008 to 2012.
- The 1st respondent, impressed with the work of the appellant had agreed to give share of the net profit in the ratio of 30 to 70 and 35 to 65 and believing the said words, the appellant completed those projects. However, the profits earned were not shared by the 1st respondent as per the agreement dated 13.12.2008. The appellant was paid only a sum of Rs. 4,00,000/- and Rs.6,00,000/- against a total amount of Rs.76,85,000/-.
- After much persuasion, the respondents issued a cheque dated 18.12.2023 for a sum of Rs.56,50,000/- with a request to the appellant to present the cheque after some time. Accordingly, the appellant presented the cheque on 30.01.2014, but the same was returned by his banker with the endorsement 'Account Closed'.
- However, it is the case of the respondents that the cheque, in blank, was given to the appellant for the purpose of official necessity and it has been misused by the appellant.
- The complaint was filed by the appellant for an offence u/s 138 of the Act.

Decision of High Court

- 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 respondents.**(p15)**
- The appellant is drawing inspiration from the presumption provided for u/s 139 of the Act to impress upon this Court that it is for the respondents to prove that the cheque, which is the subject matter of the present appeal was 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.**(p16)**

- In this backdrop, it is the duty of the appellant to establish that necessarily there was an agreement between the appellant and the respondents to the effect that the appellant was a Managing Partner in the 2nd respondent and that he was entitled to a share in the profits. Though the appellant and his wife have spoken about the agreement, alleged to have been entered into, however, there is no material placed by the appellant to show that such an agreement was entered into which would enable the appellant to have a share in the profits of the 2nd respondent.**(p18)**
- 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 respondents, through the evidence of D.W.1 have established that the cheque had found its way into the hands of the appellant during the course of employment for the purpose of looking into the day to to day expenses and for other overheads connected with the project.**(p19)**
- When the appellant has not established that there exists a legally enforceable debt, which has to be paid by the respondents for which the cheque was issued, which has since been dishonoured, **the mere dishonour of the cheque alone cannot form the basis to attract Section 138 of the Act**, more so, when it is the case of the respondents that the cheque, which was given for the purpose of carrying out the day-to-day activities has been misused cannot be brushed aside.**(p23)**
- To take shelter under the presumption provided for u/s 139 of the Act, the appellant has to first establish that the cheque was issued for discharging a legally enforceable debt, meaning thereby, that the debt should first stand established, which alone would go to show that there is a legally enforceable debt and towards the discharge of the said debt, the cheque was issued, which could be presumed.**(p24)**

Judgment:

JUDGMENT

The unsuccessful complainant, having lost before the trial court, has assailed the said order, passed in S.T.C. No.641/2015 on the file of the Judicial Magistrate No.II, Mettur, dated 22.01.2024, 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 appeal.

2. It is the case of the appellant that the appellant and respondent are known to each other as they were schoolmates and the petitioner joined the 2nd respondent of which the 1st respondent is the Managing Partner. It is further averred by the appellant that he was working in the 2nd respondent as Project Manager & Working Partner during the period 2008 to 2012. The 1st respondent, impressed with the work of the appellant had agreed to give share of the net profit in the ratio of 30 to 70 and 35 to 65 and believing the said words, the appellant completed those projects. However, the profits earned were not shared by the 1st respondent as per the agreement dated 13.12.2008. The appellant was paid only a sum of Rs.4,00,000/- and Rs.6,00,000/- against a total amount of Rs.76,85,000/-. It is

the further averment of the appellant that a sum of Rs.56,50,000/- was due from the respondents after deducting a sum of Rs.10,,35,000/-.

3. It is the further case of the petitioner that inspite of repeated reminders the 1st respondent failed to pay the balance amount and in fact, the 1st respondent caused a legal notice containing false allegations to the appellant on 5.6.2013 and 9.6.2013 calling upon the appellant to pay certain amount to the respondents. The appellant filed a complaint before the police on 6.6.2013 and had also filed Crl. O.P. No.19775/2013 in which this Court dismissed the said petition granting liberty to the appellant to approach the civil court as the dispute is civil in nature.

4. Inspite of repeated reminders, the respondents did not pay the amount due to the appellant. However, after much persuasion, the respondents issued a cheque bearing No.834049 drawn on HDFC Bank, 5 Road, Salem dated 18.12.2023 for a sum of Rs.56,50,000/- with a request to the appellant to present the cheque after some time. Accordingly, acceding to the request of the appellant, the appellant presented the cheque on 30.01.2014, but the same was returned by his banker with the endorsement 'Account Closed'. Since the respondents deliberately failed to pay the amount, the appellant caused a legal notice dated 14.02.2014 and the respondents while acknowledging the receipt of the same, issued reply to the said notice denying their liability. Therefore, left with no other alternative, the complaint was filed by the appellant for an offence u/s 138 of the Act.

5. 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.

6. On the side of the appellant, the appellant examined himself as P.W.1 and examined two other witnesses as P.W.s 2 and 3 and marked Exs.P-1 to P-7. On the side of the respondents, D.W.s 1 to 4 were examined and Exs.D-1 to D-78 were marked. Court exhibit, Ex.C-1 was also marked. The trial court, appreciating the materials available on record, held that the appellant has not established that there was a legally enforceable debt for which the cheque was issued, which was dishonoured and also failed to prove that the cheque was issued by the respondent for discharging a legally enforceable debt and, accordingly, acquitted the respondents, aggrieved by which the present appeal has been filed.

7. Learned senior counsel appearing for the appellant submitted that the cheque was issued by the respondents, which stood dishonoured and the 1st respondent has not disputed his signature in the cheque, which clearly shows that there is a legally enforceable debt, which has not been discharged by the 1st respondent. It is the further submission of the learned senior counsel that the court below had clearly held that the cheque, which was alleged to have been given to the appellant by D.W.1 has not been established by the respondents and had clearly held that it had not been misused by the appellant and that being the case, a duty is cast on the respondents to rebut the presumption u/s 139 of the Act and failure by the respondents would clearly lead to the presumption that the cheque was issued for discharging the legally enforceable debt.

8. It is the further submission of the learned senior counsel that it is incumbent on the part of the respondents to show how the cheque fell into the hands of the appellant and there being no claim that the cheque was lost as no police complaint was given, the only presumption that could be drawn is that the cheque was given by the respondents to the appellant and, therefore, the dishonour would

entail action u/s 138 of the Act.

9. It is the further submission of the learned senior counsel that P.W.s 1 and 2 had clearly spoken about the appellant being a Managing Partner and to that end, they have also spoken about the agreement which has been entered into. However, all those facts have not been properly considered by the court below while passing the impugned order acquitting the respondents and, therefore, interference is warranted with the findings recorded by the court below.

10. Inspite of issue of notice, the respondents have not chosen to appear either in person or through counsel. However, in view of the fact that the appeal is against the acquittal of the respondents and there is double presumption with regard to the innocence of the accused/respondents, this Court, on the basis of materials available on record, is inclined to proceed further to analyse the evidence.

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. 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;

8.4. 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; 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.

14. Ex.P-1 is the cheque, which is alleged to have been issued by the respondents towards the discharge of the liability to the appellant. However, it is the case of the respondents that the cheque, in blank, was given to the appellant by D.W.1 for the purpose of official necessity and it has been misused by the appellant.

15. 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 respondents, 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."

16. The appellant is drawing inspiration from the presumption provided for u/s 139 of the Act to impress upon this Court that it is for the respondents to prove that the cheque, which is the subject matter of the present appeal was 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.

17. 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 cheque was claimed to have been misused by the appellant, however, there are no materials to show that such is the case. However, the court below has not given any proper reason for coming to the said conclusion. The court below has held, based on the evidence of D.W.1 that blank cheque were given to the appellant for carrying out the day to day necessities of the work and the cheque, which is the subject matter of the lis is one such cheque, which was given to the appellant. The above evidence of D.W.1 stares writ large on the appellant.

18. In this backdrop, it is the duty of the appellant to establish that necessarily there was an agreement between the appellant and the respondents to the effect that the appellant was a Managing Partner in the 2nd respondent and that he was entitled to a share in the profits. Though the appellant and his wife were examined as P.W.s 1 and 3 who have spoken about the agreement, alleged to have been entered into, however, there is no material placed by the appellant to show that such an agreement was entered into which would enable the appellant to have a share in the profits of the 2nd respondent.

19. 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 respondents, through the evidence of D.W.1 have established that the cheque had found its way into the hands of the appellant during the course of employment for the purpose of looking into the day to to day expenses and for other overheads connected with the project. The evidence of D.W.1 in this regard has not been countered in any manner by the appellant. Though a finding has been rendered by the court below that the cheque was not misused, however, the said finding, in the wake of the findings with regard to the legally enforceable debt having not been established, cannot be the basis to hold that it was not misused. However, with regard to the said finding, no appeal has been filed by the respondents.

20. However, it is to be pointed out that the dishonour of cheque would attract the provisions of Section 138 of the Act only when it has been issued for the purpose of discharging a legally enforceable debt.

21. In this regard, a perusal of the documents, more particularly Exs.D-1, D-4, D-5, D-6, D-7, D-8,

D-9 and D-10 clearly establish that the appellant was an employee under the respondents and that he was paid with monthly salary. In fact, P.W.1, in his deposition has clearly admitted that he was paid monthly salary. That being the uncontroverted position, and even the admitted position by the appellant, in the absence of the agreement, alleged to have been entered into between the appellant and the respondents, the claim of the appellant that the cheque, which is alleged to have been issued, which has since been dishonoured, was only to discharge the debt in the form of the share of the appellant does not have any legs to stand. When the appellant himself has admitted that he has received monthly salary, the necessary inference that could be drawn from the same is that the appellant was an employee under the respondents.

22. In this backdrop, the evidence of D.W.1 that blank signed cheques were given by the respondents to the appellant for carrying out the day-to-day activities of the organisation cannot be lost sight of. The cheque, which has been dishonoured, has returned with the endorsement "Account Closed". It has not been dishonoured for insufficiency of funds or any other reason. Though it is claimed by the appellant that it was issued by the respondents, the same is controverted by the respondents on the ground that it was given for meeting the day-to-day expenses with regard to the discharge of work.

23. When the appellant has not established that there exists a legally enforceable debt, which has to be paid by the respondents for which the cheque was issued, which has since been dishonoured, the mere dishonour of the cheque alone cannot form the basis to attract Section 138 of the Act, more so, when it is the case of the respondents that the cheque, which was given for the purpose of carrying out the day-to-day activities has been misused cannot be brushed aside.

24. To take shelter under the presumption provided for u/s 139 of the Act, the appellant has to first establish that the cheque was issued for discharging a legally enforceable debt, meaning thereby, that the debt should first stand established, which alone would go to show that there is a legally enforceable debt and towards the discharge of the said debt, the cheque was issued, which could be presumed.

25. However, in the absence of any material to show that an agreement was entered into between the appellant and the respondents for sharing the profits and in the light of the fact that the appellant is employed under the respondents and had been paid monthly salary and that the cheque in issue was given for the purpose of meeting the day-to-day expenses, the appellant cannot enforce Section 138 and the rigours of Section 139 of the Act would not stand attracted to the case on hand.

26. Therefore unless the appellant discharges his burden by giving the details with regard to there being an agreement of profit sharing and that the cheque was given only towards the share of the profits by the respondents, mere placing the cheques which is alleged to have been dishonoured, and is alleged to have been given by the respondents cannot be the basis to hold that a case u/s 138 of the Act is made out. For the reasons aforesaid, the impugned order passed by the court below does not deserve any interference and the same stands affirmed. Accordingly, all the appeal fails and the same is dismissed.

03.06.2024

M.DHANDAPANI, J.

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