

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.11.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Crl.A.No.119 of 2014

S.Sukumar
Proprietor of Son of Subramaniam
M/s Selvakumar Traders,
249, Dharapuram Road,
Tiruppur - 8 ..Appellant / Complainant

Vs.

S.Sukumar ..Respondent / Accused
Son of M.G.Sekar

Prayer: Criminal Appeal filed under Section 378 (4) of Cr.P.C.,
to set aside the order of acquittal dated 21.01.2014 in
C.C.No.10 of 2013 on the file of Special Court for the Exclusive
Trial of Land Grabbing Cases at Thiruppur.

For Appellant : Mr.Sharath Chandran for
Mr.V.Raghavachari

For Respondent : Mr.A.V.Raja

J U D G M E N T

The Appellant / Complainant has filed the instant Criminal
Appeal before this Court as against the Judgment of Acquittal
dated 21.01.2014 in C.C.No.10 of 2013 passed by the Learned Sub
Court for Exclusive trial of Land Grabbing Cases, Thiruppur.

2. The trial court while passing the Impugned Judgment in
C.C.No.10 of 2013 on 21.01.2014 at Paragraph No.30 had observed
that "... it could not be definitely concluded that the
Respondent / Accused had committed an offence under Section 138
of the Negotiable Instrument Act" and resultantly found him not
guilty and acquitted him under Section 255(1) of Cr.P.C.

3. That apart, the trial court at Paragraph No.29 of the
Impugned Judgment had opined that the Respondent / Accused had
raised 'Probable Defence' by repudiating the presumption under
Section 139 of Negotiable Instruments Act, 1881.

4. Challenging the Judgment of Acquittal dated 21.01.2014 in C.C.No.10 of 2013 passed by the Learned Sub Judge, for Exclusive Trial of Land Grabbing Cases, Thiruppur, the Appellant / Complainant has filed the present 'Criminal Appeal' mainly taking a plea that the trial court had erred in coming to the conclusion that the presumption under Section 139 of the Negotiable Instruments Act stood rebutted in the instant case. Furthermore, the trial court had failed to appreciate that the Respondent / Accused admitted his signature in the cheque and in reality had not come up with any 'Probable Defence' warranting his acquittal.

5. According to the Learned Counsel for the Appellant, the trial court overlooked Ex.P.9, Income Tax Return verification Form, (Duly attested by an Auditor / Chartered Accountant) which had resulted in serious miscarriage of justice.

6. The Learned Counsel for the Appellant proceeds to project a legal argument that the trial court ought to have looked into an essential fact that it was for the Respondent / Accused to explain as to how the cheque came into possession of the Appellant / Complainant. In this regard, a clear cut convincing / cogent evidence was required to rebut the presumption under Negotiable Instruments Act and the same is missing in the present case, which fact was not appreciated in a proper and real perspective.

7. Advancing his arguments, the Learned Counsel for the Appellant / Complainant proceeds to take a stand that a Court of Law is is not to take judicial notice of a monetary transaction over Rs.20,000/-.

8. Finally, it is the contention of the Learned Counsel for the Appellant that the onus under Section 139 of the Negotiable Instruments Act, 1881 cannot be shifted by mere guess work and that a mere perusal of Ex.P.9 would clearly point out that the 'Judgment of Acquittal' rendered by the trial court is a perverse, capricious and unreasonable one.

9. The Learned counsel for the Appellant cites the decision of Hon'ble Supreme Court Goa Plast (P) Ltd., V. Chico Ursula D'Souza reported in (2004 (2) SC cases at Page 235 at Special Pages 236 and 237) wherein it is observed and held as under:-

"Both the courts below failed to consider the important aspect as to the stop payment instructions issued by the accused-respondent C.Ordinarily, the stop payment instructions are issued to the bank by the account-holder when there is no sufficient amount in the account. In the present case, the reason for stopping the payment, however, could be manifold. It is essential that to issue stop payment instructions

there must be funds in the accounts in the first place. On this aspect, the courts below have failed to see whether as on the date of signing of the cheque dated 20.07.1992, the date of presentation of the cheque dated 10.01.1993, the date of writing of the letter dated 12.02.1993 and the date on which stop-payment instructions were issued to the bank, the respondent had sufficient funds in the account. Both the courts below have held that after issuing the letter, the respondent has stopped the payment, therefore, no mala fides can be attributed. The learned Judicial Magistrate disallowed the application made by the complainant to the Bank Manager to ascertain whether or not there was sufficient amount in the account for the payment. Had the Bank Manager been examined it would have been clear whether the account had sufficient amount to pay the amount of the cheque or not. It would have also enabled to know on what date stop-payment order was sent by the drawer to the bank. The learned Magistrate committed a serious mistake in not allowing the application and the proceedings passed thereon have suffered from serious infirmity going to the root of the matter.

The respondent was otherwise admitting the liability when the cheques were being issued. This was sufficient evidence to prove that there was a liability and as per the presumption under Section 139 of the Act, the cheques issued, therefore, were towards the liability even as per the version of the respondent.

Neither is the letter dated 12.02.1993 proved nor its contents nor is the document produced in the proceedings of the court. It is pertinent to note that in the said letter, the respondent did not, however, deny the liability as such but merely shifted it on a third person. The veracity of the contents of the letter could only be verified if the contents of the letter were proved. Both the courts below have ignored the admission of the liability by the respondent who stated that the liability did exist but he was not responsible for it. While considering this, the courts below erred in treating the proof adduced by the respondent, namely, the letter denying liability and that some other person is liable for it, as sufficient to rebut the presumption under section 139 of the Act. The courts below have also not considered that the accused had admitted that he was the Managing Director of the appellant Company when the liability arose.

On a consideration of the facts and circumstances of the case and the law on the subject, it is held that

Section 138 of the Negotiable Instruments Act is attracted and a case for punishment under the provisions is made out...."

10. The Learned counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court (K.N.Beena V. Muniyappan and another) reported in (2001) 8 Supreme Court Cases at Page 458 wherein at Special Pages 459 and 460 wherein at Paragraph No.7, it is observed as follows:-

"7. In this case admittedly the 1st respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials / averments in his reply dated 21.05.1993 were sufficient to shift the burden of proof on to the appellant complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

11. The Learned Counsel for the Appellant cites the decision of Hon'ble Supreme Court (Rangappa V. Sri Mohan) reported in (2010) 11- Supreme Court Cases at Page 441 Special page 442 whereby and whereunder it is observed and laid down as follows:-

" Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant - accused cannot be expected to discharge an unduly high standard of proof.

The reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under

Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

12. The Learned Counsel for the Appellant cites the decision of Krishna P.Morajkar V.Joe Ferrao reported in (2013) 5 AIR Bombay R 294 at Paragraph 18 wherein it is observed as under:-

"18. The learned counsel for the respondent submitted that the observations of the Supreme Court in Para 14 of the judgment in Rangappa (supra) show that the Supreme Court had not in any cast any doubt on the correctness of the decision in Krishna Janardhan Bhat (supra), as it was based on specific facts and circumstances therein. Therefore, he submitted that observations in Krishna Janardhan Bhat (supra) about non-compliance of provisions of Section 269SS and the implications of Section 271 D of the Income Tax Act would still stand as good law. The learned counsel for the appellant submitted that even these observations would stand impliedly overruled. He pointed out that what was held in Krishna Janardhan Bhat (supra) was that advance taken by way of loan of more than Rs.20,000/- was only to be made by way of an account payee cheque. He submitted that in Rangappa (supra) the Supreme Court was specifically considering the case of an advance of Rs.45,000/- made in cash and yet the Supreme Court had upheld the conviction recorded. Thus even those observations based on the provisions of Section 269SS and 271 D of the Income tax Act made in Krishna Janardhan Bhat (supra) would stand impliedly overruled. I am entirely in agreement with the learned counsel for the appellant because the Supreme court in Rangappa (supra). The Supreme court had obviously noted the observations in Para 26 in Krishna Janardhan Bhat (supra) that advance of more than Rs.20,000/- was to be made only by way of an account payee cheque, and yet the Supreme Court accepted case of a complainant who claimed to have made an advance of Rs.45,000/- in cash and proceeded to uphold the conviction, even though the case rested on the fact that cash advance of a sum more than Rs.20,000/- was made. Thus, on this aspect also Krishna Janardhan Bhat (supra) stood impliedly overruled by Rangapaa (supra), and the judgment is to be held rendered on the facts of that case, not laying down any law. Therefore, judgments

which follow Krishna Janardhan Bhat (supra) can be safely ignored."

Also, in the aforesaid Judgment at Paragraph No.23 it is observed as under:-

23. In Sanjay Mishra (supra) the Court had also noted in para 14 the observations of the Supreme Court in Dalmia Cement (Bharat) Ltd., v. Galaxy Traders & Agencies Ltd., reported at (2001) 6 SCC 463 and ultimately, refused leave for filing an appeal against acquittal, possibly principally on account of the following facts noted by the Court in Paras 6,7 and 8 of the judgment.

" 6. I have given careful consideration to the submissions. I have perused a copy of the complaint and notes of evidence. In the cross-examination, the applicant has categorically stated thus:-

"... The entire amount was given in cash. The entire amount was my cash amount. The cash amount was kept at my Chembur's residence. At that time, it was unaccounted. I had not disclosed this amount to the Income tax after giving the loan till date. There was no agreement for interest on the amount given..
" (Emphasis added)

The complaint was filed in the year 2005. The evidence of the applicant was recorded on 28th February 2006. The applicant admitted that the amount allegedly paid by him to the 1st respondent by way of loan was a cash amount kept at his residence and at that time it was an unaccounted amount. He categorically admitted that till date (i.e, till 28th February 2006) he has not disclosed the amount to the Income tax. According to the case of the complainant, he had advanced loan on 14th September 2004 which was repayable within 90 days. Thus on the 14th September unaccounted amount which was kept at the residence of the applicant. Moreover, till February 2006, when the evidence was recorded, the said amount was not disclosed in the Income Tax Returns of the applicant. Thus it continued to be an unaccounted amount.

7. It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in cash by way of loan which may be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption

under section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption under Section 139 pf the said Act."

13. In response, the Learned Counsel for the Respondent / Accused contends that before the trial court, on behalf of the Appellant / Complainant witnesses P.W.1 and P.W.2 were examined and Ex.P1 to P.9 were marked. On the side of the Respondent / Accused no one was examined.

14. As a matter of fact, the trial court, had taken into consideration the entire oral and documentary evidence of the witnesses and analysed the exhibits concerned and had came to a resultant conclusion that the Appellant / Complainant had not established in a definite manner that the Respondent / Accused had committed an offence under Section 138 of Negotiable Instruments Act and found him not guilty and acquitted him under Section 255(1) of Cr.P.C., which does not suffer from any legal infirmities and same may not be displaced by this Court at this distance point of time.

15. At the outset, in the present case, this Court points out that the Appellant / Complainant in his complaint (under Sections 138 and 142 of Negotiable Instruments and Section 200 of Cr.P.C.,) at Paragraph Nos. 1 and 2 had averred as under:-

"1. The complainant submits that the complainant and the accused are friends. The complainant is doing Yarn Business in the name and style of M/s Selvakumar Traders. The accused had borrowed an amount of Rs.4,00,000/- from the complainant on 22.08.2011 for his urgent family expenses. On the date of borrowing, the accused had executed a Demand Promissory Note in favour of the complainant for the above said amount of Rs.4,00,000/- and also agreed to return the above said amount with an interest at the rate of 18% p.a., to the complainant or to his nominee.

2. The complainant further submit that when the complainant demanded the above said amount of Rs.4,00,000/- with interest in the month of December, the accused had issued a cheque dated 22.12.2011 in favour of the complainant including interest with the following description:

Cheque No.	Date	Amount	Bank
720060	22.12.2011	Rs.4,24,000	IndusInd Bank Limited Tiruppur Branch

16. Before the trial court, the stand of the Appellant / Complainant was that the Appellant had presented the cheque dated 22.12.2011 for Rs.4,24,000/- for encashment in IDBI Bank Limited at Avinashi Road Branch. But the said cheque got dishonoured stating the reason 'the Account closed' in the account of the drawer on 23.12.2011.

17. Because of the above, the Appellant / Complainant was perforced to issue Lawyer's Notice Ex.P.4 dated 24.12.2011 whereby and whereunder the Respondent / Accused was called upon to repay the said cheque amount within 15 days from the date of receipt of notice. Indeed, the Respondent / Accused received the legal notice on 27.12.2011 and issued a reply notice Ex.P6 on 04.01.2012 containing false allegations. The grievance of the Appellant / Complainant is that the Respondent / Accused had not paid the cheque amount to him and therefore, the present complaint in C.C.No.10 of 2013 was filed before the trial court.

18. For appreciating the factual aspects of the present case in a proper perspective, it is useful for this Court to make a pertinent reference to the evidence of P.W.1 and P.W. 2 coupled with Exs. P.1 to P.9.

19. It is the evidence of P.W.1 that he knew the Respondent / Accused for the last 4 or 5 years and he has acquittance with the Respondent / Accused and that he had gone to the shop but presently he does not know as to where he is residing and that the sum of Rs.4,00,000/- purported to have given to the Respondent / Accused is his own money and that he is paying the Income Tax, having a Pan Card and paying the said taxes for the last 6 or 7 years.

20. P.W.1 adds in his evidence that he does not know as whether he had shown a sum of Rs.4,00,000/- alleged to have been paid by him in his Income Tax returns/ Account and that on 26.07.2007, the Respondent / Accused had received a sum of Rs.20,000/- as loan and gave an unfilled promissory note, but affixing his signature. Moreover, he had admitted in his evidence that he had not produced any document to show that he was in possession of Rs.4,00,000/- and denied the suggestion that he had no money of Rs.4,00,000/- on 22.08.2011 and further that he had not given the same sum to the Respondent / Accused.

21. P.W.1 (In his cross-examination) had tacitly admitted that he could not establish through an oral evidence or documentary evidence other than the pro-note that on that date

he was in possession of Rs.4,00,000/- in his hands. Before the trial court, a petition to recall the Appellant was filed under Section 311 of Cr.P.C., and the same was allowed. As a result thereof, the Appellant / Complainant had marked Ex.P.8, his Income Tax Account Form and Ex.P.9 Series (Six in Number) for payment of Income Tax for the year 2011-2012.

22. Besides this, it is the evidence of P.W.1 that he does not know how much amount he had to receive from Ventura Fashion, Sivakumar V-Nit Fashion, J.Text and others and that he could answer only after looking into Ex.P.9 document. He also further stated in his evidence that from Venus Fashions Firm, a sum of Rs.50,000/- is outstanding amount to be paid to him and from V-Nit Fashion, a sum of Rs.10,000/- was to be paid and in Ex.P.9, document how much amounts were to be received from V-Nit Fashion, Venus Fashion were not mentioned. In fact, P.W.1 had stated in his evidence that he had paid a taxes of Rs.4,150/- for the assessment year 2012-2013.

23. P.W.2 in his evidence had stated that he knew about the factual aspects of the present case and that he wrote Ex.P.1, Promissory note and in the said pro-note of the year 2011, he had affixed his signature on 22.08.2011.

24. P.W.2 in his cross-examination had stated that after the date 22.08.2011 he had seen the pro-note and he knew what was written in the pro-note and he knew the Respondent / Accused for the last 10 years. P.W.2 proceeds to mention in his evidence that he does not know who is Ramesh and the said Ramesh was brought by the Appellant (Sukumar). In this connection, this Court very relevantly point out that P.W.1 (the Appellant / Complainant) in his cross-examination had stated that he had not mentioned the purported amount of loan paid to the Respondent / Accused either in his Lawyers Notice, Ex.P.4 or in his Complaint or in the sworn affidavit etc.,

25. At this stage, this Court aptly points out the evidence of P.W.2, who had stated in his chief examination that he wrote the Ex.P.1, Pronote and affixed his signature in the year 2011 and further that in the pro-note written in favour of the Appellant / Complainant he affixed his signature only and wrote his father's name and not mentioned his name. In reality, a mere running of the eye over Ex.P.1, Pro-note, this Court is of the considered view that in the said document, there is no signature of P.W.2 seen thereto (second witness). Therefore, it is lucidly clear that P.W.2 in his evidence had stated contra to the effect that he had signed in Ex.P.1, pro-note which is opposed to fact and a reality.

26. This Court on perusal of Ex.P.6, Reply Notice dated 04.01.2012 sent by the Respondent / Accused addressed to the

Learned Counsel for the Appellant / Complainant had Paragraph No.3 finds that the Respondent / Accused had taken a categorical plea that he had not issued / handed over a cheque dated 22.12.2011 for Rs.4,24,000/- drawn on IndusInd bank and to say / aver like that was a fraudulent Act. However, the Respondent / Accused at Paragraph No.4 of Ex.P.6 had stated that an unfilled cheque was given for the purpose of security and that the same was fraudulently filled up by the Appellant / Complainant as per his liking and a fraudulent document was created with false details and a false notice Ex.P.4 and Reply Notice Ex.P.6 was issued thereto.

27. By considering the averments as stated supra at Paragraph No.3 of Ex.P.6, Reply Notice dated 04.01.2012 and also by looking into the contents at Paragraph No.4 of the said Notice (Ex.P.6), this Court is of the considered view that the Respondent / Accused had mutually taken a contradictory / diametrically opposite stand in an inconsistent fashion. In this regard, it is to be remembered that the Respondent / Accused in our constitutional scheme of things is entitle to maintain silence. He need not enter into the witness box and it is for the Appellant / Prosecution to prove his case beyond all shadow of doubt, in the considered opinion of this Court.

28. In Law, as per Section 118(a) of the Negotiable Instruments Act, 1881 there is a presumption that until the contrary is established that the pro-note was made for consideration. The early burden is on the Defendant / Respondent / Accused, to establish the non- existence of consideration by bringing to the fore such facts and circumstances which unerringly lead the Court to believe the non-existence of consideration by means of direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or an illegal one. Also that, the 'Onus of Proof' on the part of the accused is to disprove the presumption under Sections 118 and 138 of the Act is not onerous. To put it precisely, the preponderance of probability through a direct or substantial evidence is quite enough to shift the burden on the complainant. The inference of preponderance of probabilities can be drawn from the materials on record but also by reference to the circumstances upon which a litigant relies.

29. Going by ingredients of Section 118(a) of Negotiable Instrument Act, it is quite clear the every Negotiable Instrument is made for consideration. When an execution of pro-note is admitted or duly proved, the presumption arising under Section 118(a) of the Act that the pro-note is fully supported by consideration. However, it cannot be forgotten that the presumptions under Sections 118(a) and 139 of Negotiable

Instruments Act are rebuttable in nature. In this connection, it may not be out of place for this Court to make a relevant mention that Section 4 of the Indian Evidence act, 1872 enjoins that a Court of Law shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The terms 'Proved' and 'Disproved' are defined in Section 3 of the Indian Evidence Act. The simple fact would be that what is required to rebut presumption is an individual is to raise a probable defence and in this regard an accused can certainly place reliance on the evidence adduced on behalf of the Appellant / Complainant and it is not necessary for the Respondent / Accused or the Defendant to disprove the existence of consideration by means of a direct evidence.

30. When once the Appellant in a given case had discharged his burden of proving his case, then, the onus clearly shifts on the shoulders of the Respondent / Accused or by means of a direct evidence to point out that the promissory note was not supported by consideration and if he lets in any acceptable or trustworthy evidence in this regard, the onus again would revert back to the Appellant / Complainant / Plaintiff and this would go on in a cyclic fashion.

31. This Court in connection with the present case recall and recollect the ingredients of Section 114 of the Indian Evidence Act, 1872, which states that 'The Court may presume the existence of any fact which it thinks likely to have been happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'.

32. Whether the statutory presumption is rebutted by the other / rest of the evidence in a given case is purely a question of fact. Under Section 118 of the Negotiable Instrument Act, the rebuttal presumption is not left to the discretion of a Court of Law.

33. Section 138 of the Negotiable Instruments Act not only speaks 'Debt' but also 'other liability'. The presumption in favour of a drawee stands strengthened by means of Section 118 (a) of the Negotiable Instruments Act till the drawer proves contrary that the cheque was not drawn for consideration and till the presumption under Section 118 is not rebutted, it will not be for the drawer to say that Section 138 is not attracted.

34. Insofar as Section 139 of Negotiable Instrument is concerned, when the presumption is rebuttable, it only points out that a litigant on whom lies the duty of proceeding further with the evidence, on the fact presumed and when a party had produced evidence clearly pointing out that the real fact was not as presumed, the object of presumption is over.

35. Whether a presumption is rebuttable or not would depend on the facts and circumstances of a given case. The inference of preponderance of probabilities can be drawn not only from the material brought on record but also from the reference to the circumstances upon which the accused placed reliance. The burden to rebut presumption on the accused is not so high as that of the prosecution. In short, as long as the presumption of Section stands, to plead, prove and establish the original consideration / transaction and to discharge the liability in which a cheque is issued, it is not the onus on the complainant in every case. It is true that the complainant is armed with presumption under Section 139 of the Negotiable Instruments Act. The accused can rebut the presumption by not only on the evidence adduced on his side but he can fall back upon the documents, improbabilities of the prosecution case, the acceptance of suggestions put to the prosecution witness(es) during course cross-examination as also defence evidence, if any, he can place reliance upon.

36. It is to be pointed out that the presumption under Section 139 of the Negotiable Instruments Act would arise when the due execution of the pro-note is established. If the execution of the cheque / pro-note is denied, the burden is upon the complainant to establish the same that the instrument was duly executed by the Defendant / Respondent. But a rebuttal evidence must be adduced before the Court in support of the defence so as to enable the Court either to believe the same to existence or consider his existence to be a reasonable one. The standard of reliability is that of a prudent man if some material is brought on record consistent with the business of the accused which may reasonably be true, even though it is not proved to be true still the accused would be entitled to acquittal.

37. Dealing with the aspect of ingredients of Section 269SS of the Income Tax Act, 1961, it is to be significantly point out by this Court that no individual can accept any loan or deposit to extent of Rs.20,000/- or more otherwise than by an 'Account payee cheque or an Account payee Bank Draft'. As a matter of fact, the said Section does not say in an unambiguous and unequivocal term that an individual cannot lend or advance over and above Rs.20,000/- in cash to the other / another 'HOMO-SAPIEN'. No wonder, an individual who receives an advance in breach of Section 269SS of the Income Tax Act, 1961 is to face the necessary consequences of Law arising thereto. In short, Section 269SS of Income Tax Act cannot be pressed into service for precluding / preventing an individual from recovering the money over and above Rs.20,000/- he had lent or advanced to

another, in the considered opinion of this Court.

38. Besides the above, as far as the present case is concerned, even though the Appellant / Complainant before the trial court came out with a case that Ex.P.1, pro-note for Rs.4,00,000/- was executed by the Respondent / Accused, the same was denied by the Respondent / Accused. In fact in the Ex.P.1, Pro-note, P.W.2 had not affixed his signature and he spoke contrary to fact that he had signed in the said pro-note. Although under Section 269SS of the Income Tax Act, 1961, if any payment is made over and above Rs.20,000/- the said transaction is to be made only through cheque and if there is any violation, as per the Income Tax Act, 271(D) of the Act, it is for the Income Tax Department to initiate prosecution for breach of the same by a concerned party. Mere breach of not adhering to the ingredients of Section 269SS of the Income Tax Act, 1961 would not throw the case of the Appellant / Complainant overboard.

39. The trial court is to bear in mind the ingredients of Sections 118, 138 and 139 of the Negotiable Instruments Act, 1881 in a proper and real perspective. Also, under Section 106 of the Indian Evidence Act, the burden of proving a fact especially within the knowledge is on the concerned person and this Section applies to the parties to a suit or proceedings. Undoubtedly, the principle enunciated under Section 106 of the Indian Evidence Act is an exception to the rule governing 'burden of proof' which applies only to such matters which were suppose to be within the knowledge of the party concerned. Also, that once the Court is satisfied with the direct or circumstantial evidence which is acceptable against an accused and if accused takes up a plea based on facts, which are within his knowledge, it is for him to establish the same under Section 106 of the Indian Evidence Act, 1872.

40. In the upshot of detailed discussions, as far as the present case is concerned, this Court is of the considered view that the trial court had clearly observed in a Judgment at Paragraph no.23 that on the date of alleged loan of Rs.4,00,000/- given to the Respondent / Accused, the aspect of requisite 'Wherewithal' / 'Means' to lend, to show the same, it was not proved beyond reasonable doubt. It appears that the trial court had given much importance to the aspect of resourcefulness of the Appellant / Complainant to lend such a hefty sum of Rs.4,00,000/- to the Respondent / Accused through Ex.P.1 dated 22.08.2011. In fact, P.W.1 (Appellant / Complainant) uttered that he was not aware that through his account a sum of Rs.4,00,000/- was to be remitted and only through Demand Draft the said amount was to be paid to the Respondent / Accused. Really speaking, even though on behalf of the Appellant / Complainant, Ex.P.9, Income Tax return form was filed, the auditor of the Appellant / Complainant was not

examined as a witness to prove the entries / details made therein. Although the Appellant / complainant had mentioned the sum of Rs.4,00,000/- in his Income Tax Account before the trial court, he had clearly stated in his evidence that he does not know about the same, only at later point of time, by means of rallying round he took a nosedive and deposed by means of a Recall Petition (Under Section 311 of Cr.P.C) being allowed that he was not able to mark Ex.P.9.

41. In fact, P.W.1 in his evidence also had stated that he does not remember on what date, at which place and at what hours the sum of Rs.4,00,000/- was asked as loan by the Respondent / Accused, but after keeping quiet / remaining silent, he answered in the witness box, ten days before the Respondent / Accused had asked for the said loan with him. Undoubtedly, there appears to be a variation or discrepancy or contradiction between the deposition of P.W.1 and P.W.2. More importantly this Court is of the earnest view that the trial court had given much importance to the immaterial and irrelevant matters, as a result of which, it had passed the 'Judgment of Acquittal', in the present case. Viewed in that perspective, this Court interferes with the Judgment of Acquittal rendered by the trial court in C.C.No.10 of 2013 and sets aside the same in furtherance of substantial cause of justice. Consequently, the Criminal Appeal succeeds.

42. In the result the Criminal Appeal is allowed. Resultantly, the 'Judgment of Acquittal' dated 21.01.2014 in C.C.No.10 of 2013 passed by the trial court is set aside by this Court for the reasons assigned in this Criminal Appeal.

43. However, this Court remits back the main case in C.C.No.10 of 2013 to the file of the trial court for re-hearing and in this regard it is open to the Appellant / Complainant's side and on the side of the Respondent / Accused to let in further oral and documentary evidence, as the case may be, if they chooses / desire or so advised. The trial court while hearing the main case in C.C.No.10 of 2013 afresh is to provide enough opportunity to the respective parties to adduce further oral or documentary evidence, to mark exhibits by adhering principles of natural justice in true letter and spirit. It is abundantly made clear that the trial court is to take up the main case in C.C.No.10 of 2013 for hearing afresh hearing with a clear cut, open and unbiased mind. Since the main case is of the year 2013 and Ex.P.1, transaction is of the year 2011 (dated 22.08.2011) considering the fact that nearly five years have elapsed, (also the case is of five years old category) trial court is directed to give top priority to the said case by posting in 'Special List System' and to dispose of the same in the manner known to Law and in accordance with Law, in any event within a period of four months from the date of receipt of copy

of this order and to report compliance to this Court without fail. Liberty is granted to the respective parties to raise all factual and legal pleas without any impediment.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

ssd

To

1.The Special Court for the Exclusive trial of
Land Grabbing Cases at Thiruppur.

2. The Registrar Judicial,
High Court, Madras
(for favour of information and
necessary follow up action)

3. The Public Prosecutor,
High Court, Madras

+2 ccs to M/s.V.Raghavachari Advocate sr 66853
66629

+1 cc to Mr.A.V.Raja Advocate sr 66921

सत्यमेव जयते

Cr1.A.No.119 of 2014

rk(co)
aa15/12/2016

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