

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.10.2016

Coram:

THE HON'BLE MR.JUSTICE M.VENUGOPAL

Crl.A.No.383 of 2014

K.Ragu ..Appellant / Complainant

Vs.

V.Bhuvaneshwaran ..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., to set aside the order of acquittal passed in STC No.56 of 2011 on the file of the learned Judicial Magistrate No.4, Salem

For Appellant : Mr.S.Senthil Kumar

For Respondent : Mr.E.C.Ramesh

J U D G M E N T

The Appellant / Complainant has filed the present Criminal Appeal before this Court as against the Judgment dated 09.1.2014 in STC No.56 of 2011 passed by the Learned Judicial Magistrate No.IV, Salem in acquitting the Respondent / Accused.

2. The Learned Judicial Magistrate No.IV, Salem, while passing the Impugned Judgment on 09.01.2014 in STC No.56 of 2011 at Paragraph No.12 had clearly observed that the Complainant (Appellant) had failed to establish that the signature found in Ex.P.1 - Cheque was that of the Respondent / Accused and ultimately held that the signature found in Ex.P.1, Cheque does not belong to that of the Respondent / Accused and further had observed that the case cheque was not issued towards debt and consequently found the Respondent / Accused not guilty and convicted him under Section 255(4) of Cr.P.C.

3. Being dissatisfied with the Judgment of acquittal dated 09.01.2014 in STC No.56 of 2011 passed by the trial court, the Appellant / Complainant has preferred the instant Criminal Appeal basically contending that the trial court had committed error in acquitting the Respondent / Accused based on 'Misconception of Facts' and 'Misconstruction of Law'.

4. The Learned Counsel for the Appellant / Complainant projects an argument that the trial court should have considered that as per Section 138 of the Negotiable Instruments Act, 1881, once the Bank had returned the cheque 'For Insufficiency Funds' then that itself is a prime factor to and in favour of the Appellant / Complainant and very much against the Respondent / Accused. Unfortunately this aspect was not properly appreciated by the trial court in a real and clear perspective and this had resulted in serious miscarriage of justice.

5. The Learned Counsel for the Appellant takes a stand that the Respondent / Accused had failed to rebut the presumption under Section 139 of the Negotiable Instruments Act and as such, the Judgment of acquittal delivered by the trial court is liable to be interfered with by this Court in the interest of justice.

6. Expatiating his contention, the Learned Counsel for the Appellant projects an argument that the statutory presumption under Section 139 of the Negotiable Instruments Act is in favour of the Appellant / Complainant and in Law it is for the Respondent / Accused to disprove the same and put forth material facts through oral and documentary evidence to rebut the presumption in question.

7. According to the Appellant, the Respondent / Accused in the present case had simply denied his signature in Ex.P.1, Cheque and in fact no steps were taken on the side of the Respondent / Accused to send the cheque for the expert opinion to substantiate his defence.

8. The Learned Counsel for the Appellant strenuously takes a plea that when the Bank had returned the Ex.P.1, Cheque on the basis of 'Insufficient funds' without considering the opinion of the Bank, the lower court had erroneously come to the conclusion that there was variation in signature on the cheque by comparing with other documents. In short, the emphatic stand of the Appellant / Complainant is that the approach of the trial court in comparing the signature of the accused with that of other documents is clearly unsustainable in the Eye of Law.

9. Per contra, it is the submission of the Learned Counsel for the Respondent / Accused that the trial court had compared the signature found in Ex.P.1, Cheque dated 17.06.2010 with that of the Respondent / Accused side Ex.D5 Series, Credit Bills in which there is a variation between the signature of the Accused in Ex.P.1, Cheque dated 17.06.2010 and that of the signature of the Respondent / Accused found in Credit Bills and only after taking into account, the evidence of P.W.1 (Appellant / Complainant) and the Respondent / Accused namely, D.W.1 and on consideration of the entire documents marked on the side of the Appellant / Complainant viz., Ex.P.1 to Ex.P.5 and Ex. D.1 to D.5 and on consideration of oral testimony of P.W.1 and D.W.1, the trial court came to a consequent conclusion that the Appellant / Complainant had not established that in Ex.P.1 Cheque, the signature found was not that of the Respondent / Accused and consequently acquitted him which need not to be displaced at this distance point of time.

10. It is to be relevantly pointed out by this Court that the 'Burden of Proof' is on the accused to disprove the presumption under Section 118 and 113 of Negotiable Instruments Act, 1881 is not heavy. As a matter of fact, the preponderance of probabilities through direct or substantial evidence is enough to shift the onus to the complainant. Moreover, an inference of preponderance of probabilities can be drawn from the materials on record but, also by reference to the circumstances upon which a party relies, as opined by this Court.

11. In fact the 'Presumption' raised under Section 118 of the Negotiable Instruments Act is a presumption of Law. The presumption under Section 118 of Negotiable Instruments Act does not extend to anything beyond consideration and further it does not raise any presumption that the amount was advanced and that it was for 'Legal Necessity'. Section 138 of Negotiable Instruments Act brings into the operation of rule of strict liability. In reality, Section 138 of Negotiable Instruments Act speaks of penal provision based on 'Legal Fiction'.

12. The purpose of interaction of Section 138 to 142 of Negotiable Instruments Act is to impart / inculcate faith in the efficacy of 'Banking Operations' and credibility in transacting business on Negotiable Instruments. Notwithstanding the civil remedy under Section 138 of the Act is meant for preventing dishonesty 'Drawers Part' of a Negotiable Instrument to draw a cheque without sufficient funds in his account maintained by him in a Bank 'which includes Payee' or 'Holder in Due Course' to act upon it.

13. Be that as it may, at this juncture, this Court on perusal of the contents of the complaint dated 12.01.2011 filed by the Appellant / Complainant unerringly points out that the Appellant / Complainant at Paragraph No.2 had clearly averred that on 10.06.2010 the accused (the Respondent) borrowed a sum of Rs.79,500/- (Rupees Seventy Nine Thousand and Five Hundred only) from him and that the Accused issued postdated cheque dated 17.06.2010 for Rs.79,500/- (Rupees Seventy Nine Thousand and Five Hundred only) drawn on Union Bank of India, Hasthampatty Branch, Salem bearing No.006492 in favour of the Complainant towards discharge of the said amount borrowed by the Accused from the Complainant.

14. It is not in dispute that the Ex.P.1, Cheque dated 17.06.2010 was presented by the Appellant / Complainant on 02.12.2010 for collection through his Bank, Salem District Central Co-operative Bank Limited, Gorimedu Branch, Salem for encashment and on 02.12.2010 itself the said cheque was returned as due to 'Insufficiency of Funds' in the account of the accused to honour the cheque with a memo dated 02.12.2010 for the reasons of and with an endorsement of 'Funds Insufficient'

15. D.W.1 (the Respondent / Accused) in his evidence before the trial court had deposed that at Manakad, he runs a business in the name of Bhuvanesh Oil Stores and he runs the Complainant (Appellant) for the past 7 or 8 years in connection with the oil purchased by him from his shop and on 03.12.2010 when he saw his Bank account through 'Net Banking' then he came to know the cheque got returned and immediately when he went to the Union Bank and made an enquiry in respect of his 'Account', he was informed that the said cheque came through Central Co-operative Bank, Gorimedu Branch for Raghu for the purpose of collection and subsequently when he went to the said Co-operative Bank and asked upon as to who was Raghu, they refused to furnish information to him and only after seeking the notice issued by the Appellant / Complainant he came to know that the cheque was sent by one Raghu and when he later enquired he came to know that one Vasan had given the said cheque to the Appellant (Ragu) and the said Vasan had worked in his shop from the year 2000 (For the past 10 years) and presently he is not working with him.

16. Furthermore, D.W.1 proceeds to utter in his evidence that the Date, writing and signature found in the case cheque were not made by him and every week he used to send oil to the Appellant / Complainant and in this regard, the Appellant / Complainant is to pay a sum of Rs.67,000/- (Rupees Sixty Seven Thousand only) as loan and for the said sum of Rs.67,000/- (Rupees Sixty Seven Thousand only) there is a Bill Account and on 10.06.2010 he had not obtained loan of Rs.79,500/- (Rupees Seventy Nine Thousand Five Hundred only) from the Appellant / Complainant.

17. The clear cut case of the Respondent / Accused is that the signature found in the suit cheque (Ex.P.1) does not belong to him and the said cheque was a stolen one and he had also stated in his evidence that the Ex.D.5, Bills were created by him subsequently.

18. It is the evidence of P.W.1 (Appellant / Complainant) that he is running a provision store and he used to purchase oil to his shop needs from the Respondent / Accused and that the Respondent / Accused would not buy any provision articles from his shop.

19. P.W.1 adds in his evidence that on 10.06.2010 when the Respondent / Accused had asked for the loan, he gave the money / amount which was in possession on the same day and when he gave money to the Respondent / Accused he had not seen his wife and children. But after giving money to the Respondent / Accused he had mentioned his family about the money he gave to the Respondent / Accused.

20. At this stage, the Learned Counsel for the Appellant / complainant refers to the evidence of P.W.1 (Appellant / Complainant) and submits that P.W.1 in this evidence had clearly admitted that Ex.P.1, Cheque was given by the Respondent / Accused and further he had denied in his evidence that he had to pay a sum of Rs.67,000/- to the Respondent / Accused in connection with the oil purchase made by him. Also he had denied the suggestion the suit cheque was stolen by one Vasan (a person working in the Respondent / Accused shop) and the same was given to him and the said cheque was presented for collection and only on that basis he had filed the present case.

21. The categorical stand of the Appellant in the sworn affidavit (in chief examination as P.W.1 before the trial court) is that the Respondent/ Accused had given in the filled up cheque in his favour and by mentioning the date 17.06.2010 and further he had averred in his sworn affidavit (in chief examination) that for the urgent need of his money, at that time, the Respondent / Accused had not repaid the amount mentioned in the Ex.P.1, Cheque and as a result of which he suffered a heavy loss, for which he was to be given a compensation.

22. In this connection this Court refers to the ingredients of Section 45 of the Indian Evidence Act, 1872 under the caption 'Opinions of Experts' which runs as follows:-

"When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identify of handwriting (or finger impressions), the opinions upon that point of persons specially skilled in such foreign law, science or art, (or in questions as to identify of handwriting) (or finger impressions) are relevant facts.

Such persons are called experts.

23. Further Section 73 of the Indian Evidence Act, 1872 enjoins 'Comparison of Signature Writing or Seal with others admitted or proved'. By virtue of Section 73 of the Indian Evidence Act, it is to be pointed out that a Court of Law must be slow to compare a disputed document with an admitted document for comparison (notwithstanding the fact that Section 73 of the Act empowers the Court to compare the disputed writings with the specimen / admitted documents shown to be genuine). Despite this, there is no legal impediment for a Court of Law / Judge to use his Eyes. The Court / Judge ordinarily ought to be hazy to base his findings in regard to 'Identification' of Handwirting solely on comparison made by itself.

24. That apart, there is no second opinion on an important fact that Section 45 of the Indian Evidence Act enjoins that the opinion of an Expert is a 'Relevant Fact' and quite admissible in evidence. Indeed, the Court may take an 'Expert's' opinion into consideration. However, the appreciate of evidence of an 'Expert' is the limit that can be fixed for filing a Petition under Section 45 of the Indian Evidence Act for sending the disputed signature or writings to the handwriting expert for comparison and opinion by and large the same shall left open to the judicial discretion of the court. Under Section 73 of the Indian Evidence Act to undertake comparison and signature etc., litigant is not precluded from filing a petition for

transmitting the documents to an Handwriting Expert. Even such a petition could be filed at an Argument stage, ie., not only soon after filing of the counter / written statement, as the case may be.

25. Coming to the ingredients of Section 73 of the Indian Evidence Act, 1872, this Section enjoins the Court concerned to compare the Handwriting with the sole purpose of finding out whether the signature, which is disputed is 'Genuine' or not. The Judge as a matter of prudence and caution should hesitate to arrive at his finding solely on the comparison made by him. However, it is open to the court concerned to obtain an opinion or assistance of an expert. Where a party disputing the signature on the document fail to apply for examination of the disputed signature by an Expert, then no fault could be found with the court concerned when it compares the disputed signature with that of the admitted signatures of the person concerned available on record itself. Even the 'Opinion of an Expert' is liable to error like that of any other witness but it cannot be brushed aside as an OTIOSE one, as opined by this Court.

26. Insofar as the present case is concerned before the trial court on behalf of the Appellant / Complainant no genuine endeavour was made to project a petition under the relevant provisions of the Indian Evidence Act, 1872 for comparing the signature by an expert with admitted signatures. When a specific stand was taken by the Respondent / Accused before the trial court in S.T.C.No.56 of 2011 to the effect that the signature found in Ex.P.1 dated 17.06.2010 does not belong to him and then it is the primordial duty of the Appellant / Complainant to have taken necessary steps for comparison of the signature of the Respondent / Accused found in Ex.P.1, Cheque with that of his admitted signature. Unfortunately, at the risk of repetition, this Court points out that the Appellant / Complainant had not taken any positive steps and the said omission appears to be a fatal one in his favour.

27. Inasmuch as the Appellant / Complainant had failed to take necessary steps for comparing a signature in Ex.P.1 with that of admitted signatures, the trial court was left with no other option but to compare the same to the credit bills found in Ex.D5 series wherein the Respondent / Accused signatures were found and it came to the conclusion that the signature seen in Ex.P.1, Cheque was at variance with that of the credit bills found in Ex.D.5. Also that, it is the plea of the Respondent / Accused that the Appellant / Complainant had not requisite wherewithal to lend a sum of Rs.79,500/- as alleged and in this regard also the Appellant / Complainant had failed to prove his point that he had requisite means / wherewithal to lend such a

sum of Rs.79,500/- to the Respondent / Accused.

28. In fact, the Respondent / accused had taken an early stand in the main case in S.T.C.No.56 of 2011 before the trial court that it was only the Appellant should pay a sum of Rs.67,000/- (Rupees Sixty Seven Thousand only) by means of commercial transaction towards outstanding amount and for the said sum of Rs.67,000/-, on behalf of the Respondent / Accused Ex.D5, Credit Bills (24 in nos.) were marked.

29. Also, the Respondent / Accused had pleaded before the trial court that the suit case, Cheque, Ex.P.1, was stolen by one Vasan, who worked in his shop and in view of the fact that the Appellant / Complainant had not established his case with signature in Ex.P.1, belongs to Respondent / Accused then, this Court is of the earnest view / opinion that it is unnecessary for this Court to deal with aspect or go into the aspect that the cheque in question was stolen by said Vasan and handed over to the Appellant / Complainant.

30. In the upshot of detailed and qualitative discussions as stated supra before this Court and taking note of the entire gamut of the facts and circumstances of the present case and also on consideration of evidence of P.W.1, Ex.P.1 to P.5, D.W.1 and Ex.D1 to D5 comes to an consequent conclusion that the Appellant / Complainant had not proved his case to the effect that the signature found in Ex.P.1, Cheque was not that of the Respondent / Accused. Viewed in that perspective, the Judgment of the acquittal delivered by the trial court in STC No.56 of 2011 dated 09.01.2014 is free from any material irregularities or patent illegalities in the Eye of Law. Resultantly, the Criminal Appeal fails.

In fine, the Criminal Appeal is dismissed. The Judgment dated 09.01.2014 passed by the Learned Judicial Magistrate No.IV, Salem is confirmed by this Court for the reasons assigned in this Appeal.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ssd

To

1. The learned Judicial Magistrate No.4,
Salem

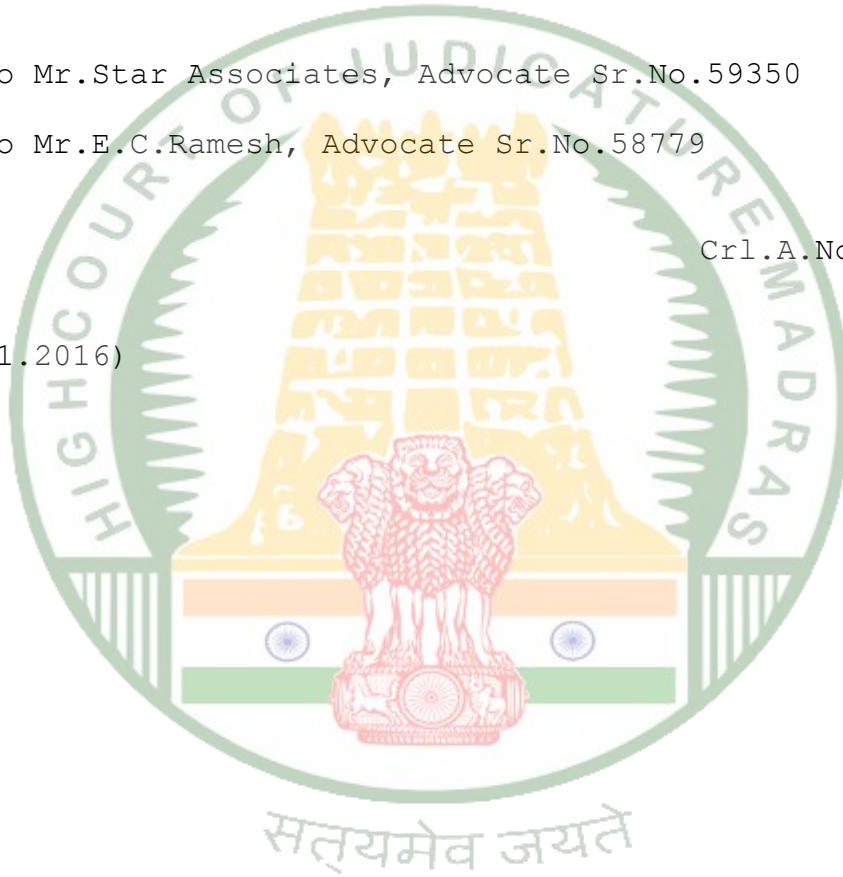
2. The Public Prosecutor,
High Court, Madras

+1 CC to Mr.Star Associates, Advocate Sr.No.59350

+1 CC to Mr.E.C.Ramesh, Advocate Sr.No.58779

Crl.A.No.383 of 2014

SKV(CO)
KP(12.11.2016)



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