

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **18.10.2016**

(Judgment Reserved on 27.09.2016)

CORAM:

THE HONOURABLE MR.JUSTICE **M.VENUGOPAL**

Crl.A.No.19 of 2010

R.Sekaran

..Appellant/Complainant

Vs.

N.Krishnamoorthy

..Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., against the judgment of acquittal of the Respondent/Accused passed by the Learned Judicial Magistrate, Kothagiri, The Nilgiris District in C.C.No.15 of 2003 dated 20.11.2009.

For Appellant : Mr.Ma.P.Thangavel

For Respondent : Mr.L.Mouli

J U D G M E N T

The Appellant/Complainant has focused the present Criminal Appeal before this Court as against the Judgment passed by the Learned Judicial Magistrate, Kothagiri, The Nilgiris District in C.C.No.15 of 2003 dated 20.11.2009.

2.Heard the Learned counsel for the Appellant/Complainant and the Learned counsel for the Respondent/Accused.

3.The Learned counsel for the Appellant/Complainant submits that the judgment of acquittal in C.C.No.15 of 2003 dated 20.11.2009 passed by the trial Court is manifestly erroneous, illegal, incompetent and against the well settled principles of Law.

4.The Learned counsel for the Appellant urges before this Court that the trial Court had failed to apply its mind to the aspect that the Respondent/Accused had admitted the signature in the cheque in issue.

5.The Learned counsel for the Appellant proceeds to take a plea that the trial Court had failed to take into account of a very vital fact that the presumption was not rebutted and the contrary was not established, then it ought to have convicted the Respondent/Accused under Section 138 of the Negotiable Instruments Act, 1881.

6.It is represented on behalf of the Appellant that the trial Court before coming to the conclusion of acquitting the Respondent/Accused should have examined one Bellan and without examining him, arrived at a conclusion, which is impermissible in law.

7.The Learned counsel for the Appellant vehemently takes a plea that the Appellant is the owner of 2 ½ acres of land and earning money by selling flour and vegetables. Also, the Appellant's uncle had given Rs.40,000/- to him which was not disputed.

8.Added further, the Learned counsel for the Appellant contends that the Appellant before the trial Court, had proved his source of income beyond reasonable doubt and seeking further evidence in this regard is an unwarranted one.

9.The learned counsel for the Appellant/Complainant projects an argument that when the execution of the instrument was admitted, then, the entire onus is on the side of the Respondent/Accused to prove that he had not committed any

offence as per the Act and if he failed to do so, he should be convicted.

10.Lastly, it is the submission of the Learned counsel for the Appellant that the trial Court grossly erred in holding that pending of civil suit between some persons and the accused had raised a doubt as to the genuineness of the transaction. In this regard, the Learned counsel for the Appellant contends that pending of a Civil Suit is not a ground for acquitting the Accused.

11.The Learned counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in **P.Venugopal V. Madan P.Sarathi** reported in **2009 AIR SC at page 568**, wherein, it is observed and held as follows:

"The presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant. In a case of this nature, however, it is essentially a question of fact."

12.The Learned counsel for the Appellant cites the decision of the High Court of Andhra Pradesh in ***Adapa Bhogi Raju V. S.G.Radayya and another*** reported in ***1994 CRI. L.J. at page 411 and at special page 413***, wherein, at para 5 it is among other things observed as follows:

"... Thus, on a plain reading of Section 138 of the Act, it is clear that 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 under this Section. So, the essential ingredients of S.138 are that there must be a debt or other liability legally enforceable, that a cheque must be given by the debtor in favour of the creditor in discharge of the said debt or liability, in whole or in part and

that, that cheque should be returned by the bank for insufficiency of funds to the credit of the debtor to honour the cheque. In this case, the above ingredients are brought out by the evidence of the complainant, supported by the documents Exs.P1 to P8. It is proved beyond doubt that the cheques were issued by the accused under the capacity of the proprietor of the firm. It is also brought out that in the business transactions the accused became due to the complainant and after settlement of the accounts, the four cheques were issued by the accused in favour of the complainant. The finding of the lower court to the contrary is not based on any cogent reasoning. The material on record clearly brings home the essential elements of S.138 of the Negotiable Instruments Act and consequently, he is liable to be convicted for the said offence."

13. In response, it is the contention of the Learned counsel for the Respondent/Accused that the trial Court while passing the impugned judgment of 'Acquittal' in C.C.No.15 of 2003 had specifically observed that the Respondent/Accused (as D.W.1) has mentioned in his evidence that he had issued the cheque to Bellan

and further, that the Appellant/Complainant was not able to mention the details as to how the money lent to the Respondent/Accused had come to him. Moreover, it is also represented on behalf of the Respondent/Accused that the trial Court had come to the resultant conclusion that the Appellant/Complainant was not having adequate income to lend the money to the Respondent/Accused. Furthermore, the trial Court had also opined that when the Appellant/Complainant (P.W.1) in his evidence had deposed that at the age of 24 years, he had taken over the responsibility of the family from his father and also that he had performed the marriage of his two sisters and that when he was looking after the full responsibility of the family at the age of 23 years i.e., on 06.11.2002 when the cheque was obtained by him from the Respondent/Accused, the version that he had lent a sum of Rs.3 lakhs and the details concerned therewith, were not acceptable.

14.In short, the stand of the Respondent/Accused is that the trial Court had appreciated the oral evidence of P.W.1, D.W.1 and taken into consideration of the exhibits viz., Ex.P1 to Ex.P6 and Ex.R1 and finally, passed the judgment of acquittal in the main

case, which may not be displaced by this Court at this point of time.

15.Before the trial Court, it is the evidence of P.W.1 (Appellant/Complainant) that when he knows Bellan of Attavalai Village and there was no connection between himself and the said Bellan and that presently at Kothagiri in S.V.T. Mini bus, he is working as a conductor for the past three months on a daily wages of Rs.150/- and before coming to the job of Conductor, he looked after the garden work belonging to his father and he has a garden of 2 ½ acres and that he does not know the survey number and 2 ½ acres garden is in 8 plots and he had taken on lease, some of them.

16.It is the further evidence of P.W.1 that he had taken 30 cents of garden for lease and another 20 cents of garden for Rs.50,000/- and also, he had taken on lease, 30 cents from one Joshi S/o.Madhakaur and another 20 cents from Attavalai Kariya Gounder's son Krishnan and the garden taken on lease are in his enjoyment and that he was not threatened by his parents to let in evidence for one Bellan (doing money lending business) and for the said Bellan, he is a benami and that the Respondent/Accused father

does not know that he paid a sum of Rs.3 lakhs to the Respondent/Accused.

17.P.W.1 in his evidence had stated that in October 2002, he gave money to the Respondent/Accused but he does not know the date and for what reason, the Respondent/Accused had received money from him and that his father when he had handed over the garden to him, had given him a sum of Rs.50,000/- and that the said sum given by his father was spent by him for his family.

18.D.W.1 (Respondent/Accused) in his evidence had deposed that it was not true to state that he had received a sum of Rs.3 lakhs from the Appellant/Complainant and gave a cheque and further that, after entering appearance in the case, he gathered particulars about the Appellant/Complainant and came to know that in Attavalai Village, he was doing coolie work with Bellan. Moreover, D.W.1 had stated in his evidence that already he knew the Bellan and from that Bellan, he received a sum of Rs.70,000/- when his mother was not keeping good health and firstly, the said Bellan gave Rs.20,000/- and later, he gave Rs.10,000/- and informed him that inclusive of interest, the amount came to

Rs.64,000/- and later, the said Bellan gave another Rs.36,000/- to him and informed him that in the account, he would keep it as Rs.1 lakh and that he had paid a sum of Rs.1,88,000/- (Rupees One Lakh and Eighty eight Thousand Only) inclusive of interest and settled the accounts.

19.Continuing further, D.W.1 in his evidence had deposed that the said Bellan had threatened him and obtained a document in his favour from him in respect of the property belonging to his father measuring one acre and 37 cents and the Respondent/Accused had executed the document (given the said land to the Bellan without the knowledge of his father).

20.That apart, it is the evidence of D.W.1 that when he was in a drunken state and in an imbalanced state, he executed the document in favour of the said Bellan and that his father had filed a case in O.S.No.70 of 2004 on the file of the District Munsif Court, Kothagiri (in regard to the sale deed executed by him) and except the signature found in Ex.P1, the other details were not written by him and the present case was filed by the said Bellan through Sekaran and that he is not bound to pay a sum of Rs.3 lakhs

mentioned in the cheque either to the Appellant/Complainant or to the said Bellan.

21.D.W.1 in his evidence (cross examination on 25.07.2008) had stated that it was not correct to state that he had issued the cheque to the Appellant/Complainant for the loan taken by him and that Bellan of Attavalai Village had threatened him and obtained the cheque and the Appellant/Complainant does not know the income and expenditure accounts between himself and the said Bellan. Furthermore, D.W.1 had deposed in his evidence, Ex.P1 cheque belonging to him and also that the signature found therein was his signature and that it was not correct to state that during the pendency of the case, he had given cheque to Bellan.

22.At this juncture, this Court pertinently points out that Section 118 of the Negotiable Instruments Act, 1881 is mandatory in character, although it deals with presumption. The presumption under Section 118 of the Negotiable Instruments Act is not an irrebuttable one and that a debtor can press into service the facts and circumstances disclosed by the Complainant/Plaintiff's side. Also that, it shall not be a defence in a prosecution for an offence

under Section 138 of the Negotiable Instruments Act, the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons mentioned in the Section. It is to be remembered that Section 139 of the Negotiable Instruments Act provides for initial presumption in favour of the Complainant, unless the contrary is established. Furthermore, it shall be presumed unless the contrary is proved that the 'Holder of the Cheque' received the cheque of the nature referred to in Section 138 of the Negotiable Instruments Act for discharge in whole or in part, of any debt or other liability. To attract liability under Section 138 of the Negotiable Instruments Act existing 'Debt' or 'Liability' is to be proved.

23.As per Section 118(b) of the Negotiable Instruments Act, the cheque must be presumed to have been drawn on the date it bears. In the event of holding that the post dated cheque for the purpose of clause (c) of proviso to Section 138 of the Act has to be treated as to have been drawn on the date it is delivered to the Payee, and not to be treated as drawn on the date it bears, the very object of proviso for which Section 138 was created would be defeated. If the execution of cheque was denied by the Defendant

and as the evidence on the side of the Complainant/Plaintiff was found unsatisfactory, then, 'a Court of Law' cannot draw a presumption under Section 118 of the Act. In fact, by means of circumstantial evidence or by presumption of fact drawn under Section 114 of the Indian Evidence Act, 1872, the presumption under Section 118 (a) of the Negotiable Instruments Act can be rebutted.

24.It cannot be gainsaid that the legislature had limited the availability of presumption under Section 139 of the Negotiable Instruments Act to the 'Holder only' and not to the 'Payee'. A presumption under Section 118 (a) of the Negotiable Instruments Act is against the maker or drawer or endorser and not a presumption specifically in favour of the Payee, Holder or Holder in due course. Indeed, a presumption can be rebutted by presenting clear cut/definite evidence that no consideration was passed or by relying upon the facts and circumstances of a case as well as the flaws in the evidence of Complainant/Plaintiff's side.

25.By now, it is well settled that a statutory presumption has an 'Evidentiary Value'. A 'standard of proof' so as to prove a

defence on the part of the accused is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties. But also by reference to circumstances upon which he relies.

26. Insofar as the instant case is concerned that the categorical stand of the Appellant/Complainant is that the Respondent/Accused had issued him a cheque bearing No.002962 dated 06.11.2002 for Rs.3 lakhs drawn at Central Bank of India on the account maintained by him in the said bank in discharge of his liability to him. Further, the aforesaid cheque was issued by the Respondent/Accused on the specific representation that he has sufficient funds in his account in the aforesaid bank to cover the cheque amount and the same will be honoured by his bank for encashment and that he accepted the cheque on the basis of the aforesaid representation. But when the Appellant/Complainant presented the cheque for encashment at the aforesaid bank on 06.11.2002, the same was dishonoured by the Bank based on the reason 'funds insufficient'.

27.It is the evidence of P.W.1 (Appellant/Complainant) that when the Respondent/Accused came for receiving the money, he brought the filled up cheque along with him and that the Respondent/Accused in October 2002 had received the money from him. At this juncture, on perusal of Ex.P1 cheque, indicates that the date was mentioned as 06.11.2002 and in fact, the Respondent/Accused had signed in the cheque but the other words of recitals like R.Sekaran, Rupees Three Lakhs Only were all found to be in different ink.

28.In reality, the Appellant/Complainant in his complaint in C.C.No.15 of 2003 had not stated that the cheque dated 06.11.2002 by the Respondent/Accused was a post dated one. It passes beyond one's comprehension as to how the Respondent/Accused could have issued Ex.P1 cheque dated 06.11.2002 when he came to the Appellant/Complainant in October 2002 to receive the amount and the said amount was also received. When the Respondent/Accused as D.W.1 in his evidence had clearly mentioned that except his signature in Ex.P1 cheque, the other details in the cheque were not written by him, then it is not made

clear on the part of the Appellant/Complainant before the trial Court as to who wrote the recitals of Ex.P1 cheque. Moreover, even though D.W.1 has admitted that Ex.P1 cheque belongs to him and further admitted that the signature in the cheque was that of his and that he had issued the cheque to Bellan for the loan taken by him, yet this Court is of the considered view that the evidence of D.W.1 in this regard is to be read as a whole/entirety and not in a piece meal fashion because of the reason that the Respondent/Accused had taken a specific plea that the Bellan had threatened him and obtained the cheque.

29.Besides the above, D.W.1 in his evidence has stated that he does not know who is Sekaran and according to him, it is only the Bellan had filed the present complaint through the Appellant/Complainant (benami).

30.When it is the evidence of P.W.1 that he is working as a conductor for three months at Kothagiri S.V.T. Minibus and earning a sum of Rs.150/- per day etc., he had not established to the subjective satisfaction of this Court as to how he had lent such a huge sum of Rs.3 lakhs to the Respondent/Accused. Also, when the

Appellant/Complainant was said to be working as a coolie with one Bellan as per evidence of D.W.1 (Respondent/Accused), then this Court is of the considered view that the onus of proving the where withal of the Appellant/Complainant resources is heavily on his shoulder and that he cannot remain silent as opined by this Court. Suffice it for this Court to point out that when the Appellant/Complainant was aged about 24 years, he had taken the responsibility of looking after his family from his father, is not quite convincing on the part of the Appellant/Complainant to take a plea that the cheque dated 06.11.2002 for a sum of Rs.3 lakhs was received from the Respondent/Accused for the loan amount lent by him. In fact, the Respondent/Accused in the instant case had raised probable defences that the Appellant/Complainant had acted as a benami to one Bellan from whom the Respondent/Accused had purportedly received a total sum of Rs.64,000/- and later to be kept as Rs.1 lakh in the account and that he settled the said amount of Rs.1,88,000/- (together with interest) and that during the said transaction of receiving the money from Bellan, he had handed over the blank cheque leaf to him.

31. In the instant case, Bellan was not examined as a witness either on the side of the Appellant/Complainant or on the side of the Respondent/Complainant. Furthermore, the suit in O.S.No.70 of 2004 was filed by the Respondent/Accused's father against Bellan in respect of the property obtained from the Respondent/Accused by threatening him and also when he was not in a proper mental frame of mind. Even against the Tahsildar, the Respondent/Accused's father had filed a case in regard to the name transfer pertaining to the land, in favour of the Bellan. Also that, the Respondent/Accused had taken a plea that he does not know the Appellant/Complainant prior to the receipt of notice from the Appellant/Complainant and filing of the case by him.

32. In the view of the foregoing qualitative discussions and also, this Court bearing in mind, the evidence of P.W.1 (Appellant/Complainant) that the Respondent/Accused had received money from the Appellant/Complainant in October 2002 and further, at the time of receiving the money, the Respondent/Accused gave a cheque to the Appellant which runs contra to Ex.P1 cheque dated 06.11.2002 and also, this Court by

considering the overall assessment of the entire facts and circumstances of the instant case in a conspectus fashion comes to an irresistible conclusion that the Appellant/Complainant had not established his case that the Respondent/Accused had committed an offence under Section 138 of the Negotiable Instruments Act, 1881 to the subjective conscience of this Court. Viewed in that perspective, the judgment of 'Acquittal' passed by the trial Court in C.C.No.15 of 2003 dated 20.11.2009 in the considered opinion of this Court is just, a valid, correct and legally tenable one, especially, in the absence of material irregularities or patent illegalities. Resultantly, the Criminal Appeal fails.

33.In fine, the Criminal Appeal is dismissed and the judgment of the trial Court in C.C.No.15 of 2003 dated 20.11.2009 is hereby affirmed by this Court for the reasons assigned in the Appeal.

18.10.2016

Index: Yes
Internet: Yes
DP

To

1. The Judicial Magistrate, Kothagiri,
The Nilgiris District.
2. The Public Prosecutor,
High Court, Madras.

M.VENUGOPAL.J,

DP

Pre-Delivery Judgment in

Crl.A.No.19 of 2010

18.10.2016