

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.09.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Crl.A.No.2 of 2010

S.Arumugham

..Appellant / Respondent /
Complainant

Vs.

G.Srinivasan

..Respondent / Appellant /
Accused

Prayer: Criminal Appeal filed under Sections 378(4) of Cr.P.C., to call for the records and to set aside the Judgment dated 30.07.2009 passed by the Learned Additional District & Sessions Judge, (Fast Track Court - I), Salem in Crl.Appeal No.36 of 2009 reversing the Judgment dated 16.04.2009 in STC No.3060 of 2006 on the file of the learned Judicial Magistrate No.V, Salem.

For Appellant : Mr.M.Vaidyanathan

For Respondent : Mr.B.Gopalakrishnan for
Mr.R.Nalliyappan and
Mr.L.P.Shanmugasundaram

J U D G M E N T

Heard both sides.

2. The Appellant / Respondent / Complainant has preferred the present Criminal Appeal before this Court as against the Judgment dated 30.07.2009 in Criminal Appeal No.36 of 2009 passed by the Learned Additional District Sessions Judge, (Fast Track Court No.1), Salem in reversing the Judgment dated 16.04.2009 in STC No.3060 of 2006 passed by the Learned Judicial Magistrate No.5, Salem.

3. It comes to be known that the Learned Additional District Sessions Judge, (FTC No.I), Salem in Criminal Appeal No.36 of 2009 preferred by the Respondent / Accused (As an Appellant) on 30.07.2009 passed a Judgment in allowing the Appeal and set aside the Judgment passed by the trial court in STC No.3060 of 2006 dated 16.04.2009 whereby and whereunder the Respondent / Accused was convicted in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 and was imposed with a punishment of three years Simple Imprisonment and he was further directed to pay a fine of Rs.3,000/-, in default of payment of fine, he was directed to undergo Simple Imprisonment for a period of 15 days.

4. Being dissatisfied with the Judgment dated 16.04.2009 in STC No.3060 of 2006 passed by the trial court in convicting the Respondent / Appellant / Accused, the Respondent / Appellant / Accused preferred C.A.No.36 of 2009 on the file of the Learned Additional District Sessions Judge, Salem (FTC No.1, Salem) and on 30.07.2009, the Appeal was allowed by the Appellate Court whereby and whereunder, the Judgment of the Learned Judicial Magistrate No.V, Salem in STC No.3060 of 2006 dated 16.04.2009 was set aside. Further more, the fine amount of Rs.3,000/- (Rupees Three Thousand only) paid by the Respondent / Accused was directed to be refunded to him.

5. Being aggrieved against the Judgment of acquittal dated 30.07.2009 in CrI.A.No.36 of 2009 passed by the First Appellate Court, the Appellant / Respondent / Complainant has preferred the present Criminal Appeal before this Court assailing the correctness, legality and validity of the Judgment dated 30.07.2009 passed in CrI.Appeal No.36 of 2009.

6. According to the Learned Counsel for the Appellant / Respondent/ Complainant, the Judgment of the Appellate Court in C.A.No.36 of 2009 reversing the Judgment dated 16.04.2009 in STC No.3060 of 2006 passed by the Learned Judicial Magistrate No.5, Salem is contrary to law, weight of evidence and probabilities of the case. The Learned Counsel for the Appellant / Complainant urges before this Court that the First Appellate Court had failed to note down the provisions of the Negotiable Instruments Act, 1881 and wrongly drew an adverse inference on the complainant.

7. The Learned Counsel for the Appellant / Respondent / Complainant projects an argument that the First Appellate Court had failed to take into account that the cheque was issued by the Respondent / Accused only to discharge the debt (hand loan) together with interest and viewed in that perspective, the Judgment in CrI.Appeal No.36 of 2009 is a perverse one in the Eye of Law.

8. The other plea taken on behalf of the Appellant / Respondent / Complainant is that the First Appellate Court should have appreciated that the Appellant / Complainant's case squarely comes within the ambit of Section 138 of Negotiable Instruments Act, 1881.

9. Lastly, it is the stand of the Appellant / Complainant that the 'Debt' is a legally enforceable one and in reality the First Appellate Court should not have allowed the Criminal Appeal No.36 of 2009 by reversing the Judgment of the trial court dated 16.04.2009 in STC No.3060 of 2006.

10. In response, it is the submission of the Learned Counsel for the Respondent / Accused that in the present case, the Appellant / Complainant had failed to establish that the Respondent / Accused borrowed a sum of Rs.60,000/- (Rupees Sixty Thousand only) on 29.11.2004 and issued a cheque for Rs.80,000/- (Rupees Eighty Thousand only) on 11.09.2006.

11. Apart from that it is represented on behalf of the Respondent / Accused that no document was obtained from the Respondent / Accused for the amount lent. Furthermore, it is stated on behalf of the Respondent that the First Appellate Court came to a resultant conclusion that the Appellant / Complainant had not established that he lent Rs.60,000/- to the Respondent / Accused on 29.11.2004 agreeing to repay the same with Rs.1.50/- interest per Rs.100/- per month. Under such circumstance, the reasoning of the First Appellate Court in acquitting the Respondent / Accused by setting aside the Judgment of the trial court in STC No. 3060 of 2006 dated 16.04.2009 does not suffer from any material irregularities or patent illegalities in the Eye of Law.

12. At this stage, this Court aptly points out that in the complaint of the Appellant / Complainant dated 15.11.2006, the Appellant / Complainant had averred that the Respondent / Accused borrowed loan of Rs.60,000/- (Rupees Sixty Thousand only) from him on 29.11.2004 and that the Respondent / Accused promised to pay Rs.1.50/- interest per month for Rs.100/-. It is the further case of the Appellant / Complainant that the Respondent / Accused had promised to repay the amount with interest within one year and inspite of repeated demands, the Respondent / Accused had not paid any amount towards the loan.

13. The clear cut stand of the Appellant / Complainant is that on 11.09.2006 the accused gave a cheque to him for Rs.80,000/- (Rupees Eighty Thousand only) in respect of principal and interest drawn in Ammapet Urban Co-operative Bank Limited, Salem - 3 vide Cheque No.404520 dated 11.09.2006.

14. It transpires that when the cheque was placed for collection in Indian Overseas Bank, Salem Main Branch on 11.09.2006 itself, the cheque got returned on 13.09.2006 owing to 'insufficient funds' as such, the act of the Respondent / Accused amounts to cheating punishable under Sections 138 and 142 of the Negotiable Instruments Act, 1881. Also that, a legal notice was issued by the Appellant / Complainant to the Respondent / Accused on 23.09.2006 demanding him to pay the cheque amount and though the said legal notice was received by the Respondent / Accused on 06.10.2006, he had not chosen to either to pay the cheque sum or to issue reply notice. Therefore, the Appellant / Complainant had filed the complaint under Sections 138 and 142 of the Negotiable Instruments Act.

15. In this connection, it is useful for this Court to make a pertinent reference to the evidence of P.W.1 (Appellant / Complainant) P.W.1 (the Appellant/ Complainant) in his evidence before the trial court had stated that on 29.11.2004 the Respondent / Accused obtained a loan of Rs.60,000/- from him agreeing to repay with Rs.1.50/- the interest for Rs.100/- per month and inspite of repeated demands to settle the loan amount, the Respondent / Accused had not paid the amount and Ex.P.1 is the Cheque dated 11.09.2006 issued by the Respondent / Accused and this was given to settle principal interest amount and that on 13.09.2006, he deposited the cheque for collection and since there was 'insufficient funds' in the bank account of the Respondent / Accused, the cheque got returned and Ex.P.2 is the return memo. Ex.P.3 is the Debit Advice and the notice issued by the Appellant / Complainant to the Respondent / Accused through Counsel dated 23.09.2006 is Ex.P.4. Ex.P.5 is the acknowledgment. The Respondent / Accused had not given any reply nor any money towards the loan amount. It is the evidence of P.W.1 (Appellant / Complainant) (in cross-examination) that he retired as Accountant from the Tamilnadu Electricity Board during the year February, 2004 and in the papers shown to him, the recitals found therein were not written by him and at that time, when he advanced loan to the Respondent / Accused, he had not obtained a pronote from him and also not kept any 'Account'.

16. Besides above, it is the evidence of P.W.1, (Appellant / Complainant) that there is no written document whereby the Respondent / Accused had agreed to pay interest and the recitals in the Ex.P.1, Cheque was returned by the Respondent / Accused and that the Respondent / Accused had affixed his signature in his presence. Moreover, it is the evidence of P.W.1 that Rs.20,000/- (Rupees Twenty Thousand only) was towards 'Interest' and that he does not specifically state that for how many months the said sum represents towards 'Interest' .

17. It is the evidence of D.W.1 (Post Master) that Ex.D.1, cover came to his office on 26.09.2006 and since the Respondent / Accused was not present at the address, the inmates of the house were informed about the cover sent to him and on 27th and 28th, the Respondent / Accused had gone out and only on 29.09.2006, the said cover was delivered to him.

18. It is to be noted that with a view to determine the point whether an offence is punishable under Section 138 of the Negotiable Instruments Act is made out against a particular person, then, it is essential for a Court of Law to examine the ambit of presumptions to be raised as substantiated by ingredients of Sections 118 and 139 of the Negotiable Instruments Act, 1881. Really speaking, Section 118 of Negotiable Instruments Act speaks of certain presumptions to be raised. It cannot be gainsaid that Section 118 of the Act provides presumption to be raised till the contrary is established; (a) as to consideration, (b) as to date of instrument, (c) as to time of acceptance, (d) as to time to transfer, (e) as to order indorsements (f) as to appropriate stamp and (g) as to holder being a holder in Due Course.

19. Section 139 of the N.I.Act enjoins that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature mentioned in Section 138 for the discharge, in whole or in part, of any debt or other liability. If there is an admission of an execution of the pro-note or the same is proved to have been executed, the presumption under Section 118(a) of the Negotiable Instruments Act is raised i.e., it is supported by consideration. If the Plaintiff pleads a different consideration from the one mentioned in Negotiable Instrument, then, the statutory presumption would not arise.

20. It is an axiomatic principle in Law that the material burden lies on the Respondent / Defendant to establish non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities exhibiting the existence of consideration was doubtful / improbable/ an illegal one. The preponderance of probability through direct or substantial evidence is quite sufficient to shift the burden on the complainant, as opined by this Court.

21. One cannot brush aside an essential fact that Section 138 of the Negotiable Instruments Act creates a strict liability. A plain reading of Section 138 of the Negotiable Instruments Act unerringly points out that the offence under said section can be committed by the drawer of the cheque on an

account maintained by him with a banker. The offence punishable under Section 138 of the Negotiable Instruments Act will get attracted not only based on the liability to pay the amount but also coupled with the fact that the instrument was issued by the concerned person. It is for the accused to rebut the presumption contained in Section 139 of the Act. The presumption created by Section 139 of the Negotiable Instruments Act may get displaced by the prosecution evidence on record itself, or the Respondent / Accused may choose to lead an independent evidence in rebuttal thereof. The presumption under Section 139 of the act extends only to the issuing of cheque towards discharge of legally enforceable debt or liability and it has to be raised only after the complainant proves that such debt or liability in fact existed as on the date of the cheque in question and that the cheque was given by the accused. In fact, the Respondent / Accused has a right to maintain silence. Inference of 'Preponderance of probabilities' can be drawn by a Court of Law not only from the available materials on record (as projected by the parties) but also by reference to the circumstance which the Respondent / Accused places reliance.

22. It is to be borne in mind that the early burden of proof lies on the complainant which he has to discharge in the case of dishonour of cheque. To put it precisely, the complainant is to discharge the initial onus that cheque was given to him by the accused in discharge of 'Legally Enforceable Liability'. Apart from that, the burden is on the complainant to show that the cheque was issued in discharge of particular loan amount. If the complainant fails to discharge the said burden, then an accused is entitled to be acquitted in Law.

23. It cannot be forgotten that an 'Accused' is not required to enter into the witness box. He may displace his burden on the basis of materials available on record. However, the aspect whether the statutory presumption was rebutted or not must be decided with reference to other evidence on record.

24. No wonder, Section 138 of the N.I.Act is a penal provision and in order to attract the purview of this Section, the dishonoured cheque should be issued in discharge wholly or in part of any 'Debt' or other liability of 'Drawer to the Payee'.

25. At this juncture, this Court worth recalls and recollects the Judgment of this Court between Angu Parameswari Textiles (P.) Ltd., and Others V. Sri Rajam and Co., reported in 2001 (Vol.105) Company Cases at Page 186 wherein it is held as follows:-

"For the purposes of Section 138 of the Negotiable Instruments Act, 1881 the Cheque should be towards the discharge of either the whole debt or part of the debt. If the cheque is for more than the amount of the debt due, section 138 cannot be attracted."

26. Be that as it may, as far as the present case is concerned, it is the clear cut case of P.W.1 (Complainant) that the Respondent / Accused on 11.09.2006 issued a cheque to him (towards principal and interest) drawn in Ammapet Urban Co-operative Bank Limited, Salem- 3 vide Cheque No.404520. Undoubtedly, till 2005, the interest for the borrowed amount of Rs.60,000/- (Rupees Sixty Thousand only) on 29.11.2004 works out to Rs.10,800/- (Rupees Ten Thousand Eight Hundred only) (The Respondent / Accused agreeing to repay the sum with interest at 1.50/- for Rs.100/- per month) For nine months, the interest during the year 2006 comes to Rs.7,200/- (Rupees Seven Thousand only). For the 11 days interest, the amount works out to Rs.330/- (Rupees Three Hundred and Thirty only). In aggregating all, the sum comes to Rs.78,330/- (Rupees Seventy Nine Thousand Three Hundred and Sixty only). One day interest was Rs.30/- (Rupees Thirty only) Totally, the sum works out to Rs.78,360/- (Rupees Seventy Nine Thousand Three Hundred and Ninety only). However, in the complaint, it was alleged by the Appellant / Complainant that the Respondent / Accused gave a cheque for Rs.80,000/- (Rupees Eighty Thousand only)

27. In the present case, it is the evidence of P.W.1 (the Appellant / Complainant) that Rs.20,000/- (Rupees Twenty Thousand only) refers to 'Interest' and he does not know for how many months the said sum represents towards interest and there is no document to show that the Respondent / Accused had agreed to pay interest. Further, P.W.1 had categorically in his evidence had admitted that there is no record to show that on 29.11.2004, he had a sum of Rs.60,000/- (Rupees Sixty Thousand only) and that he had not obtained a pro-note at the time of advancing the loan amount to the Respondent / Accused and that he had not written any Account.

28. In view of the fact, the amount in all comes only to Rs.78,360/- but, strangely, the Appellant / Complainant in his complaint before the trial court had averred that the Respondent / Accused issued a cheque for Rs.80,000/- (Rupees Eighty Thousand only) on 11.09.2006 (For the borrowed loan amount of Rs.60,000/- on 29.11.2004). In the present case, there is no record to show that on 29.11.2004 the Petitioner had the requisite wherewithal / source to lend the said amount to the Respondent / Accused. Furthermore, at the risk of repetition this Court once again points out that for the amount purportedly borrowed Rs.60,000/- on 29.11.2004 the interest till the year

2005 turns out to Rs.10,800/-. For nine months during the year 2006, the interest works out to Rs.7,200/-. For the 11 days interest, the amount comes to Rs.330/-. In all, the amount comes to Rs.78,330/- . If one takes into account the interest sum of Rs.30/- for one day, then, the amount comes to Rs.78,330/- + Rs.30/- = Rs.78,360/-. Significantly in the complaint the Appellant / Complainant had come out with a case that the Respondent / Accused gave a cheque for Rs.80,000/-. As such, this Court without any hesitation opines that the Appellant / Complainant had not proved to the subjective satisfaction of this Court that the Respondent / Accused had issued a cheque dated 11.09.2006 towards the 'Legally Enforceable Debt'.

29. Looking at from any angle and in the light of the foregoing the consequent conclusions arrived at by the First Appellate Court to the effect that the Appellant / Complainant had not established that he lent a sum of Rs.60,000/- (Rupees Sixty Thousand only) to the Respondent / Accused on 29.11.2004 (Agreeing to repay the same at Rs.1.50/- interest for Rs.100/- per month) and on 11.09.2006, the Respondent / Accused issued a cheque for Rs.80,000/- (Rupees Eighty Thousand only) and finally holding him not guilty under Section 138 of the N.I.Act and acquitting him and issuance of further direction to refund the sum of Rs.3,000/- (Rupees Three Thousand only) paid by the Respondent / Accused to him, in the considered opinion of this Court are free from any flaw. Resultantly, the Criminal Appeal fails.

In the result, the Criminal Appeal is dismissed. The Judgment dated 30.07.2009 in CrI.Appeal No.36 of 2009 passed by the Learned Additional District Sessions Judge, (FTC No.1) Salem is affirmed by this Court for the reasons assigned in this Criminal Appeal.

सत्यमेव जयते
-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

ssd

To

1. The Additional District & Sessions Judge,
(Fast Track Court - I), Salem

2.The District Sessions Judge Salem

3. The Judicial Magistrate, No.V Salem

4.The Chief Judicial Magistrate Salem

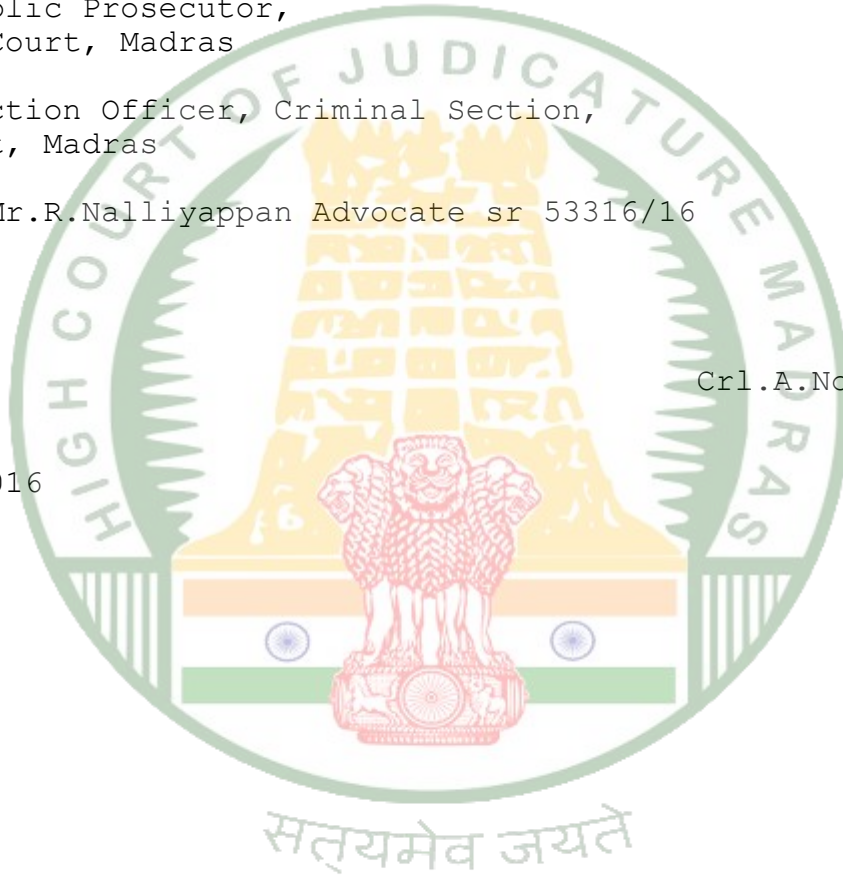
5. The Public Prosecutor,
High Court, Madras

6. The Section Officer, Criminal Section,
High Court, Madras

+1 cc to Mr.R.Nalliyappan Advocate sr 53316/16

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