

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2017

PRONOUNCED ON : 19.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.574 of 2014

M.Aruchamy

... Appellant

Vs.

S.Kasiviswanathan

... Respondent

Criminal Appeal filed under Section 378 of Cr.P.C. against the judgment dated 01.07.2014 made in C.A.No.27 of 2014 on the file of the V Additional District and Sessions Judge, Coimbatore, reversing the judgment dated 07.02.2014 made in STC No.271 of 2012 on the file of the Judicial Magistrate, Fast Track Court at Magisterial Level - II, Coimbatore.

For Appellant : Mr.B.R.Shankaralingam

For Respondent : Mr.C.Deivasigamani

J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the judgment dated 01.07.2014 made in C.A.No.27 of 2014 on the file of the V Additional District and Sessions Judge, Coimbatore, reversing the judgment dated 07.02.2014 made in STC No.271 of 2012 on the file of the Judicial Magistrate, Fast Track Court at Magisterial Level - II, Coimbatore.

2. For the sake of convenience, the appellant and the respondent will be referred to as complainant and accused.

3. It is the case of the complainant that the accused borrowed Rs.2 lakhs from him on 05.09.2006 for his business purpose and executed a promissory note [Ex.P.1] promising to repay the amount on demand with interest at 15% per annum. In discharge of the said liability, the accused issued a cheque bearing no.369470 [Ex.P.2] for Rs.2,40,000/- drawn on HDFC Bank, Trichy. The complainant presented the cheque for collection on 07.01.2008 with Syndicate Bank, Coimbatore and it was returned unpaid on the ground "Account closed", vide cheque return memo [Ex.P.3] dated 09.01.2008. The complainant issued a statutory notice dated 12.01.2008 [Ex.P.5], which was received by the accused on 14.01.2008, vide Acknowledgment Card [Ex.P.6]. Since the accused did not return the amount, the complainant initiated a prosecution in C.C.No.215 of 2008 before the Judicial Magistrate No.V, Coimbatore, under Section 138 of the Negotiable Instruments Act [hereinafter referred to as "the N.I. Act"], against the accused and later, the case was transferred to the Court of the Judicial Magistrate, Fast Track Court at Magisterial Level-II, Coimbatore and was renumbered as STC No.271 of 2012. On receipt of summons, the accused appeared and when he was questioned about the accusation against him, he denied the same.

4. To prove the case, the complainant examined himself as P.W.1 and marked six exhibits. The accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C., which he denied. No witness was examined nor any document marked on behalf of the accused.

5. After considering the evidence adduced by both parties and hearing the learned counsel on either side, the trial Court, by judgment dated 07.02.2014, convicted the accused under Section 138 of the NI Act and sentenced him to undergo four months Simple Imprisonment and pay a fine of Rs.2,000/-, in default to undergo one month Simple Imprisonment. Aggrieved by the conviction and sentence, the accused filed an appeal in C.A.No.27 of 2014 before the Sessions Court, Coimbatore, which was heard by the V Additional District and Sessions Judge, Coimbatore, who, by order dated 01.07.2014, has acquitted the accused, aggrieved by which, the complainant has filed the present appeal against acquittal, in which, this Court has granted Special leave to appeal.

6. Heard Mr.B.R.Shankaralingam, learned counsel for the complainant and Mr.C.Deivasigamani, learned counsel for the accused.

7. The complainant, who examined himself as P.W.1, has stated in his evidence, that the accused had borrowed Rs.2 lakhs on 05.09.2006 for his business purpose and had executed a promissory note [Ex.P.1] for the said sum, agreeing to

repay the amount with interest at 15 % per annum. In the cross examination of the complainant, he has inadvertently stated that he has filed only photocopy of the promissory note, whereas, this Court called for the records and perused the same and found that the original promissory note has been filed as Ex.P.1. Even in the list of exhibits appended to the judgment of the trial Court, it has been inadvertently stated as "Copy of a promissory note".

[a] The complainant, in his evidence, has further stated about the issuance of the impugned cheque, dishonour of the same, issuance of statutory notice to the accused and failure of the accused to comply with the demand. Thus, the ingredients of the offence has been satisfactorily proved by the complainant. The complainant was examined-in-chief on 26.10.2009 and he was not cross-examined immediately. He was recalled and cross-examined by the accused on 06.01.2010.

[b] In the cross-examination, the complainant has stated that he is a farmer. He has also stated that he is also a partner in Siruvani Finance. When he was asked about his income tax returns, he has stated that he is paying income tax and that he is ready to produce the income tax returns. However, he has stated that the loan has been given to the accused in his individual capacity and that the loan was not given by Siruvani Finance.

[c] It is seen that one Radhakrishnan has signed as witness in the promissory note. In the cross-examination on this aspect, the complainant has stated that Radhakrishnan is a common friend of the complainant and the accused and therefore, he had signed as witness in the promissory note. When he was asked as to where the cheque was signed, he has stated that the accused brought the filled in cheque, but, signed the cheque before him at the time of handing over to him and that is why there is a difference in the ink. It has been suggested to the complainant that the pro note and the cheque were issued to the Finance Company and those instruments have been misused by the accused. However, in the 313 Cr.P.C. statement of the accused, he has completely denied everything and has not come forward to give any explanation as to how the pro note and the cheque that bear his signature found its way to the complainant.

[d] In order to satisfy the judicial conscience, this Court compared the signature in the pro note, cheque and in the 313 Cr.P.C. statement of the accused and found that one and the same person has signed in all the three records. Of course, it is not the defence of the accused that the signature in the cheque is not that of his. The accused has not suggested to the complainant [P.W.1] nor stated in his 313 Cr.P.C. statement that he had borrowed a certain sum from Siruvani Finance and that he had executed a pro note and given a cheque only towards discharge of that liability to Siruvani Finance and not towards the discharge of the liability to the complainant. However, the Sessions Court has acquitted the

accused on a very specious reasoning, as could be seen from paragraph 8 of the Appellate Court judgment:

"8. During cross, the Complainant admitted that he is doing money lending business and he is a partner of Siruvani Finance firm at Gandhipuram, Coimbatore. Though, it is his case that the amount was given not from the Finance Company, but from his personal money, P.W.1 clearly admitted that he submitted Income Tax Returns combining his personal income as well as the income derived from Financial Business. As per the definition of Money Lender in Tamil Nadu Money Lender's Act 1957 which means "a person whose main or subsidiary occupation is the business of advancing and realizing loan but excludes a bank or a co-operative society". So, naturally the Complainant is coming under the definition of Money Lender as his subsidiary occupation is money lending as stated in his income tax returns which shows the Complainant advances many loans to the tune of Rs.6,50,000/-.

8. The Appellate Court has proceeded on the footing that the complainant is a money lender and that the provisions of the Tamil Nadu Money Lenders Act, 1957 will apply and since he had not maintained any records under the said Act and Rules, the debt has not been proved and therefore, the accused has been acquitted. The definition of the word "money lender" under the Tamil Nadu Money Lenders Act, 1957 is as follows:

"2(8) **"money-lender"** means a person whose main or subsidiary occupation is the business of advancing and realising loans, but excludes a bank or a co-operative society."

9. The Sessions Court has proceeded to brand the complainant as a money lender on the solitary statement in his cross-examination that he is a partner in Siruvani Finance. In the first portion of the cross-examination, the complainant has stated that his main occupation is agriculture and he has also stated that he is

a partner in Siruvani Finance. Beyond that, there is absolutely no cross-examination or evidence to show that the complainant is into money lending business. No material worth the salt has been produced by the accused to show that the main or subsidiary occupation of the complainant is the business of advancing and realising loans. The main or subsidiary occupation of Siruvani Finance may be the business of advancing and realising loans, but that definition cannot be thrust on the complainant, based on the solitary statement that, he is a partner in Siruvani Finance. Like any other Finance Company, Siruvani Finance may be into accepting deposits, giving loans for individuals and for vehicles etc.

10. Supposing the complainant had stated that his main or subsidiary occupation is the business of advancing and realising loans, then, the provisions of the Tamil Nadu Money Lenders Act can be applied. In fact, this was not a ground of attack either before the trial Court or in the grounds of appeal before the Sessions Court. No opportunity was given to the complainant to show that he was not a money lender within the meaning of the Tamil Nadu Money Lenders Act, whereas, the Sessions Court has discovered this ground to acquit the accused. The Sessions Court has acquitted the accused on the ground that the promissory note has not been proved by examining the witness. A promissory note is a Negotiable Instrument and it does not require the attestation of any witness. However, in our countryside, people give hand loans in the presence of respectable persons and they obtain the signature of such a person in the promissory note as a witness.

The complainant has clearly stated in the cross-examination that since Radhakrishnan was known to both of them, he signed as a witness to the promissory note. Therefore, non-examination of Radhakrishnan as a prosecution witness cannot be fatal to the case of the complainant.

11. Mr. Deivasigamani, learned counsel for the accused submitted that when the accused had denied his signature in the promissory note and the cheque, the complainant must have taken steps to obtain expert opinion.

12. On a careful reading of the cross-examination of the complainant, it is seen that the accused has been blowing hot and cold. In one breath, he has stated that he has not signed the cheque at all, but has also stated that he has given the cheque to the Finance Company and the same has been misused. Of course, the accused can take various defences, but he cannot take mutually contradictory stances, especially in the light of Section 139 of the N.I. Act. Though the presumption under Section 139 of the N.I. Act can be rebutted by the accused by preponderance of probability, yet, the accused must place before the Court a reasonable and convincing explanation for the Court to believe his version. If the accused had felt that his signature has been forged in the pro note and the cheque, it is for him to take out an application for sending the pro note and cheque along with his admitted signature relating to the period of the pro note and cheque for comparison. By no stretch of imagination can the complainant be

expected to have specimen signatures of the accused relating to the cheque period.

13. In **Rangappa vs. Mohan [AIR 2010 SC 1898]**, it has been held that when once the execution of the cheque is admitted, the presumption under Section 138 of the N.I. Act will work backwards to cover the debt also. However, the accused can disprove the debt by preponderance of probability. Strangely, the Sessions Court has cited this judgment, but has not followed it by proffering a reason that the complainant should have proved the debt by producing the records under the Tamil Nadu Money Lenders Act.

14. Mr.Deivasigamani, learned counsel contended that the accused should have made an entry on the pro note that he had received the cheque and he should have made an entry in his account book that he has received the cheque and on the cheque being dishonoured, he should have made a reverse entry in the promissory note and in the account book about that. This argument of Mr.Deivasigamani has found favour with the Sessions Court also, as could be seen from para 12 of the order. This Court is not able to fathom from where such weird ideas of accounting is required to be maintained by common folks, who normally give hand loans on pro note on mutual trust. With the risk of repetition, the accused has not even suggested to the complainant [P.W.1] that the latter is a professional money lender. In the absence of such a suggestion in the cross-

examination, branding the complainant [P.W.1] as a money lender under the Tamil Nadu Money-Lenders Act and finding fault with him for not maintaining a particular style of accounting and on that ground holding that there was no debt, appears incredible. It must be remembered that the accused received the statutory notice [Ex.P.5], vide postal acknowledgment card [Ex.P.6], but did not care even reply to it. The accused has closed his account and he has not even given any explanation in his 313 Cr.P.C. statement as to why he closed his Bank Account.

15. The complainant [P.W.1] had not stated that he is a professional money lender. He has merely stated that the accused asked for a loan, which he gave, on his executing a promissory note in the presence of Radhakrishnan and towards the said loan, the accused gave the cheque several months later.

16. In such view of the matter, the acquittal of the accused by the Sessions Court deserves interference and accordingly, the appeal is allowed and the judgment of the trial Court in STC No.271 of 2012 on the file of the Judicial Magistrate, Fast Track Court at Magisterial Level - II, Coimbatore, is restored.

Since the prosecution under Section 138 of the N.I. Act is quasi civil in nature, the Parliament has thought it fit to permit compounding of the offence under Section 147 of the N.I. Act. Instead of sending the accused to prison, this

Court is of the view that if the accused deposits Rs.2,40,000/- towards the cheque amount and another sum of Rs.1 lakh as compensation and costs to the credit of STC No.271 of 2012, before the Judicial Magistrate, Fast Track Court at Magisterial Level - II, Coimbatore, on or before 28.02.2018, the Magistrate shall disburse the amount to the complainant if he is alive or to his legal heirs and compound the offence. If the amount of Rs.3,40,000/- is not deposited on or before 28.02.2018, the trial Court shall issue warrant of commitment for the accused to undergo the sentence imposed upon him by judgment dated 07.02.2014 in STC No.271 of 2012.

19.12.2017

gms

NOTE TO OFFICE: Issue order copy by 20.12.2017

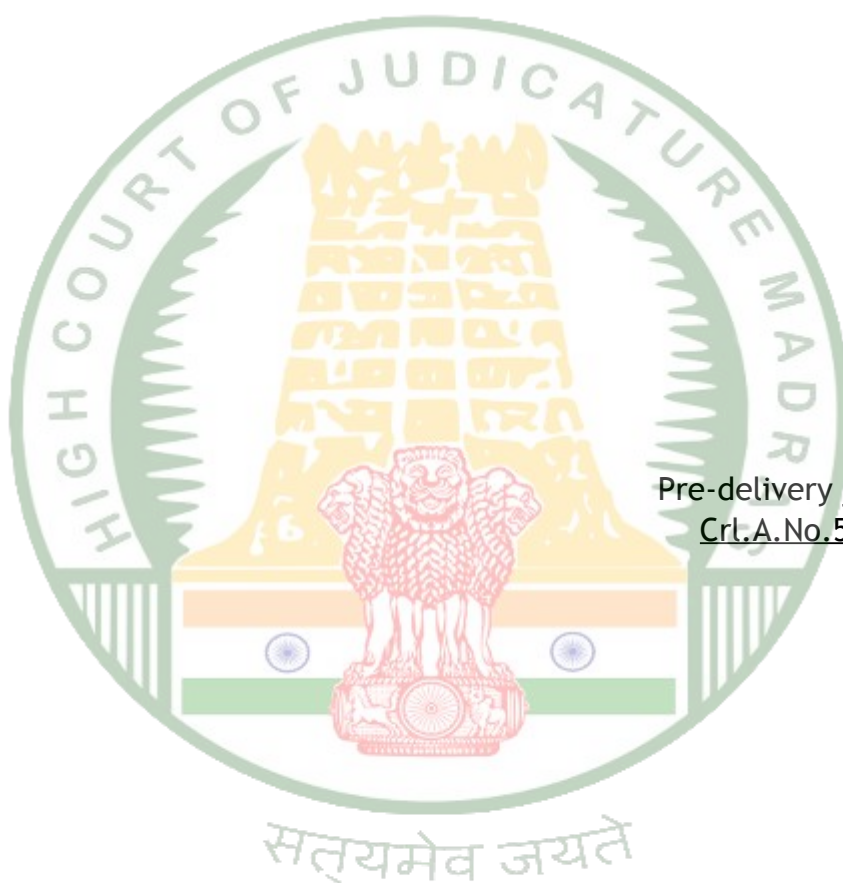
To

1. V Additional District and Sessions Judge,
Coimbatore.

2. The Judicial Magistrate,
Fast Track Court at Magisterial Level - II,
Coimbatore.

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P.N.PRAKASH, J.
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Pre-delivery judgment in
Crl.A.No.574 of 2014

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