

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.11.2017

PRONOUNCED ON : 13.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.465 of 2012

N.Palanisamy

... Appellant

Vs.

1.Sri Maruthi Processors
a registered firm by its partner
R.Palanisamy, Kolathukadu
Opp: K.P.T.Petrol Bunk
Salem NH Bye-pass Road
Komarapalayam
Tiruchengode Taluk.

2.R.Palanisamy

3.Kamalam

... Respondents

Criminal Appeal filed under Section 378 of Cr.P.C. against the order of acquittal dated 15.07.2011 made in C.A.No.158 of 2010 on the file of the Additional District and Sessions Court/Fast Track Court No.IV, Bhavani reversal of the judgment of conviction dated 19.11.2010 made in STC No.2320 of 2009 on the file of the Judicial Magistrate, Bhavani.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.I.C.Vasudevan (for R2)

J U D G M E N T

This appeal has been filed against the order of acquittal dated 15.07.2011 passed in C.A.No.158 of 2010 by the learned Additional District and Sessions Court/Fast Track Court No.IV, Bhavani .

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

3. It is the case of the complainant that on 25.10.2007, the second accused borrowed Rs.4 lakhs for the business purpose of the first accused partnership firm and had executed a promissory note for the said sum, agreeing to repay the amount with interest at 12% per annum on demand. Towards the debt, R.Palanisamy [A2], in the capacity of partner of Sri Maruthi Processors [A1], gave a cheque dated 03.12.2008 from the account of Sri Maruthi Processors [A1] for Rs.4 lakhs (Ex.P.2), which was presented by the complainant on 17.12.2008 for collection through his Bank, viz., Bank of Baroda, Bhavani Branch. However, the said cheque was returned to the complainant unpaid on 19.12.2008 along with a memo dated 18.12.2008 (Ex.P.3) from the Karur Vysya Bank (bank of the accused) on the ground "opening balance insufficient".

4. On 26.12.2008, the complainant issued individual statutory notices calling upon the accused to make the payment. The said notices were returned as "door locked, intimation given not claimed". The complainant initiated a prosecution in S.T.C.No.2320 of 2009 under Section 138 of the Negotiable Instruments Act against Sri Maruthi Processors [A1], R.Palanisamy [A2] and Kamalam [A3] and the trial was held before the Judicial Magistrate, Bhavani.

5. On the appearance of the accused, they were questioned about the substance of the accusation against them, which they denied. The complainant examined himself as P.W.1 and marked 7 exhibits. The accused were questioned about the incriminating circumstances appearing against them under Section 313 Cr.P.C., which they denied. The accused did not adduce any evidence nor did they mark any exhibit.

6. After hearing either side and considering the evidence on record, the trial Court, by judgment dated 19.11.2010, convicted all the three accused under Section 138 of the Negotiable Instruments Act and sentenced them to undergo one year Simple Imprisonment and pay a compensation of Rs.4 lakhs jointly or severally, to the complainant under Section 357 Cr.P.C. Of course, the trial Court has committed an error in awarding a sentence of imprisonment to Sri Maruthi Processors [A1], which is only a juristic entity. That by itself will not vitiate the entire proceedings. Aggrieved by the conviction and sentence, the accused filed

Crl.A.No.158 of 2010 in the Sessions Court, Erode District, which was heard by the learned Additional District and Sessions Judge, Fast Track Court No.IV, Bhavani, Erode District, who, by order dated 15.07.2011, allowed the appeal and acquitted the accused. Challenging the acquittal, the complainant is before this Court after obtaining special leave under Section 378(4) Cr.P.C.

7. Heard the learned counsel for the complainant and the learned counsel for the accused.

8. Before going into the rival submissions, it would be necessary to extract the following passage from the judgment of the Supreme Court in **Arulvelu and another vs. State rep. by the Public Prosecutor and another [(2009) 10 SCC 206]**.

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

9. N. Palanisamy [P.W.1] the complainant herein, filed his proof affidavit before the trial Court which was treated as his examination-in-chief, wherein, he has sworn to the facts narrated in the complaint. N. Palanisamy [P.W.1] has stated that he is an agriculturist and that R. Palanisamy [A2] is the husband of

Kamalam [A3] and that A1 and A2 were running a partnership firm in the name and style of Sri Maruthi Processors [A1] and that on 25.10.2007, R. Palanisamy [A2] borrowed Rs.4 lakhs for his business purposes, towards which, he executed a promissory note [photo copy Ex.P.1] agreeing to pay the amount with interest at 12% per annum on demand; that on 03.12.2008, the second accused issued a cheque bearing no.176201 [Ex.P.2] drawn on the account held by Sri Maruthi Processors [A1] with Karur Vysya Bank, Erode Branch.

[a] At the time of issuance of the cheque, Kamalam [A3], wife of R.Palanisamy [A2] was also there and when the cheque was presented for collection with Bank of Baroda, Bhavani Branch on 17.12.2008, the same was returned unpaid on 19.12.2008 with the bank memo [Ex.P.3] on the ground "opening balance insufficient".

[b] The individual statutory notices dated 26.12.2008 were issued to the accused and the same returned unserved on the ground that "door locked, intimation given not claimed". The returned notices were marked as Exs.P.5 to 7. In the cross-examination, N. Palanisamy [P.W.1] has stated that the accused are his relatives and that R. Palanisamy [A2] and Kamalam [A3] are partners in Sri Maruthi Processors [A1].

[c] It was further suggested to the complainant [P.W.1] that there are other partners, viz, Sivagami, Ganesan, Nataraj, Thirugnanasambandam and Annamalai, for which, the complainant said that he was not aware. Further, the complainant has stated in the cross-examination that he knew that the firm was started by R. Palanisamy [A2] and Kamalam [A3].

[d] The entire cross-examination proceeded on the basis that the complainant has not taken any steps to file a civil suit and that the accused are not known to the complainant. It would be relevant to specifically state here that the issuance of the impugned cheque was not denied in the cross-examination. The fulcrum of the cross-examination was that the promissory note [Ex.P.1] was not signed by R. Palanisamy [A2]. Therefore, the trial Court found that the accused, having not denied the execution of the impugned cheque, a burden is cast on them under Section 139 of the Negotiable Instruments Act, which they failed to discharge. That apart, the trial Court has also believed the evidence of N. Palanisamy [P.W.1] with regard to the debt and that the impugned cheque was issued in discharge of a legally enforceable debt. Therefore, the trial Court convicted and sentenced the accused, as stated above.

10. However, the first appellate Court has acquitted the accused on the ground that the complainant had failed to prove as to who were the partners in Sri

Maruthi Processors by producing the partnership deed or other documents.

Paragraph 15 of the appellate Court judgment reads as follows:

"15. When the matter is before the court of law, the respondent could not state that the partnership deed need not be marked before the court. Firstly the court of law should know whether all the partners have been joined as accused in this case or who are those partners taking active part in the day to day affairs of the 1st accused concerned and who are the persons authorised to put their signature in the cheque and this transaction on behalf of the firm should be known to the court. But in this case, without following any such provisions of law, the trial court by seeing only the papers which has been produced before it stating that the cheque was bounced and hence the accused are liable to be punished if these accused are not a partners of any concern. The trial court should have called for the partnership deed and who are those partners taking active part in the business. Without doing so, the conclusion of the trial court is not within the ambit of law."

11. Mr.I.C.Vasudevan, learned counsel appearing for the accused submitted that in the promissory note, [Ex.P.1], it is stated that the loan has been taken by R. Palanisamy [A2], whereas, in the complaint and in the proof affidavit, it is stated that the loan has been taken for the business of A1 and therefore, there is contradiction. The complainant has given a contradictory version. He placed strong reliance on the judgments of this Court in **Kalavally v. Parthasarathy [2009 (2) Crimes 559 (Mad.) and V.Ponkasamuthu v. M.Aathimuthu [2009 (1) T.N.L.R. 217 (Mad)(MB)]**.

12. Per contra, Mr.N.Manokaran, learned counsel appearing for the complainant/appellant placed strong reliance on the recent judgment of the Supreme Court in **B.M.Basavaraj v. Srinivas S.Datta [CDJ 2016 SC 1007]**.

13. In **Ponkasamuthu** (supra) the accused filed Exs.D1 to D11 in order to rebut the presumption that there was no legally enforceable debt and only in those circumstances, a learned Single Judge of this Court refused to upset the order of acquittal. In **Kalavally** (supra), the accused therein had taken a defence that the cheque was stolen from her house, because the husband of the accused was a Member of the Parliament and the complainant belongs to the same political party and using his closeness, he got entry into the house and had taken the cheques. The accused therein marked Exs.D1 to D3 in order to rebut the presumption. In this case, the complainant has clearly pleaded that a sum of Rs.4 lakhs was borrowed on 25.10.2007 and a promissory note was also executed. Even in the promissory note, it has been stated that the amount has been borrowed by R.Palanisamy [A2] for his household expenses and business purposes. However, the impugned cheque has been given on the account drawn by Sri Maruthi Processors [A1] and the same has been signed by R.Palanisamy [A2]. The accused have not disputed this fact. Therefore, even assuming that R. Palanisamy [A2] had taken a personal loan for himself, the factum of issuing the cheque of Sri Maruthi Processors [A1] signed by R. Palanisamy [A2] will be the determining factor.

14. Learned counsel for the accused submitted that the promissory note [Ex.P.1] was photocopy and not the original. This was not objected to by the accused at the time of trial and in fact, the entire-cross examination has been

built only on the promissory note [Ex.P.1] and it is too late in the day to contend that the same is a photocopy and not admissible. Assuming for a moment that it is inadmissible, yet, the original cause of action viz., the loan that was taken by R.Palanisamy [A2] on 25.10.2007 has been satisfactorily established via the evidence of the complainant [P.W.1].

15. Now, it may be necessary to refer to the recent judgment of the Supreme Court relied upon by Mr.N.Manokaran, learned counsel for the complainant. In that case, the complainant and the accused entered into a contract for supply of goods and the complainant supplied the goods, for which, the accused issued two cheques which were dishonoured. The complainant initiated a prosecution under Section 138 of the Negotiable Instruments Act against the accused, in which, the accused were acquitted by the trial Court and the High Court on the ground that the complainant did not establish that he had supplied the materials to the accused as per the contract.

16. Repelling this contention, the Supreme Court has held as follows:

"8. A neat submission which is made by Mr.Sushil Kumar Jain, learned senior counsel appearing for the appellant, is that once the cheques were given by the respondent to the appellant there was a presumption in law that the due were payable by the respondent to the appellant. He had pointed out that this is so acknowledged by the High Court also in the impugned judgment but has committed an error in law in holding that inspite thereof, it was for the appellant to establish that he had fulfilled its obligation under the agreement and only then presumption under Section 139 of the Act was available. This is clearly an erroneous approach on the part of the courts below.

9. Section 139 of the Acts reads as under:-

"139. Presumption in favor of holder

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

10. Once the appellant files a complaint on the basis that he was holding the aforesaid cheques as holder in due course which were admittedly given by the respondent to the appellant and the said cheques were dishonoured when they were presented for encashment to the Bank and he, further, is able to establish that due notice of the dishonour of the said cheques was given to the respondent as provided in law, there was a clear presumption in favour of the appellant that the money was due under the said cheques. It may be noted that there is no defence to the effect that the cheques were not used by the respondent or the cheques do not bear its signatures or they were not presented properly for encashment.

11. In the aforesaid circumstances, it was not even necessary for the appellant to produce any document to the effect that it had fulfilled the obligation under the agreement which was entered into between the parties. The case was founded on the dishonour of the two cheques and not on the basis of the said agreement. Further, it was not a civil suit which was filed on the basis of the said agreement or any demand was raised for money on the ground that the agreement had been fulfilled. The case is that the payment was not released. It is here where the High Court has fell in legal error.

12. We are, therefore, of the opinion that the dishonour of the aforesaid cheques in the aforesaid manner clearly establish that the amount was due to the appellant and it is the respondent which has failed to discharge its obligation. This is more so, when in the legal notice, specific averment was made by the appellant that the appellant had discharged its obligation under the contract and only thereupon, the cheques were issued and the respondent had not even replied to the said notice. We, thus, set aside the orders of the courts below and hold that the respondent has committed an offence in terms of the provisions under Section 138 of the Act."

17. In the teeth of this legal position, the order of acquittal of the accused passed by the first appellate Court suffers from manifest illegality warranting interference. The reasons given for acquittal does not pass muster the law laid

down by the Supreme Court in **Arulvelu and another v. State rep by the Public Prosecutor and another [(2009) 10 SCC 206]**. However, the complainant has failed to establish that Kamalam [A3] was in-charge and responsible for the affairs of Sri Maruthi Processors [A1] for fastening vicarious liability under Section 141 of the Negotiable Instruments Act.

18. As regards R. Palanisamy [A2], he is not only a partner of Sri Maruthi Processors [A1], but is also a signatory in the impugned cheque.

19. In the result, this appeal is partly allowed. The order of acquittal passed by the Additional District and Sessions Judge, Fast Track Court No.IV, Bhavani, Erode in Crl.A.No.158 of 2010 dated 15.07.2011 is hereby set aside and the judgment of the Judicial Magistrate, Bhavani in STC No.2320 of 2009 dated 19.11.2010 is partly restored. The conviction and sentence imposed on Kamalam [A3] are set aside and she is acquitted. R. Palanisamy [A2] is convicted and sentenced to undergo 1 year Rigorous Imprisonment as ordered by the trial Court. Under Section 147 of the Negotiable Instruments Act, an offence can be compounded at any time. In order to give an opportunity to R.Palanisamy [A2], the sentence of imprisonment imposed on him is suspended till 01.02.2018. In the mean time, if he deposits the cheque amount of Rs.4 lakhs and also costs of Rs.1 lakh to the credit of STC No.2320 of 2009 before the trial Court, the offence may be compounded. If the said amount of Rs.5,00,000/- is not deposited on or before

01.02.2018, the trial Court shall issue warrant of commitment to R. Palanisamy [A2] to undergo the sentence imposed upon him by judgment dated 19.11.2010 in STC No.2320 of 2009.

.12.2017

NOTE TO OFFICE:

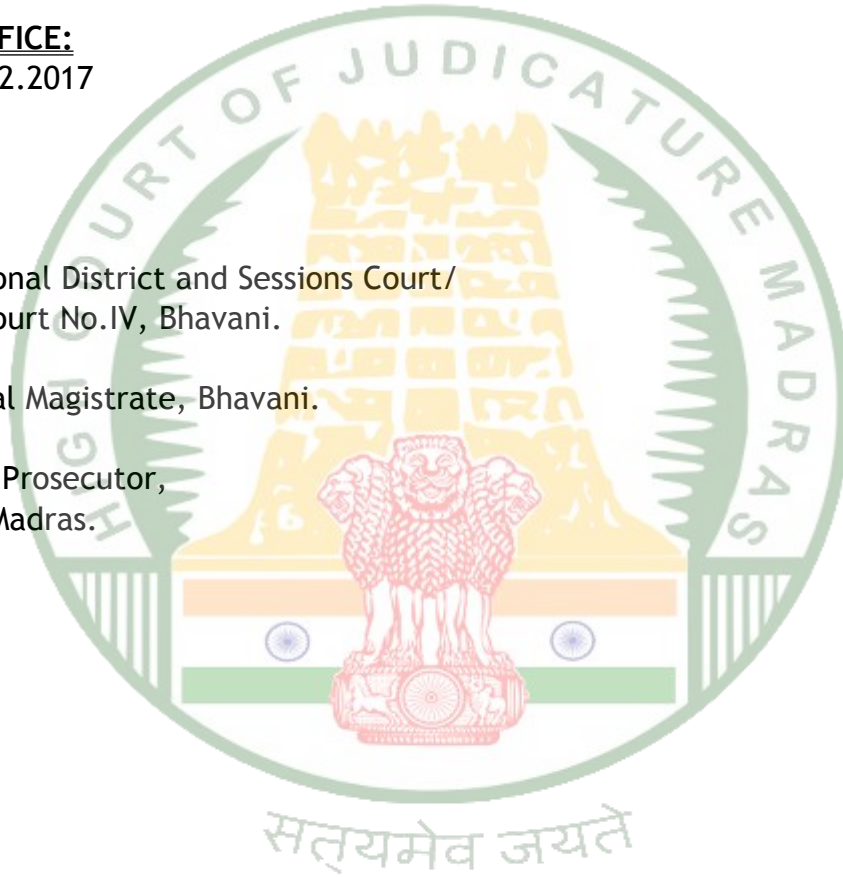
Issue on 14.12.2017

To

1.The Additional District and Sessions Court/
Fast Track Court No.IV, Bhavani.

2.The Judicial Magistrate, Bhavani.

3.The Public Prosecutor,
High Court, Madras.



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P.N.PRAKASH, J.

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Pre-delivery judgment in
Crl.A.No.465 of 2012

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