IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.10.2017

PRONOUNCED ON : 11.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE **P.N. PRAKASH**

Crl.A.No.404 of 2016

Chellappan ... Appellant

Vs.

R.Mani ... Respondent

Criminal Appeal filed under Section 378 of Cr.P.C. against the judgment and order of acquittal passed by the learned III Additional District and Sessions Judge, Salem, in C.A.No.14 of 2013 dated 23.03.2014 for the reversal judgment of conviction under Section 138 of the N.I. Act sentencing to undergo one year rigorous imprisonment and fine of Rs.5,000/- in default one month simple imprisonment by the learned Judicial Magistrate No.IV, Salem in STC No.149 of 2010.

For Appellant : Mr.AR.L.Sundaresan
Senior Counsel
for Mr.L.Baskaran

For Respondent : Mr.A.K.Kumarasamy
Senior Counsel
for Mr.S.Kaithamalai Kumaran

J U D G M E N T

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

2. It is the case of the complainant that on 01.10.2009, the accused borrowed Rs.4,75,000/- promising to repay the said sum with interest at 12% per annum and in discharge of the debt, issued a cheque bearing no.401170 [Ex.P.1] dated 01.10.2009 for Rs.4,75,000/-. The complainant presented the cheque for collection on 02.11.2009 and it was returned unpaid on the ground "Funds insufficient" on 03.11.2009 [Ex.P.2]. The complainant issued a statutory notice dated 12.11.2009 [Ex.P.3] under Section 138 of the Negotiable Instruments Act calling upon the accused to repay the amount within fifteen days. According to the complainant, the accused did not repay the amount and hence, the complainant initiated prosecution in STC No.149 of 2010 before the Judicial Magistrate No.IV, Salem against the accused for the offence under Section 138 of the Negotiable Instruments Act. On summons, the accused appeared and denied the substance of the accusation.

3. The complainant examined himself as P.W.1 and marked four exhibits. The incriminating circumstances were put to the accused under Section 313 Cr.P.C., which were denied by him. The accused examined himself as D.W.1 and

marked five exhibits.

4. After considering the evidence adduced by both parties, the trial Court, by judgment dated 30.01.2013, convicted the accused and sentenced him to undergo one year Rigorous Imprisonment and pay a fine of Rs.5,000/- in default to undergo one month Simple Imprisonment. Challenging the conviction and sentence, the accused preferred C.A.No.14 of 2013 before the Sessions Court, Salem, which was heard by the III Additional District and Sessions Judge, Salem, who, by judgment dated 23.03.2014, set aside the conviction and sentence imposed by the trial Court and acquitted the accused, aggrieved by which, the complainant is before this Court.

5. Heard Mr.AR.L.Sundaresan, learned Senior Counsel appearing for Mr.L.Baskaran, learned counsel on record for the complainant/appellant and Mr.A.K.Kumarasamy, learned Senior Counsel appearing for Mr.S.Kaithamalai Kumaran, learned counsel on record for the accused/respondent.

6. This Court carefully perused the evidence on record and the judgments of the Courts below. Suffice it to say that the complainant has satisfactorily established the following facts:

[a] that the impugned cheque [Ex.P.1] bearing No.401170 was signed by the accused;

[b] that the impugned cheque was presented on 02.11.2009;

[c] that the statutory notice u/s 138 of the Negotiable Instruments Act [Ex.P.3] was issued on 12.11.2009 and the same was received by the accused, vide Ex.P.4 on 14.11.2009; and

[d] that the accused did not pay the amount towards the cheque.

7. It is the defence of the accused that the he was owning lorries and that he used to fill gas for his vehicles in "Ganesha Petrol Bunk" owned by the complainant and that he had a running account with the complainant in the year 2002. It is his further case that he had handed over the signed blank cheques to the complainant in the year 2002 and the impugned cheque [Ex.P.1] bearing no. 401170 was also given to the complainant in the year 2002, as payment for filling gas for his lorries. According to the accused, he had settled all his dues with the complainant and that he had not borrowed any money, much less Rs.4,75,000/- on 01.10.2009 as alleged by the complainant. When he asked the complainant to return the impugned unfilled cheque leaf bearing no.401170, the complainant told him that the cheque leaf has been lost and therefore, the accused did not further pursue the matter and left it at that. It is his further case that the complainant had misused the cheque leaf in the year 2009 and has initiated the present prosecution.

[a] During trial, the accused marked his bank account details, vide Exs.D.4 and 5 in order to show that the cheque leaves bearing nos. 401170,

401171, 401173 etc. series were issued and cleared in the year 2002, whereas, the present impugned cheque leaf bearing no.401170 has been put to use by the complainant in the year 2009.

[b] The accused has also marked a legal notice dated 16.11.2009 [Ex.D.3] that has been issued by one Mr.K.R.Venkatachalam, B.A. B.L., Advocate, on behalf of his client one Mr.C.Saravanan to the accused calling upon the accused to repay the sum of Rs.2 lakhs that is said to have been borrowed by the accused from Saravanan on 15.05.2007. Admittedly, the said Saravanan is the son of the complainant. The statutory notice dated 12.11.2009 [Ex.P.3] and notice dated 16.11.2009 [Ex.D.3] have been issued by the same Advocate, viz., Mr.Venkatachalam.

[c] On these facts, the accused put forth a defence that, when the complainant's son has alleged that Rs.2 lakhs that was said to have been borrowed on 15.05.2007 itself was not paid till 16.11.2009, the question of the complainant giving a loan of Rs.4,75,000/- on 01.10.2009 without any documentary evidence is improbable. The first appellate Court found substance in the aforesaid contention put forth by the accused and acquitted him by the judgment impugned.

8. Mr.AR.L.Sundaresan, learned Senior Counsel submitted that the trial Court has found that the accused had not used all the cheque leaves of 401170

series in the year 2002 and therefore, it is possible for the accused to have deliberately retained the cheque leaf bearing no. 401170 , which he has issued to the complainant in the year 2009 towards the discharge of the loan of Rs.4,75,000/-. He also submitted that the transaction between the complainant's son Saravanan and the accused was an independent one and just because both the father and son had approached the same Advocate with their case, it cannot be stated that the complainant had failed to prove the debt.

9. Per contra, Mr.A.K.Kumarasamy, learned Senior Counsel placed strong reliance on the following judgments of the Supreme Court and the relevant passages therefrom are as under:

(1) **K. Prakashan v. P.K. Surenderan [(2008) 1 SCC (Cri) 200]**

> "**22.** It is now trite that if two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken. The appellate court's jurisdiction to interfere is limited. (See *M.S. Narayana Menon* [(2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] and *Mahadeo Laxman Sarane* v. *State of Maharashtra* [(2007) 12 SCC 705 : (2007) 7 Scale 137] .) The High Court furthermore has not met the reasons of the learned trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act without posing unto itself a further question as to how the said burden of proof can be discharged. It furthermore did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different."

(2) Krishna Janardhan Bhat v. Dattatraya G. Hegde [2008 1 CTC 433]:

> "23. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of

the prosecution in a criminal case is different."

(3) John K. Abraham v. Simon C. Abraham [(2014) 2 SCC 236]:

"**9.** It has to be stated that in order to draw the presumption under Section 118 read along with Section 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had the required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant. "

10. This Court gave its anxious consideration to the rival submissions.

11. In this case, except the *ipse dixit* of the complainant that on 01.10.2009 the accused borrowed Rs.4,75,000/- , there is no other material to prove the debt. According to the complainant, the accused borrowed Rs.4,75,000/- on 01.10.2009 and had agreed to return the amount with 12% per annum as interest. The impugned cheque [Ex.P.1] is also dated 01.10.2009. According to the complainant, though the cheque was issued on the date of borrowal, the accused had told him to present the cheque for clearance one month later and therefore, the complainant presented the cheque on 02.11.2009. Strangely, the alleged borrowed amount is also Rs.4,75,000/- and the cheque amount is also Rs.4,75,000/- and there is no explanation as to the interest component, which according to the complainant, the accused had agreed to pay at the rate of 12% per annum.

12. Bearing this in mind, if the second submission of the accused that the complainant would not have given Rs.4,75,000/- as hand loan on 01.10.2009 when his son's debt of Rs.2 lakhs itself was due from the year 2007 onwards, for which, his son has issued a notice dated 16.11.2009 through the same Advocate is viewed, the assertion of the accused that the complainant did not give any loan on 01.10.2009 appears probable.

13. Dictates of common sense states that when a person is allegedly due a huge sum from an earlier period to another, the latter's father will not venture to fall into the same pit by giving a huge loan without obtaining pro note or any document from the loanee. As held by the Supreme Court, in the facts and circumstances of the present case, this Court is of the view that the complainant has failed to prove the debt beyond reasonable doubt, which is a *sine qua non* for fastening criminal liability under Section 138 of the Negotiable Instruments Act.

In the result, this appeal is devoid of merits and the same is dismissed.

11.12.2017

gms

To

1.III Additional District and Sessions Judge, Salem.

2. The Judicial Magistrate No.IV, Salem.

P.N.PRAKASH, J.

gms

Pre-delivery judgment in
Crl.A.No.404 of 2016

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