

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on : 05.06.2017****Pronounced on : 17.07.2017****Coram****THE HONOURABLE Mr. JUSTICE M.VENUGOPAL****Crl.A.No.383 of 2016**

A.R.Chellappan ... Appellant/Complainant

V.

A.R.E.Thirugnanam ... Respondent/Accused

Prayer: Appeal filed under Section 378 of the Criminal Procedure Code, against the Order of Acquittal dated 04.02.2016 made in S.T.C.No.133 of 2015 on the file of the Learned Judicial Magistrate, Fast Track Court, Tiruchengode.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.V.Elangovan

JUDGMENT

The Appellant/Complainant has focused the present Criminal Appeal before this Court as against the Judgment of Acquittal dated 04.02.2016 in S.T.C.No.133 of 2015 passed by the Learned Judicial Magistrate, (Fast Track Court), Tiruchengode.

2.The trial Court, while passing the Judgment in S.T.C.No.133 of 2015 dated 04.02.2016, after analysing the available material on record, came to the resultant conclusion that the Appellant/Complainant had not established that the case cheque was executed by the Respondent/Accused etc. and ultimately, found the Respondent/Accused not guilty in respect of an offence under Section 138 of the Negotiable Instruments Act, 1881 and acquitted him under Section 255(1) Cr.P.C.

Appellant's Submissions:

3.Questioning the Validity, Legality and Correctness of the Judgment of Acquittal dated 04.02.2016 in S.T.C.No.133 of 2015 passed by the Learned Judicial Magistrate, Fast Track Court, Tiruchengode, the Appellant/Complainant has filed the instant Appeal, by taking a prime plea that the execution of Ex.P1 – Cheque was not denied and therefore, the burden is on the side of the Respondent/Accused to rebut the presumption arising under Sections 118 and 139 of the Negotiable Instruments Act, 1881.

4.The Learned Counsel for the Appellant submits that 'Holder of a Cheque' is legally entitled to fill up an instrument to the value as per

Section 20 of the Negotiable Instruments Act and therefore, the aspect of who filled up Ex.P1 – Cheque is of no significance to disbelieve the Complainant's case.

5.The Learned Counsel for the Appellant takes a stand that the evidence of D.W.2 in regard to the similarity in signature seen in Ex.P1 and Ex.D4 would no way dislodge the legal presumption and further, a reading of the evidence of D.W.2 would go to show that the trial Court has considered irrelevant materials to justify its conclusion.

6.It is represented on behalf of the Appellant that the trial Court had failed to appreciate that the testimony of P.W.1 was quite clear, cogent and unshaken one. As a matter of fact, the trial Court had committed an error in disbelieving the evidence of P.W.1 merely based on some suggestion put in cross examination.

7.The Learned Counsel for the Appellant emphatically projects an argument that the words 'shall presume' require the Court to take in account that the liability of the 'Drawer' of the cheque for the amount for which the cheques were drawn on accepting the consideration.

8.The Learned Counsel for the Appellant brings it to the notice of this Court that on behalf of the Respondent/Accused, no evidence was let in to rebut the presumption under Section 139 of the Negotiable Instruments Act except some *ipsi dixit* oral evidence. In this regard, the trial Court had not borne in mind the ingredients of Section 139 of the Negotiable Instruments Act.

9.The Learned Counsel for the Appellant contends that the words 'unless the contrary is proved' occurring in Section 118 and 139 of the Negotiable Instruments Act would make it clear that the presumption was to be rebutted by 'Proof' and not by a mere explanation, which was barely plausible unless the explanation was supported by proof, the mandatory presumption created by Law could not be said to be rebutted.

10.It is the version of the Appellant that in any event Ex.D1 to D8 (Respondent/Accused side documents) would not in any manner lend support to the plea of 'Acquittal'.

11.Lastly, it is the submission of the Learned Counsel for the Appellant that the trial Court had committed an error in discussing the

case beyond the records and dissected the merits and demerits of the rival claims notwithstanding the fact that the case was confined to Ex.P1 – Cheque.

Respondent's Contentions:

12.In response, the Learned Counsel for the Respondent/Accused contends that the trial Court, at paragraph 8 of its Judgment, had clearly observed that the Appellant/Complainant's wife had written the word 'A.R.Chellappan' in the case cheque and deposed to that effect in her evidence and therefore, opined that the case cheque was not executed by the Respondent/Accused to and in favour of the Appellant/Complainant.

13.The Learned Counsel for the Respondent/Accused submits that in regard to Ex.D4 – Cheque dated 04.10.2011, the Appellant/Complainant had denied the same in his evidence, but his wife as D.W.2 had exhibited the version of the Respondent/Accused etc.

14.Finally, the trial Court found that the Respondent/Accused was not guilty in respect of an offence under Section 138 of the Negotiable Instruments Act and consequently, he was acquitted under

Section 255(1) Cr.P.C., which does not suffer from any legally infirmities. As such, the Appeal filed by the Appellant/Complainant is to be dismissed by this Court to secure the ends of Justice.

Gist of the Complaint:

15.At the outset, this Court relevantly points out that in the Complaint in S.T.C.No.133 of 2015 on the file of the trial Court, the Appellant/Complainant had averred that the Respondent/Accused was very much known to him for the past five years and that on 13.02.2015, the Respondent/Accused approached him and asked for a loan of Rs.3,50,000/- for his urgent family and business expenses and further agreed to repay the said amount within a period of one month. In fact, the Respondent/Accused had established him to lend a sum of Rs.3,50,000/- as loan to him.

16.It is the stand of the Appellant that he had agreed to lend the said sum of Rs.3,50,000/- and lent the said amount to the Respondent /Accused as loan and further that, the Respondent/Accused after received the amount and issued the Indian Overseas Bank, Kumarapalayam Branch Cheque bearing No.384749 dated 13.03.2015 with a view to repay the loan amount and the said cheque was issued

after filling up the same in favour of the Appellant/Complainant and added further, gave an assurance to the Appellant to deposit the said cheque in the Bank and to receive the amount/money.

17.It comes to be known that the Appellant/Complainant issued a Lawyer's Notice – Ex.P4 to the Respondent/Accused dated 26.05.2015 since he had not paid the money nor he had given proper reply as to the return of the cheque. The said Ex.P4 – Notice was received by the Respondent/Accused, he had not either paid the amount or given. Under these circumstances, the Appellant had filed a complaint before the trial Court under Sections 138 and 142 of the Negotiable Instruments Act, which was taken on file in S.T.C.No.133 of 2015.

18.It is the case of the Appellant/Complainant that he deposited the aforesaid cheque on 13.03.2015 Indian Bank, Kumarapalayam Branch, but the cheque got returned owing to the 'insufficient funds' in the Respondent/Accused account. Moreover, when the Appellant/Complainant had informed the Respondent/Accused about the lending of the cheque, the Respondent/Accused expressed regret for his mistake and informed that there was a delay in regard to the amount

which was due to him and prayed for two months time and again he deposited the cheque on 12.05.2015 at Indian Bank, Kumarapalayam Branch in his account for the purpose of collection and the cheque got returned on 14.05.2015 due to 'insufficient funds'.

19.To have a panoramic picture of the factual scenario of the Appellant/Complainant's case, it is imperative/profitable for this Court to refer to the evidence of Appellant/Complainant's side witnesses viz., P.W.1 to P.W.3 and the Respondent/Accused side witnesses D.W.1 and D.W.2 coupled with the documentary evidence available on record.

Summation of evidence of the Appellant/Complainant's Side:

20.It is the evidence of P.W.1 (Appellant/Complainant) that he had not shown in his Income Tax Account about the loan advanced to the Respondent/Accused and further that, the Respondent/Accused used to come to his village temple and in that manner, he got acquainted with him for the past five years and that the Respondent/Accused is doing the business of oil, thread, hotel and lending money on interest.

21.P.W.1 adds in his evidence that the Respondent/Accused had asked for a loan from him on 13.02.2015 and before that, there was no money transaction between him and the Respondent/Accused and that the Respondent/Accused before that had not asked for a loan from him at any point of time. Besides these, it is the evidence of P.W.1 that the Respondent/Accused obtained a loan in his house at evening 6'o clock and at evening 5.00 p.m. he asked for a loan and at that time, he was keeping the money in his possession and he gave the loan amount by means of 1000/- and 500/- rupees notes and that when the Respondent/Accused came to him at that time, on the right hand side, he had written his name (Appellant) and also in front of him, he filled up the amount, and affixed his signature and gave the cheque and at that time of money being paid to the Respondent/Accused he and the Respondent/Accused were alone present and that in his Income Tax account, he had shown a sum of Rs.3,50,000/- in his possession.

22.That apart, P.W.1 proceeds to state in his evidence that he received a cheque for the amount paid by him to the Respondent/Accused and that he is not a Partner in Shri Akshaya Auto Finance and that he had not received the Indian Overseas Bank Cheque bearing

No.845254 for Rs.30,000/- (which was given to the said finance); that the said cheque was not given to him; and that he does not remember the said cheque on 04.10.2011 was credited into his account. Furthermore, the details in the case cheque written in different ink were there at the time of handing over of the same and that the date and name in the cheque was not written and it was already written and brought by the Respondent/Accused when he came there.

23.P.W.1 had stated in his evidence that he does not know the Bank account of the Respondent/Accused and in the case cheque, the year '2000' was altered as '1' and that he had not enquired about the same with the Respondent/Accused. In fact, P.W.1 (in his cross examination) had deposed that Ex.P8 – the Income and Expenditure Account submitted before the I.T. Department relates to the Watch Income and Expenditure Account and in Ex.P8, it was not shown separately on what date the loan (money) was given to the Respondent/Accused, but it was mentioned in a whole sum (cumulative fashion) manner. Further, he had admitted in his evidence that in Ex.P8, his total income was shown as Rs.3,02,190/- but he had denied that he had no wherewithal to advance the loan amount to the Respondent/Accused.

24.P.W.2 (Bank Assistant Manager) in his evidence had deposed that the Complainant in Indian Bank, Kumarapalayam Branch is keeping the account for the past 15 years and presently he is keeping the O.D. Account and he does not know how much amount was in the account of the Complainant on 14.05.2015.

25.In reality, P.W.2 (in his cross examination) had stated that in Ex.P1 – Cheque, in respect of the year, the number '1' was found to be altered and further, it was correct to state that if there was any correction, then, the signature of the person, who issued the cheque, ought to be there.

26.P.W.3 (Branch Manager) in his evidence had deposed that Ex.P1 – Cheque was issued to the Respondent/Accused by their Bank and only after seeing the documents, he could say on what date the case cheque was returned.

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Narration of evidence of the Respondent/Accused Side:

27.D.W.1 (Assistant Manager of I.O.B., Kumarapalayam Branch), in his evidence had deposed that Ex.D2 – Cheque Book List True Copy

would point out as to how many book was given to the Respondent/ Accused and in that, from 01.03.2014 CTS cheque was given, from the year 2013, the CTS Cheque was issued and the Bank Account List of the Respondent/Accused - Ex.P3 relates to the period from 01.01.2013 to 11.11.2015 and in the said list, the case cheque was returned for two times and other cheques were not returned; that the cheque No.845254 was issued to the Respondent/Accused and the aforesaid cheque was deposited in their bank by one Chellappan for collection and the Cheque - Ex.P1 got encashed and it was correct to state in the case cheque, '0' was altered as '1'.

28.It is the evidence of D.W.2 (wife of the Appellant/ Complainant) that she is the wife of the Appellant/Complainant and that in respect of Akshaya Auto Finance, there is a Bank Account Kumarapalayam Indian Overseas Bank and in the said finance, the Respondent/Appellant was having transaction and in all the receipts, their Finance Accountant A.R.Chellappan had affixed his signature and he is the Complainant in the case.

29.D.W.2 in her evidence further added that in Ex.D4, the name of A.R.Chellappan were written by her husband and Ex.D11 – Income

and Expenditure Account pertaining the Respondent/Accused (for a period from 01.04.2011 to 31.03.2012) and based on that, the Respondent/Accused was to pay an outstanding amount of Rs.2,50,000/- and since he was paid the interest correctly and there was no action taken through her Finance and it was correct to state that in Ex.D7 – Day/Cash Book pertaining to Shri Akshaya Auto Finance, it was seen that on 01.04.2013 the Respondent/ Accused was paid a sum of Rs.3,50,000/-.

30. Apart from the above, it is the evidence of D.W.2 (in cross examination) that she was a Partner in Akshaya Auto Finance for the past five years and in the year 2011, their Finance was registered (Register number being 337/2011) and it was correct to state that on 01.04.2013 the Respondent/Accused in their Firm had received a sum of Rs.3,50,000/- and on the same day, paid the said amount, settled the account for which he had not issued any cheque and also he had not given any complaint before the Partner about the said cheque.

Salient Features of the Complaint:

31. It cannot be gainsaid that as per Section 138 of the Negotiable Instruments Act, 1881, a complaint is *per se* maintainable

at the instance of an individual in whose favour, a cheque was drawn, only in the specified circumstances: (a) that the cheque is drawn by an 'individual'; (b) the cheque, drawn on an account maintained by such an individual with a banker for payment of any sum by another person from out of that account for the discharge in entirety or in part of the Debt or other Liability, is returned back by the Bank as unpaid one, either on account of the amount standing to the credit of that account is insufficient to honour the cheque or that it exceeds the sum arranged to be paid from that account; (c) If an Individual committing an offence under Section 138 of the Negotiable Instruments Act is a company, or an association of individuals, not only the company but every person, who was in charge of and responsible to the company for the conduct of business of the company, shall be deemed guilty of the offence and liable to be proceeded against, as per decision ***Shiv Kumar Verma V. Manoj Pandey reported in 2011 Cri. L.J. 191 (Del).***

32. It is to be noted that as per Section 142 of the Negotiable Instruments Act, a Complaint should be filed by the 'Payee' or the 'Holder in Due Course' and a cursory reading of Section 142 of the Negotiable Instruments Act does not lay down that the complaint must

be filed by the 'Payee' personally. Even the filing of the complaint by the Power of Attorney Holder of the Payee cannot be said to be an illegal or invalid one, as per decision ***Ramesh (S.) V. Basanth Kumar Patil, (2002) 108 Comp Cas 847 (Kar.)***

Discussions:

33. One cannot ignore a significant fact that an alteration of a negotiable instrument is material if it changes its legal characteristic or its scope as means of 'evidence'; it is material if it easily affects a litigant's substantial rights whether such result really follows or not, and even though the change is abandoned by the party in whose favour it was intended to operate. The well settled legal position is that the integrity and sanctity of contracts cannot be broken by means of invalidating a negotiable instrument against a *Homo Sapien*, who is not consenting/had not consented to the change by means of an 'Alteration', the identity of the instrument is very much destroyed and to hold one of the litigants liable under such circumstances, is to create a contract which he had not agreed upon. If an instrument appears to be altered, it is incumbent on the Complainant to exhibit that the alteration in question was not improperly made.

34.It is to be noted that as long as there is legally enforceable liability either on the date of issuance of the cheque or on the date of encashment of the cheque, the Complainant is entitled to encash the cheque issued by an Accused.

35.The settled legal position is that it is not obligatory on the part of an Accused to let in evidence by entering into the witness box. However, it would suffice that if an Accused can demonstrate from the examination/cross examination of the Complainant and from the materials collected to take advantage of the same to his aid and to demolish the case of the Complainant in regard to the pre-existence of a debt or liability for discharge of which the cheque was issued. In fact, in Law, an Accused is entitled to do like this. An offence under Negotiable Instruments Act, 1881 does not involve any moral turpitude. Also that, Negotiable Instrument offence is not a regular offence like attempt to Murder, Murder Simple Hurt or Grievous Hurt as the case may be.

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36.It is to be borne in mind that ordinarily, the facts of a given case required to form the foundation of presumption of Law, that would exist, then, in that event, no discretion is left with the Court of

Law to arrive at a just, fair and satisfactory decision. But, this would not fetter an individual against whom the presumption is drawn from rebutting it and establishing the contrary. In the case of discretionary presumption, the presumption, if drawn may be rebutted by an explanation which 'might reasonably be true and which is consistent with the innocence' of the Accused. That apart, in case of a mandatory presumption 'the onus rests on the Accused not in a heavier fashion as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be said to be discharged merely by reason of the fact that the explanation offered by an Accused is quite probable and reasonable one. Also, it is to be exhibited that the explanation is free from falsity.

37.Indeed, Section 138 of the Negotiable Instruments Act gets attracted only when the cheque was issued in respect of either past or current liabilities as the case may be. A cheque issued in regard to uncertain and future liabilities would not come within the ambit of Section 138 of the Negotiable Instruments Act. The Law regarding the element of proof required from the Accused to establish his defence is only by means of 'preponderance of probability' that the defence sounds the ring of truth. It is to be mentioned that Section 118 of the

Negotiable Instruments Act is mandatory in character. In fact, only in very exceptional case, there will be an 'irrebuttable presumption'. Ordinarily, the presumption under Section 118 of the Negotiable Instruments Act, 1881 will arise with all its vigour and vitality until the contrary was established. Always it is open to prove that by means of 'Rebuttal' a negotiable instrument was without consideration.

38. It is to be pertinently pointed out that Section 17 of the Indian Evidence Act, 1872 speaks of 'Admission'. An 'Admission' is a statement of fact which dispenses with the production of evidence by conceding that the fact asserted by the opposite side is true. An 'Admission' should be clear-cut and accurate specific statement of an individual in his own words. To put it succinctly, the predominant feature of this classes of evidence consists of its binding nature. Admission is a positive act of acknowledgement or confession as the case may be. In the words of 'STEPHEN', 'An admission is a statement, oral or written, suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding' (vide *STEPHEN'S DIGEST*, 7th Edn., Article 15, p. 24). However, the vague statement cannot be deemed to be an admission. But, to constitute an 'Admission' in Law,

the statement of a litigant should be *prima facie* categorical and an unequal one. An admission has an evidentiary value only to the extent that its maker/propounder has personal knowledge of the matters it contains, as per decision ***Comptroller of Customs V. Western Electric Co. Limited, 1966 (Privy Council) AC 367 at page 371.***

39. One has to bear in mind that an element of fact '*Mens Rea*' is excluded in larger public interest to curtail the instances of dishonouring of cheques with a view to create greater credibility to the commercial dealings/transactions.

40. Indeed, an admission made in the Court of Law is a valid and relevant piece of evidence to be used either legal proceedings. Also that, an Admission would constitute a substantive piece of evidence in the case and a reliance can be placed upon the same for proving the truth of the facts contained therein.

41. It is to be pointed out that the proceedings so far as Section 138 of the Negotiable Instruments Act is concerned, they are in '*Personam*' and that the principle of 'vicarious liability' cannot be extended in Law. A person will be a 'Holder in Due Course' if he is in

possession of a negotiable instrument from the 'Payee' by means of a valid endorsement and delivery of the same. The 'Payee' and the 'Endorsee' of an order of cheque is a 'Holder in Due Course' too within the meaning of definition.

42. At this stage, this Court worth recalls and recollects the decision ***Amaravathi Chit Investments V. Vaithiya (TM) 2005 Cri. L.J. 576 at page 578***, wherein it is, inter alia, observed as under:

".... Though for the said chit transaction, cheque Ex.P.1 was issued, in the affidavit filed in support of the Criminal M.P.No.2078 of 1995 filed before the VIIth Metropolitan Magistrate, the accused has denied the liability as claimed by the complainant in respect of the cheque Ex.P.1. It is stated that the cheque was issued to one Arjun Amaravathi Chits but the same was wrongly misused by the complainant. In the affidavit also, it is stated that there is alteration with regard to the date of cheque and also in the body of the cheque. The hand writing expert D.W.1 has filed report Ex.D3 and also stated in his evidence that in the cheque

Ex.P.1, the writings Q1 and Q2 were made by using ink whereas Q3 and Q5 were made by using ball point pen and in the writing marked as Q1, there is a declourisation of the figures 1993 and the figure 'I' in the month 25-12-1993 marked as Q1, has been inserted with different ink. Therefore, as rightly argued by the learned counsel for the accused and as rightly pointed out by the Metropolitan Magistrate, there have been material alterations in the date of cheque by adding '1' before '2' in the month to make it appear that the cheque was issued on 25.12.1993 so as to bring the cheque within the validity period for the purpose of limitation. The trial Court, considering all these aspects and recording finding that there have been material alterations in the month by adding '1' before '2' for the purpose of limitation and that the complainant has not proved the liability in respect of the cheque issued, rightly acquitted the accused as the offence under S.138 of the Act is not made out. As such, there is no reason to interfere with the said Judgment."

43.Also, this Court pertinently points out the decision **Raj Shekhar Singh V. The State of Bihar and another, AIR 2012 (NOC 28 (PAT.))**, wherein it is, among other things, held as under:

"In the first cheque the date 30.05.2004 has been interpolated after erasing the particular digit over which numeral – 5 has been written. Likewise, in the second cheque also the numeral at the left for month has been erased to overwrite numeral-5. The reason given by trial Judge that there was no need for respondent to issue two cheques on the same date for paying the amount of Rs.50,000/- and 59,860/- appears reasonably correct inasmuch as if the cheques were post-dated and they were meant to make payments of two different amounts, there was no need of issuing two cheques of the two amounts on the same date. The reasons must have been to pay up the borrowed amount in two installments, each separated from the other by same or similar period of time. As such, there must have been some distance inn period of issue of the cheques and as such in the dates. There is some over writings in the numeral of the

year as also the amount, but when the very fact of interpolation has been accepted by the trial court, then could it not be case that in order to justifying the interpolation or in order to making it acceptable to a reasonable person, some other digits might have also been written in the same fashion as was interpolated to create the evidence of camouflaging the act. This inference is simply available when one scrutinizes the amount Rs.50,000/- after which there is a sign of "equal to" and that is succeeded by 00. The last of the '00' appears overwritten. Likewise, the numeral 9 in the amount of Rs.59,860/- also appears overwritten so as to make it probable and consistent with the other over writings on the cheques that it could be in usual course and it was not a subsequent act. It may also be significant to note that the Amanatee Chittha was not produced. The contention was that a copy of it was placed on the record. But the difficulty is that it was not brought on record properly by following the rules of Evidence Act. At any rate, if the Amanatee Chittha was an agreement so as to setting down the

terms of payment of borrowed amount, then the court was rightly making an enquiry as to why that was not properly brought on record. Mere issuance of cheques and bouncing back of it is not an offence, unless the requirements of discharging in whole or part 'any debt or other liability' is alleged and established by evidence. The contention of the respondent that the necessity of changing the dates was there so as to making the filing of the complaint petition in consonance of the provisions of law also appears reasonably acceptable as if the cheques had been issued with some date in the month of June, 2004 or August, 2004. In that case the very complaint petition could not have been maintainable before any court of law. The impugned order of acquittal calls for no interference."

44.It is to be mentioned that in Crl.M.P.No.6517 of 2016 in Crl.A.Sr.No.12866 of 2016, the Special Leave to prefer an Appeal was granted by this Court on 27.04.2016. In this connection, it is relevant for this Court to cite the Judgment of the Hon'ble Supreme Court

(Three Judges Bench), in **Damodar S.Prabhu V. Sayed Babalal H.** reported in **AIR 2010 Supreme Court 1907** wherein at paragraph 14, it is laid down as follows:

"14. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.

In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings."

As a matter of fact, this Judgment till date holds the field.

45.No wonder, a Court of Law is to deliver its Judgment based on the Principles of Law and guided by the constitutional provisions. Moreover, the Court concerned is to be unbiased, impartial and in evaluating the available material evidence on record in a dispassionate fashion and not to be swayed away on surmises, conjectures, presumptions, assumptions or on pre-conceived notions.

46.The categorical case of the Appellant/Complainant before the trial Court in S.T.C.No.133 of 2015 is that the Respondent/Accused on 13.02.2015 borrowed a sum of Rs.3,50,000/- for his urgent family and business expenses from him and issued a post dated cheque bearing No.384749 dated 13.03.2015 for the said amount drawn on Indian Overseas Bank, Kumarapalayam Branch in favour of the Appellant/Complainant. However, the Cheque - Ex.P1 when presented for collection in the Appellant/Complainant Bank on 13.03.2015 was returned on 14.03.2015 due to 'funds insufficient' in Respondent/Accused account. Once again, Ex.P1 - Cheque was deposited for collection based on the instructions of Respondent/Accused (after two months) on 12.05.2015 by the Appellant/Complainant which was

returned on 14.05.2015 owing to the funds insufficient in the Respondent/Accused account. Therefore, the Appellant/Complainant was issued a Legal Notice - Ex.P4 dated 26.05.2015 (which was received on 28.05.2015), but the Respondent/Accused had not replied and also not paid the amount in question. Therefore, the stand of the Appellant/Complainant is that the Respondent/Accused had committed an offence under Sections 138 and 142 of the Negotiable Instruments Act, which resulted in filing of the Complaint before the trial Court, which was taken on file in S.T.C.No.133 of 2015.

47.It is the evidence of P.W.1 (Appellant/Complainant) that the Respondent/Accused obtained a loan of Rs.3,50,000/- from him on 13.02.2015 at about 6.00 p.m. (although he asked for a loan at 5.00 p.m.) and in fact, he gave the said loan amount from his possession and stated that initially, he had not mentioned the said loan in his Income Tax Account, but later he deposed in his evidence that he had shown the sum of Rs.3,50,000/- in his possession and in his Income Tax Account.

48.In the present case, although P.W.1 (Appellant/Complainant) in his evidence had stated that in Ex.P1 - Cheque, the Respondent/

Accused had mentioned the date and the name (at the time of asking for loan), but the evidence of his wife viz., D.W.2 is that it was correct to state that in Ex.D7 on 01.04.2013, it was seen that the Respondent/Accused had remitted a sum of Rs.3,50,000/-. Further, she had deposed in her cross examination in a cocksure fashion that on 01.04.2013 the Respondent/Accused had received a sum of Rs.3,50,000/- and from the said amount, on the same day, he repaid the same and settled the account for which had not issued any cheque and also had not given any complaint before the Partner in respect of the said cheque. In short, the aforestated evidence of D.W.2 cuts the case of the Appellant/Complainant (P.W.1).

49.To put it differently, there is a market variation between the evidence of P.W.1 (Appellant/ Complainant) and the evidence of D.W.1 (Wife of P.W.1) in regard to the due loan amount of Rs.3,50,000/- and the settlement of the same. Inasmuch as D.W.2 had clearly stated in her evidence that in Ex.D7, it was mentioned that on 01.04.2013 the Accused had remitted a sum of Rs.3,50,000/- which clearly goes to establish that the Respondent/Accused had paid back the sum of Rs.3,50,000/-, which he had received as loan amount from the Appellant/Complainant. When the real fact of the matter is that the

Respondent/Accused had paid a sum of Rs.3,50,000/- on 01.04.2013 as mentioned in Ex.D7 and admitted by D.W.2, then, the present C Complaint filed by the Appellant/Complainant against the Respondent/Accused is devoid of merits. Moreover, this Court is of the considered opinion that the evidence of D.W.2 is quite natural, cogent, coherent, convincing and worthy of acceptance. Per contra, the evidence of P.W.1 (Appellant/Complainant) is far from truthful one and therefore, this Court rejects his evidence.

50.As regards the wherewithal/financial resource of the Appellant /Complainant is concerned, it is to be pointed out that in Ex.P8 – I.T. Return (Verification Form) for the Assessment Year 2015-2016 under the Caption 'Profits and Accounts of Business or Profession' speaks of his total income from business and profession as Rs.3,02,190/-. If that be the fact situation, then, it passes beyond one's comprehension as to how P.W.1 (Appellant/Complainant) would have lent a sum of Rs.3,50,000/- to the Respondent/Accused on 13.02.2015 and that too from the amount that he was in possession. Therefore, the evidence of P.W.1 in this regard coupled with documentary evidence viz., Ex.P8 – I.T. Return create a simmering doubt of his financial position to lend the sum.

51. Dealing with the aspect of 'Material Alteration', a mere running of the eye of the Complaint in S.T.C.No.133 of 2015 filed by the Appellant/Complainant shows that the Appellant/Complainant had not mentioned anywhere in the Complaint about the 'alteration' of the year. In fact, P.W.1 had admitted in his evidence that in Ex.P1 – Cheque, the year '0' in '2000' was altered as '1'. In this connection, this Court, on perusal of Ex.P1 – Cheque finds that on the right hand side of the Cheque under the caption 'Date', the numerals '13/03' were clearly written, but next to the numerical '20' (obviously indicating the year) '1' is seen in a smudged overwritten and thick fashion and after the number '1', '5' is written (indicating the year as '2015').

52. In view of the fact that P.W.1 (Appellant/Complainant) himself had admitted in his evidence that the third numeral '0' in the year 2000 was altered as '1' in Ex.P1 – Cheque, then, this Court is of the considered view that in regard to the said alteration, the signature of the Respondent/Accused was not affixed and as such, this Court safely comes to a conclusion that the alteration in question was made/ done without the tacit consent or approval of the Respondent/Accused,

which culminates in avoiding the instrument. Suffice it for this Court to point out that Ex.P1 – Cheque suffers from 'Material Alteration' as per Section 87 of the Negotiable Instruments Act, 1881 and therefore, Ex.P1 – Cheque is held by this Court to be a void one (in the absence of consent of the Respondent/Accused with a view to carry out the common intention of the original parties).

53. Admittedly, in Ex.P1 – Cheque, the third numeral '0' in the year '2000' was altered as '1' which is a 'Material Alteration' and certainly varies the rights, liabilities or legal position of the parties ascertained by Ex.P1 in its original state or otherwise changes the legal effect of the instrument as originally expressed or reduces to certainty some provision which was originally un-ascertained and therefore, it is void. A 'Material Alteration' includes within its fold a new interpolation/inception did not form part of original Ex.P1 document which came into existence between the parties. To put it succinctly, this Court is of the earnest view that no title in Law is derived, cemented on a tampered, tinkered, altered void instrument.

54. There is no two opinion of an important fact that an individual who is in possession of a document subsequent to its execution, should there be any alteration, is to discharge the onus of establishing that it

is not altered.

55.As a sequel to the aforestated detailed qualitative and quantitative discussions and this Court, on going through present facts and circumstances of the case in conspectus fashion, comes to a resultant conclusion that the view arrived at by the trial Court that the Respondent/Accused was not guilty in respect of the offence under Section 138 of the Negotiable Instruments Act is free from legal infirmities. Consequently, the Appeal fails.

Conclusion:

56.In fine, the Criminal Appeal is dismissed. The Judgment of Acquittal passed by the Learned Judicial Magistrate (Fast Track Court), Tiruchengode dated 04.02.2016 in S.T.C.No.133 of 2015 is confirmed by this Court for the reasons assigned in this Appeal.

17.07.2017

Speaking/Reasoned Judgment

Index : Yes

Internet : Yes

Sgl

WEB COPY

To

- 1.The Judicial Magistrate
Fast Track Court,
Tiruchengode.
- 2.The Section Officer,
Records Section,
High Court, Madras.



WEB COPY

M.VENUGOPAL,J.

Sgl



JUDGMENT IN
Crl.A.No.383 of 2016

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17.07.2017