

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.04.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No.428 of 2016

R.Thiagarajan ... Appellant /Complainant

Vs.

P.Saravanan ... Respondent / Accused

PRAYER: Criminal Appeal filed under Section 378(4) of the Code of Criminal Procedure, against the Judgment dated 05.10.2015 passed in S.T.C. No.310 of 2013 on the file of Learned Judicial Magistrate (Fast Track Court), Tiruchengode and convict the Accused for the Offence under Section 138 of the Negotiable Instruments Act, 1881.

For Appellant : Ms.Jebitha
for Ms.Zeenath Negum
For Respondent : Mr.D.Shivakumaran

J U D G M E N T

The Appellant / Complainant has preferred the instant Criminal Appeal before this Court (as an 'Aggrieved Person') as against the judgment dated 05.10.2015 in S.T.C. No.310 of 2013 passed by the learned Judicial Magistrate (Fast Track Court), Tiruchengode.

2. It transpires that the Learned Judicial Magistrate (Fast Track Court), Tiruchengode while passing the impugned judgment on 05.10.2015 in S.T.C. No.310 of 2013 at paragraph No.9 had clearly observed that the case cheque was prior to the year 2008 as evident from Ex.D.5 to D.9 and also through evidence of D.W.2 and that apart, P.W.1 had admitted that he knew about the sale effected by the Respondent/Accused and his Father-in-Law as per Exs.D.3 and D.4 documents and if these were looked into in integral manner, then the version of the accused was acceptable one.

3. Also at paragraph No.10, the trial Court had opined that the version of the Appellant/Complainant was highly a doubtful one if a sum of Rs.40,000/- drawn on 11.10.2013 was taken into account and besides these, the Appellant/Complainant had also

not filed the income tax account before the trial Court, which was an adverse factor against him. Moreover, the Day Book and Ledger were not filed by D.W.3 and that was also held to be a factor which stands against the Appellant/Complainant. Ultimately, the trial Court had found that the Appellant/Complainant was not guilty in respect of the offence under Section 138 of the Negotiable Instrument Act and acquitted him under Section 255 (1) of Cr.P.C.

4. Questioning the propriety 'Judgment of Acquittal' passed by the trial Court on 05.10.2015 in S.T.C.No.310 of 2013, the Appellant/Complainant has filed the present Criminal Appeal before this Court by taking a plea that the trial Court should have convicted the Respondent/Accused when he had admitted the signature of the Respondent/Accused in the case cheque. Further, it is the stand of the Appellant/Complainant that the Respondent/Accused had failed to rebut the presumption under Section 139 of the Negotiable Instruments Act, 1881.

5. The Learned Counsel for the Appellant urges before this Court that the trial Court should not have taken into account the new defence raised by the Respondent/Accused, which was not put forward in the reply notice Ex.P.5 or under the questioning made under Section 313 of Cr.P.C.

6. It is represented on behalf of the Appellant that the Respondent/Accused is a 'Chronic Defaulter' and had borrowed the amount from various persons and issued cheques, which were all dishonoured as seen from Ex.P.7 'Statement of Account'.

7. The Learned Counsel for the Appellant brings it to the notice of this Court that the Appellant/Complainant had sufficient amount in Ex.P.7 'Statement of Account' and further the Respondent/Accused had fraudulently sold his properties, which resulted in 'Insolvency Petition' being filed against him by the Appellant's Father-in-Law.

8. Conversely, it is the contention of the Learned Counsel for the Respondent/Accused that the cheque given by the accused in the year 2007 when he took loan from Senthil Murugan Finance, was presently used in a clandestine fashion and in fact, the case cheque was prior to the year 2008 as seen from Exs.D.5 to D.9 and from the evidence of D.W.2.

9. Further, the Learned Counsel for the Respondent/Accused refers to Ex.P.6 - Bank Account Book and on perusal of the same, it is lucidly clear that from 5.10.2013 to 7.10.2013 a sum of Rs.1,20,000/- was withdrawn and on 8.10.2013, a sum of Rs.1,00,000/- was paid through Net Bank. Subsequently, the Appellant had withdrawn a sum of Rs.40,000/- on 11.10.2013 and

even after taking into account of the same, the case of the Appellant/Complainant that the Respondent/Accused had borrowed a sum of Rs.2,00,000/- from him as hand loan for his urgent expenses on 16.10.2013 was a doubtful one, as opined by the trial Court.

10. Moreso, when the Appellant/Complainant's stand was that all his 'Revenue and Expenditure' were effected through 'Bank Account', then there is no other document other than Ex.P.1, cheque dated 17.10.2013 to show that the Respondent/Accused had borrowed a sum of Rs.2,00,000/- from the Appellant/Complainant. Even P.W.1 (Appellant/Complainant) had not adduced any satisfactory evidence before the trial Court that he withdrew a sum of Rs.2,00,000/- from the 'Bank Account' and paid the same to the Respondent/Accused. Added further, it is represented on behalf of the respondent that the non production of 'Income Tax Account' before the trial Court, to show that a sum of Rs.2,00,000/- was lent by the Appellant to him was an adverse factor.

11. It is to be pointed out that Section 138 of N.I. Act creates a new offence based on a cheque returned unpaid and subject to certain conditions. The said Section and its ancillary provision were included in Chapter XVII of Act. The aforesaid Chapter was introduced in the Act with effect from 01.04.1989. An offender in terms of Section 138 of N.I. Act is the 'Drawer' of cheque.

12. Undoubtedly, Section 138 of N.I. Act is a penal provision. To attract Section 138 of N.I. Act, the dishonoured cheque should have been issued in discharge or wholly or in part of any debt or other liability of Drawer to Payee.

13. That apart, Section 139 of N.I. Act, casts a presumption that a 'Holder of cheque' by receiving the same towards discharge of a liability. Section 140 of the Act, precludes a Drawer from pleading that he had no reason to believe that the cheque would be dishonoured. At an early stage, a Court of Law is to pursue a complaint with a pragmatic perception and not to scrutinize a complaint in a meticulous fashion as opined by this Court.

14. An existence of a legally recoverable debt is a not a matter of presumption under Section 139 of N.I. Act, which nearly raises a presumption in favour of Holder of cheque and the same was issued for discharge of any debt or other liability.

15. At this juncture, this Court aptly points out that by means of Section 6 of 'Banker's Books' of Evidence Act, it is only an application of any party to a legal proceeding, a Court

of Law may order a party to a legal proceeding to make an inspection of 'Books Account' of the Bank. Indeed, the word 'party to a legal proceedings' used there would enable the inspection to be made only to show such inspection was necessary for the purpose of such proceedings. To put it succinctly, there ought to be a main proceeding, in which, the Court might come to the conclusion that such inspection was necessary and it was only in such a proceeding that order can be passed for an inspection as per the decision in KATTABOMMAN TRANSPORT CORPORATION v. STATE BANK OF TRAVANCORE reported in AIR 1992 (Ker) 351 and 357.

16. In the instant case, it is to be noted that the cheque is dated 17.10.2013 and the number of the said cheque is 805254 for Rs.2,00,000/-. It is true that the cheque is not an "Account Payee Cheque". Before the trial Court, the Manager of the Bank was examined as P.W.2. In fact, P.W.2 in his evidence (in cross examination) had deposed that it was correct to state that through ATM on a single day, a sum of Rs.2,00,000/- could not be withdrawn and furthermore, he had categorically stated that in a single day from the bank account through ATM over and above, Rs.40,000/- could not be drawn and if any amount over and above Rs.40,000/- was to be drawn, then a person would have to appear before the Bank in person and to fill up the challan and to draw the amount and it was correct to state that on 16.10.2013 in that fashion, from the account the amount was not taken.

17. In this connection, it is useful for this Court to make a pertinent mention that P.W.1 (in his cross examination) had admitted that it was correct to state that all the transactions are within the limits of the Income Tax and he had shown the loan amount of Rs.2,00,000/- in his Income Tax Account.

18. Further, it is the evidence of P.W.1 that the Respondent/Accused on 16th October 2013, issued a cheque dated 17.10.2013 and asked for a loan and he paid the said amount to the Respondent/Accused on the same day. Besides, P.W.1 had tacitly admitted in his evidence that it was correct to state that if one can seize the bank account list for ascertaining the sum of Rs.2,00,000/- drawn on that day.

19. Significantly, it is to be borne in mind that in the present case even though P.W.1 had stated that it was correct to state that if one seizes the bank account, it can be found out as to withdrawal of a sum of Rs.2,00,000/-. But, P.W.2, the Bank Manager had stated in his evidence that on that day, it was not correct to state that on a single day, through ATM a

sum of Rs.2,00,000/- could not be drawn and further on a single day, through ATM, one cannot withdrawn more than Rs.40,000/-. Hence, there is a variance in regard to the evidence of P.W.1 and P.W.2. Furthermore, on 11.10.2013, the appellant, P.W.1 had withdrawn only a sum of Rs.40,000/- from his bank account. Even a copy of the income tax return or 'Income Tax' Statement relating to the Appellant/Complainant was not filed before the trial Court. Moreover, the Day Book and Ledger of one 'Senthil Murugan Finance' run by the complainant's Father-in-Law and his wife were not produced before the trial Court in the main case.

20. The crucial fact which cannot be ignored in the present case is that through documents Ex.D.5 to D.9, it comes to be known that the case cheque Ex.P.1 was prior to 2008 and that on the alleged money of borrowal made by the Respondent/Accused, the Respondent/Accused's father had sold the properties as evidenced from Ex.D.3 and Ex.D.4, which fact was admitted by the Appellant as P.W.1.

21. In a criminal case, it is the duty of the Complainant/prosecution to prove the case against the Respondent/Accused beyond reasonable doubt. But, at the same time, it could not be brushed aside that the offence under Section 138 of the Negotiable Instruments Act is a civil liability clothed in a criminal colour. Further, under our constitutional scheme of things an accused is entitled to maintain silence in respect of an offence under Section 138 of N.I. Act. Apart from that, under Section 138 of N.I. Act in a Section of Negotiable Instruments Act/Criminal case, it is open to the Respondent/Accused to fall back upon the loopholes in the evidence of the Complainant/prosecution witnesses and to take advantage to the maximum extent. In short, the Respondent/Accused can gather/collect materials in his favour from the evidence of prosecution witnesses, who were examined on the side of the Complainant.

22. It is to be noted that, it is for the Appellant/Complainant to prove that the Respondent/Accused had borrowed a sum of Rs.2,00,000/- on 16.10.2013 especially when the loan transaction was made under a cheque. In the instant case, from the evidence of D.W.3, it is clear that the complainant's Father-in-Law and his wife were partners in Senthil Murugan Finance till 30.09.2009. Even the evidence of P.W.3 lies on the same line of the evidence of D.W.3. As seen from Exs.D.10 and Ex.D.11, the Appellant/Complainant's father-in-law and his wife were partners of Senthil Murugan Finance. When the Respondent/Accused took loan in the year 2007 in Ex.D.10 namely, the petition of I.P.No.19 of 2013 at paragraph

Nos.4 and 5, it was mentioned that the Respondent/Accused and his father had received a sum of Rs.2,00,000/- each as loan. In the present case, the Respondent/Accused had established to the satisfaction of the Court that when he availed the loan in the year 2007 from Senthil Murugan Finance at that time, the cheque given by him was presently used by the Appellant/Complainant and accordingly, the instant case was filed in the form of complaint before the trial Court. In short, this Court is of the considered opinion that the Respondent/Accused had raised some valid/probable defence in the case. Moreover, the Appellant/Complainant had not come out with a case against the Respondent/Accused in clear and crystalline fashion because of the reason that a cheque purportedly issued by the Respondent/Accused in the year 2007 to Senthil Murugan Finance was obviously made use of by the Appellant/Complainant to lodge a complaint against the Respondent/Accused.

23. In the light of the foregoing discussions and in view of the fact that the Appellant/Complainant had not established his case to the subjective satisfaction of this Court, this Court on the basis of the facts and the circumstances of the case comes to an irresistible conclusion that the trial Court on an appreciation of entire oral and documentary evidence available on record of respective sides had rightly found the Respondent/Accused not guilty and acquitted him under Section 255(1) of Cr.P.C (relating to offence under Section 138 of Negotiable Instrument Act) which does not suffer from material irregularities or patent illegalities in the eye of Law. Consequently, Criminal Appeal fails.

24. In fine, the Criminal Appeal is dismissed. The judgment of the trial Court dated 05.10.2015 in S.T.C.No.310 of 2013 is confirmed by this Court for the reasons assigned in this appeal.

Sd/-

सत्यमेव जयते
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate,
(Fast Track Court),
Tiruchengode.

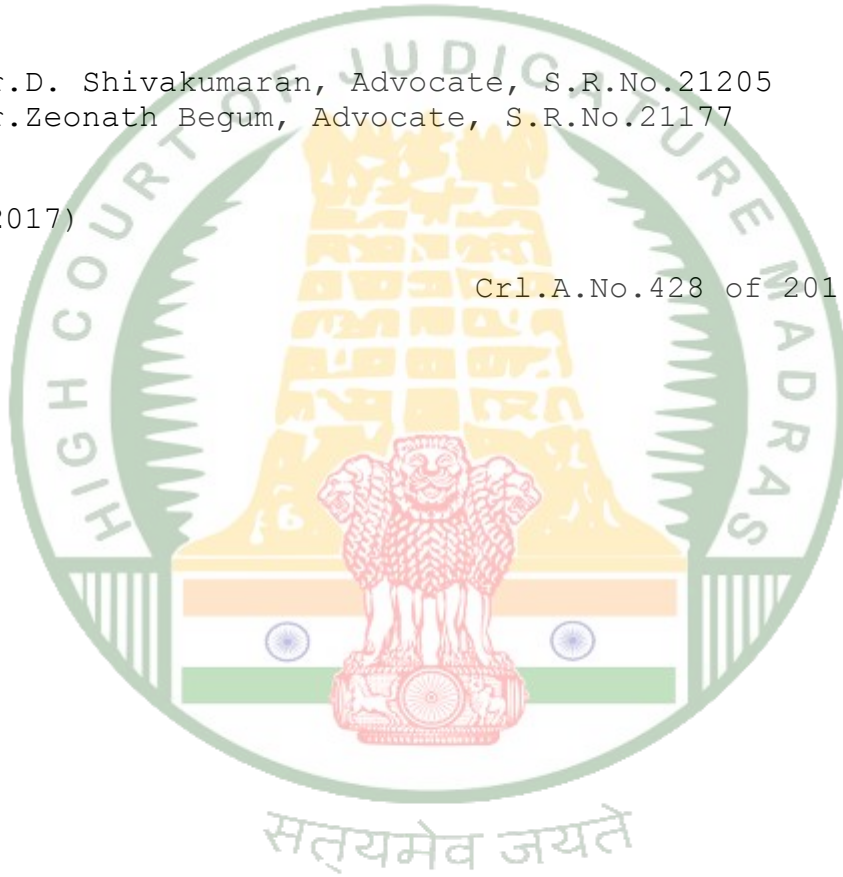
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Namakkal

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Crl.Section, High Court, Madras

+1cc to Mr.D. Shivakumaran, Advocate, S.R.No.21205
+1cc to Mr.Zeonath Begum, Advocate, S.R.No.21177

rsy(CO)
md(25/04/2017)

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