

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.04.2017

Pronounced on : 26.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

CRL.A.No.429 of 2016

R.Thangavel

... Appellant/Complainant

Vs.

K.Palanisamy

... Respondent/Accused

PRAYER: This Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure against the order passed in S.T.C.No.380 of 2011 dated 08.10.2015 on the file of the Judicial Magistrate No.II, Pollachi.

For Appellant : Mr.R.Nandhakumar
For Respondent : Mr.N.Ponraj

J U D G M E N T

The Appellant/Complainant has preferred the instant Criminal Appeal as against the judgment of the acquittal dated 08.10.2015 in S.T.C.No.380 of 2011 passed by the Learned Judicial Magistrate No.II, Pollachi.

2. The Learned Judicial Magistrate No.II, Pollachi, while passing the impugned judgment of the acquittal in S.T.C.No.380 of 2011 on 08.10.2015 at para-16 ... among other things observed that ... 'on the side of the Respondent/Accused, a presumption in his favour as per Section 139 of NI Act was made and further, the Appellant/Complainant had failed to establish the ingredients of his case and finally came to the conclusion that the offence under Section 138 of NI Act was not established against the Respondent/Accused' and resultantly, acquitted him under Section 255(1) of Cr.P.C.

3. Questioning the correctness, validity and legality of the judgment of the acquittal, dated 08.10.2015 in S.T.C.No.380 of 2011 passed by the Trial Court, the Appellant/Complainant has preferred the present Criminal Appeal before this Court, by taking a plea that the trial Court had failed to take into consideration that in the instant case, the execution of Ex.P2, Cheque dated 30.10.2010 was not denied. Further, when the

execution of cheque was not denied, the burden is on the part of the Respondent/Accused to rebut the presumption under Section 118 and 139 of N.I. Act, 1881. In this connection, the Learned Counsel for the Appellant/Complainant takes a stand that the trial Court had not considered the legal aspects of Sections 118 and 139 of N.I. Act, which has resulted in serious miscarriage of justice.

4. The Learned Counsel for the Appellant/Complainant contends that only 'a smoke of suspicion' alone was endeavoured to be created by the Respondent/Accused and the trial Court without viewing the veracity of the defence version, had simply acquitted the Respondent/Accused, which is clearly unsustainable in the eye of law.

5. The Learned Counsel for the Appellant urges before this Court that on the date of issuance of Ex.P2-Cheque, there was an existence of legally enforceable debt and to dislodge the mandatory presumption as per Section 139 of N.I. Act, 1881, the Respondent/Accused had not pleaded any probable, acceptable and reasonable defence. On the contrary, it is represented on behalf of the appellant that the appellant had clearly adduced a impeccable, unimpeachable and cogent evidence in support of his contention.

6. The Learned Counsel for the Appellant projects an argument that the Respondent/Accused had admitted the signature and execution of the cheque and therefore, it is improper and unfair on the part of the trial Court to acquit the respondent / accused, of course based on the presumption and assumption.

7. The Learned Counsel for the Appellant brings to the notice of this Court that the Respondent/Accused as RW1, had deposed and admitted that the appellant/complainant had filed a civil suit against him based on the promissory note executed by him and the same was decreed in favour of the appellant/complainant.

8. The Learned Counsel for the Appellant draws the attention of this Court that the Respondent/Accused had deposed that the earlier cheque proceedings between him and RW2 (Ponmalaiyur Arumugam) was settled in Appeal Proceedings and therefore, it is improper to draw the presumption against the present Ex.P2-Cheque, when the Respondent/Accused had alleged and admitted that he had not taken any action to get back all the documents given by him to the said RW2.

9. The Learned Counsel for the Appellant contends that the evidence of PW2 (a third party to the present Cheque Ex.P2) that he had not disclosed his earlier transaction with the respondent /accused to the appellant/complainant would not be a

legal and substantial reason for the Respondent/Accused to refute the presumption. However, this vital aspect of the matter, was omitted to be looked into by the trial Court in proper and real perspective.

10. Finally, it is the stand of the Appellant that the judgment of the acquittal passed by the trial Court is based on erroneous view or the result of ignoring legal and admissible evidence with the result that the finding arrived at or really a perverse one.

11. The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court in T.VASANTHAKUMAR V. VIJAYAKUMARI reported in 2015 CRI. L. J. 2853 at Special page 2855 and 2856 wherein at paragraphs 8 to 10, it is observed as under:

"8.We have heard the Learned Counsel appearing for the appellant as also the Learned Counsel appearing for the respondent. The complainant has alleged that the money (loan) was advanced to the defendant on 20-05-2006 in relation to which the cheque was issued to him by the defendant on 16-01- 2007. The cheque was for Rs.5 lakhs only, bearing No.822408. It is of great significance that the cheque has not been disputed nor the signature of the defendant on it. There has been some controversy before us with respect to Section 139 of Negotiable Instruments Act as to whether complainant has to prove existence of a legally enforceable debt before the presumption under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. Section 139 reads as follows:

"139. Presumption in favour of the 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."

9.This Court has held in its three judge bench judgment in Rangappa v. Sri Mohan (2010) 11 SCC 441:

"The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant.

10. Therefore, in the present case since the cheque as well as the signature has been accepted by the accused respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence."

12. The Learned Counsel for the Appellant reliance on the order of the Bombay High Court in Criminal Application No.2217 of 2005 between DIGAMBER MADHAVRAO UCHALE V. PRAKASH MADHAV SOLANKE, dated 15.09.2016 wherein at paragraphs 8 and 9, it is observed as under:

"8. It is thus clear that the previous judgment which is final can be relied upon under Sections 40 to 43 of the Evidence Act. In civil suit between the parties, the principle of res-judicata may apply. In criminal case section 300 of Cr.P.C. makes a provision that once a person is convicted or acquitted he may not be tried if the conditions mentioned therein are satisfied. If the criminal case and civil proceedings are for the same cause, the judgment of the Civil Court would be relevant, if conditions of any of the sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in section 41. Section 41 provides, which judgment would be conclusive proof of what is stated therein. In the instant case, Section 41 has no application. Further, the judgment, order or decree passed in previous civil proceedings if relevant, as provided under sections 40 and 42 of the Evidence Act or other provisions of Evidence Act then in each case the Court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. The Court may take into consideration the illustration of Section 42, which makes the position clear. Thus in the instant case, the Learned Magistrate would require to consider all evidence

whether the judgment, order or decree passed in the said Special Civil Suit is relevant and if relevant, its effect.

9. It is thus clear that in view of the provisions of Sections 41, 42 and 43 of the Evidence Act, to what extent the judgment given in the previous proceedings are relevant, is provided and therefore, it would be against the law, if it is held that as soon as the judgment and decree passed in Civil Suit, criminal proceedings are required to be dropped, if the suit is decided against the plaintiff, who is complainant in criminal proceedings. In view of the observations made by the Hon'ble Apex Court, I do not find any substance in the submissions made by Learned Counsel for the applicant that the findings recorded by the criminal court stand superseded by the findings recorded by the Civil Court."

13. Conversely, it is the submission of the Learned Counsel for the Respondent/Accused that the Respondent/Accused does not know who is the complainant and that the Ex.P1-pro note dated 14.07.2008 and the cheque was given by the Respondent/Accused to one Ponmalaiyur Arumugam, and the said Arumugam, based on the cheque executed in his favour, had filed one case and the said case, the trial Court passed the judgment and at the time of Appeal, both of them had compromised the matter and that the said cheque copy of the Respondent/Accused was in possession of the appellant/complainant and based on the said cheque, through the appellant/complainant (Arumugam relative), the appellant / complainant had filed the present case.

14. The Learned Counsel for the Respondent/Accused contends that S.T.C. Case was filed before the trial Court in the year 2011 and that in the complaint, the appellant/complainant had stated that the case transaction took place in the year 2008. The appellant/complainant in his evidence as PW1, had admitted that he does not know about the full details of the family members of the Respondent/Accused and also the extent of lands were owned by him.

15. Learned Counsel for the Respondent/Accused draws the attention of this Court to the fact that the appellant/complainant in his cross examination as PW1, had admitted that one Ponmalaiyur Arumugam was known to him for the past 15 years and further, the appellant/complainant's case cheque number and the case number with which already the said Ponmalaiyur Arumugam had filed the case against the Respondent/Accused are consecutive in numbers. Further, the said Arumugam was a second witness. In Ex.P1- pro note [Xexox copy

marked before the trial Court] for Rs.6 lakhs dated 14.07.2008. In this connection, this Court relevantly points out that RW2 (Ponmalaiyur Arumugam] in his evidence has deposed that he is residing at Ponmalaiyur and that he knows the Respondent/Accused for the past seven years based on the monetary transactions and that as against the Respondent/Accused, he had filed one cheque case and cheque No.643620 of Pollachi Dhanalakshmi Bank, was shown to him and the said cheque was Ex.P1 and the said Cheque is in trial held in the trial Court and that the second Ex.D2-Pro note was given by the Respondent/Accused and based on the compromise, money was paid and hence, the case was closed.

16. RW1 in his evidence had stated that in writing the present case pro note, he went to the house of the appellant/complainant and that the pro note was executed for Rs.6 lakhs and that he does not know wife's name of the appellant/complainant and that the appellant/complainant was not his relative and he withdrew the case against the Respondent/Accused because of the reason that the Respondent/Accused had paid the money in full to him.

17. Ex.D1 is the xerox copy of the judgment of the C.C.No.384 of 2002 dated 29.07.2004, passed by the Learned Judicial Magistrate No.II, Pollachi. A perusal of the judgment of Ex.D1, indicates that the Respondent/Accused [K.Palanisamy] had found guilty in respect of the offence under Section 138 of NI Act and he was awarded with a punishment of one year Simple Imprisonment and further he was imposed with a fine of Rs.5000/-, in default of payment of fine, he was directed to undergo further six months Simple Imprisonment. As a matter of fact, the case in C.C.No.384 of 2002 was filed by the Arumugam (RW2) in S.T.C.No.380 of 2011.

18. In the present case, the Respondent/Accused as RW1, before the trial Court, had deposed that there was no truth in the present complaint and when there were monetary transactions between himself and Ponmalaiyurr Arumugam, he issued two cheques bearing Nos.643619 and 643620. Based on the said cheques, the present complaint was filed before the trial Court and that he does not know about the appellant/complainant. RW1 [in his cross examination] had stated that he had not given any police complaint against Arumugam and that seven years had lapsed from the date of filing of his case against Arumugam and it was correct to state that the Appellant/Complainant had filed a promissory note case on the file of Sub Court, Pollachi and in the said case, Ponmalaiyur Arumugam had affixed his signature as a witness.

19. It is the evident of the appellant / complainant as PW1 that the Respondent/Accused had executed Ex.P1-pro note, dated 14.07.2008 in his favour and that he was not in a position to

file original pro note proceedings, before the Sub Court, Pollachi. Based on the said pro note, a case was filed against the Respondent/Accused and that the Respondent/Accused gave a cheque Ex.P2, dated 30.10.2010, to him and the said return memo was Ex.P3 and that he issued a lawyers notice Ex.P4, dated 03.12.2010, to the Respondent/Accused for which Ex.P5 reply dated 28.12.2010, was issued by the Respondent/Accused.

20. PW1 in his cross examination, had stated that he knows the accused for the past 15 years and he got acquaintance with one Arumugam when he went to marriage and that when the Respondent/Accused handover the cheque to him, he and the Respondent/Accused were present and that appellant's sons were not present and that the Respondent/Accused written the cheque when he came to him and it was correct to state that all the filled up cheques were given by the Respondent/Accused and he does not know whose signature was seen in the cheque and that the Respondent/Accused had not given any money towards interest. But he had received money from him for interest. PW1 proceeds to state that in his evidence that the Respondent/Accused executed the pro note in his house [Appellant's House] and at the time of Respondent/Accused executing the pro note in his house, adjacent garden labour boy was present and that Nachimuthu filled up the pro note and that he had not called the said Nachimuthu But the said Nachimuthu had put his signature as witness in the pro note and that Ponmalaiyur Arumugam had also fixed his signature as witness in the pro note.

21. PW1 had also stated in his evidence that for Ex.P5 reply notice issued by the Respondent/Accused, he had not issued any 'Rejoinder'. At this stage, this Court, on perusal of the contents of the complaint in S.T.C.No.380 of 2011 on the file of the trial Court finds that the Appellant/Complainant had averred that the Respondent/Accused for his family expenses and for his form expenses, received a loan of Rs.6 lakhs in cash, agreeing to pay interest at 0.75 p. for Rs.100/- per month. Lastly, the Appellant on 20.10.2010, met the Respondent/Accused and asked him to repay the loan amount with interest, for which the Respondent/Accused informed that he would pay a sum of Rs.6 lakhs after 10 days and by uttering the same, issued a post-dated cheque dated 30.10.2010 for Rs.6 lakhs, drawn in the name of Dhalalaxmi Bank, Pollachi Branch and cheque Number was 603619 to him.

22. In the complaint, the Appellant had also averred that the Respondent/Accused contacted him and informed him that the cheque was not to be deposited for collection on 30.10.2010 and informed him that after 10.11.2010, the cheque could be given to the bank for collection and accordingly, on 11.11.2010, he deposited the said cheque at Canara Bank, Jameen Othukuli Branch. But the said cheque got returned on 15.11.2010 mentioned

as 'refer to drawer'. Thereafter, the appellant/complainant issued Ex.P4 notice dated 03.12.2010, to the Respondent/Accused for which, the Respondent/Accused gave Ex.P5, reply.

23.The Appellant/Complainant filed a complaint against the Respondent/Accused under Section 138 of N.I. Act, 1881 before the trial court which was taken on file in S.T.C.No.380 of 2011.

24.The Learned Counsel for the appellant/complainant categorically submits that as against the Respondent/Accused, a civil suit in O.S.No.34 of 2011 was filed before the Sub Court, Pollachi, by the appellant/complainant and in the said suit, the appellant/complainant had filed a complaint by mentioning that the Respondent/Accused as evident borrowed a sum of Rs.6 lakhs on 14.07.2008 agreeing to pay interest of Rs.0.75 p. for Rs.100 per month and for the said transaction, executed a pro note and thereafter, he had not paid either interest or principal. Therefore, the appellant/complainant had filed a suit against the Respondent/Accused for recovering a sum of Rs.7,40,700/- together with interest at 9% pa. from the filing of the case till date of payment .

25. The Learned Counsel for the appellant/complainant brings to the notice of this Court that the suit in O.S.No.34 of 2011 filed by the appellant/complainant against the Respondent/Accused for the loan of Rs.6 lakhs by means of pro note, dated 14.07.2008, was decreed by the trial Court on 15.07.2014.

26. It comes to be known that the suit in O.S.No.34 of 2011 on the file of the trial Court was filed on 23.02.2011. According to the Learned Counsel for the appellant/complainant that the cause of action of the said suit arose on 14.07.2008 onwards for the principal sum of Rs.6 lakhs, interest calculated from 14.7.2008 to 22.02.2011 at the rate of 9% p.a. was Rs.1,40,700/-. The Respondent/Accused in the said civil suit in O.S.No.34 of 2011 was directed to pay a sum of Rs.7,40,700/- and to pay Rs.9% for the principal sum of Rs.6 lakhs from the date of filing of the suit till the date of passing of decree.

27. It is to be borne in mind that the judgment of Criminal Court in S.T.C.No.380 of 2011 was delivered by the trial Court on 08.10.2015. It may not be out of place before this Court to point out that Section 42 of Indian Evidence Act 1872 admits as evidence all judgments inter parties which would operate as 'Res judicata' in second suit. Section 41 of the Indian Evidence Act, 1872, admits judgments 'In Rem' as evidence in a later suit, where the existence of right is in issue, whether between the same litigants or otherwise.

28.It is to be noted that by production of Judgment, a

Judgment is to be proved under Section 43 of the Evidence Act and not the correctness of the decision as per decision TRIPURA SEETHAPATHI V. ROKHAN VENKANNA reported in 1922 MADRAS at page 71.

29. It is to be pointed out that the judgment in Criminal Court may be relevant only to point out that there was a trial resulting in Conviction or Acquittal. The decision of the concerned Criminal Court cannot be pressed into as one binding in civil action. The Criminal Court Judgement is held admissible evidence in civil proceedings only with an aim of exhibiting that there was a Criminal Case with identical facts entailing an Acquittal. Further, an admission in criminal proceedings cannot be proved in a civil case by furnishing the Criminal Court Judgment as a Civil Court is bound to arrive at a decision by itself, based on the given facts placed before it. Any finding in criminal proceedings, is not binding in civil proceedings as opined by this Court. Besides this, it cannot be forgotten that a judgment of acquittal is irrelevant in a civil suit based on the same cause of action, just as a judgement of conviction is irrelevant in a civil suit that facts on which conviction is passed as per decision ONKARMAL V. BANWARILAL reported in AIR 1962 RAJ. at page 127.

30. It is seen from Ex.D2 [Xerox copy of cheque 15.02.2002], the said cheque was signed by [Palanisamy] the Respondent/Accused in S.T.C.No.380 of 2011. The said cheque was issued to and in favour of Arumugam for Rs.2,42,000/- and the said cheque bears the name of Dhanalakshmi Bank, Pollachi. As a matter of fact, the cheque is bearing No.643620.

31. More importantly, it is to be significantly pointed out before this Court that Ex.P2-cheque, dated 30.10.2010 purportedly issued and cheque number was 643619. In the said cheque, the Respondent/Accused has signed. It was addressed R.Thangavel (appellant/complainant). A perusal of Ex.2-cheque, bearing No.643619 dated 30.10.2010, shows that the number of a cheque is 643619. But the number of the cheque in Ex.D2 given by the Respondent/Accused [K.Palanisamy] was to A.Arumugam for Rs.2,42,000/- dated 15.02.2002 bearing cheque No.643620. Therefore, the evidence of RW1 [Respondent/Accused] in a his chief examination that he gave two cheques bearing Nos.643619 and 643620 to Ponmalaiyur Arumugam 15 years before, when he had transaction with the said Arumugam appears to be quite a probable one. This gets strengthened because of the reason that Ex.D2 cheque issued by the Respondent/Accused to A.Arumugam bears the date 15.02.2002 whereas Ex.P2 bears the date 30.10.2010. Further more, the transaction in the complaint of the appellant's/complainant before the trial Court in S.T.C.No.380/2011, the date of loan taken by the Respondent/Accused was mentioned as 14.07.2008 for Rs.6 lakhs

and that a post-dated cheque dated 30.10.2010 was purposely given by the Respondent/Accused in favour of the appellant/complainant.

32. It is to be remembered that an offence under Section 138 of N.I. Act, although it is a civil liability it is clothed in a criminal form. Further more, the presumption under Section 139 of N.I. Act is not automatic. Ordinarily, the Respondent/Accused need not enter into the witness box as witness. In fact, he can remain silent. In constitutional scheme of things, however, the Respondent/Accused without entering into box and adducing evidence, can shake the evidence of the Complainant/PW1 and further, the Respondent/Accused can gather material in his favour from the evidence of PW1. It would suffice that if the Respondent/Accused creates an atmosphere of 'preponderance of probabilities' in his favour. Unfortunately, in the present case, the judgment in S.T.C.No.380 of 2011 on the file the trial Court, was delivered on 08.10.2015. But the judgment in Civil Suit in O.S.No.34 of 2011 between the Appellant/Complainant and the Respondent/Accused, the judgment was delivered on 15.12.2014. In fact, the judgment of the Civil Court in O.S.No.34 of 2011 dated 15.12.2014 was very much available in favour of the Appellant/Complainant. However, he had not marked the same as an exhibit before the trial Court on his side.

33. The well settled legal position is that 'onus of proof' is different in a civil case. In a civil case, 'preponderance of probability' is enough. However, in a criminal case, the prosecution is to establish its case against the accused beyond reasonable doubt. There is no legal principle that the findings recorded by the Court either in civil or criminal proceedings shall be binding between the parties while dealing with the same subject matter and both cases will have to be adjudicated on the basis of evidence let in.

34. Ordinarily, an Appellate Forum is not meant to fill up the gaps or omissions or lacunae in the trial court case. After all, the prime consideration is to avoid miscarriage of justice. In the present case in S.T.C.No.380 of 2011 on the file of the trial Court, there had existed a reasonable doubt and the trial Court delivered a judgment of acquittal in the main case. The circumstances relied on by the Respondent/Accused in S.T.C.No.380 of 2011 on the file of the trial Court, cannot be considered to be irrelevant or insignificant ones in the considered opinion of this court. It is true that this Court is an Appellate Authority has plenary power than that of trial Court in the manner Assessment, Trial, and Appreciation of Evidence, to decide the disputed points.

35. As an appellate Court, the High Court in Appeal against

the Acquittal is to tread cautiously and in fact, the High Court should be circumspect in disturbing the finding of the acquittal passed by the trial Court. Further, on flimsy grounds, the finding of an 'Acquittal' on appreciation of evidence by the trial Court would not be easily displaced by the High Court sitting in Appellate jurisdiction. Indeed 'an Appeal' from an acquittal should be in an exceptional circumstance or for compelling reasons as the case may be. Of course, in Law, it is an extraordinary remedy, notwithstanding the fact that preferring an 'Appeal' is a statutory right envisaged under Criminal Procedure Code.

36. Be that as it may, on a careful consideration of respective contentions and also taking note of the facts and circumstance of the present case, [which floats on the surface] in a cumulative fashion, this Court comes to an inevitable conclusion that the judgment of acquittal passed by the trial Court in S.T.C.No.380 of 2011, does not speak from any illegality or infirmity in the eye of law.

37. In fine, the criminal appeal is dismissed. The judgment of acquittal passed by the trial Court in S.T.C.No.380 of 2011 dated 08.10.2015 is confirmed by this Court for the reasons assigned in this appeal.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Judicial Magistrate No.II,
Pollachi.

2. Do Thro The Chief Judicial Magistrate
Coimbatore

3. The section Officer
Criminal Section
High Court, Madras

+1 CC to Mr.N. Ponraj, sr 25234

CRL.A.No.429 of 2016

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