

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2017

CORAM

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

CRL.A.No.459 of 2016

D.Sivakumar

... Appellant/Complainant

.vs.

Panneerselvam

... Respondent/Accused

PRAYER: Criminal Appeal filed under Section 378(4) of Cr.P.C., to set aside the judgment made in S.T.C.No.3 of 2015 on the file of the Judicial Magistrate, Fast Track Court, Attur and convict the respondent for the offence under Section 138 of Negotiable Instruments Act, 1881.

For Appellant : Mr.L. Moueli for
Mr.T.Murugamanickam

For Respondent : M/s L.Rajendran & M.Prabhu

सत्यमेव जयते
Judgment

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The complainant in S.T.C.No.3 of 2015 on the file of the Judicial Magistrate, Fast Track Court, Athur is the appellant herein. This appeal is directed against the order of acquittal. The complainant has filed the complaint for the offence under Section 138 of Negotiable Instruments Act, on the allegation that he

lent Rs.5,00,000/- on 13.04.2014 and another Rs.5,00,000/- on 13.05.2014 to the respondent. According to him, the cheque in question (Ex.P1), bearing No.079304 drawn on ICICI Bank dated 13.06.2014 was issued by the respondent for Rs.10,00,000/- for the discharge of the said liability. The cheque when presented for encashment was dishonored. The complainant sent a notice to the respondent, calling upon him to pay the amount covered by the cheque, but the notice was returned as "unclaimed". Hence the complaint. In support of the case of the complainant, he examined himself as PW1 and marked 5 documents, including the cheque.

2. The respondent pleaded not guilty. According to him, he has borrowed Rs.2,00,000/- from the complainant during 2012 and at the time of taking loan, the complainant has obtained two unfilled cheques, unfilled stamp papers, bond and also the Registration Certificate and other documents pertaining to his lorry, from him. It is his further case that he has discharged the loan by making payments in installments at the rate of Rs.2,000/- per day and when the lorry was taken away by the finance company, he asked for the return of documents, but the complainant gave evasive reply. However, he failed to return the documents. In support of the case of the respondent, he examined himself as Dw1 and one Mathu @ Mathappan as Dw2.

3. On a consideration of the evidence, the Trial Court has held that the respondent has rebutted the presumptions drawn against him and it acquitted the accused holding that the complainant has failed to prove his case beyond reasonable doubt. Challenging the order of acquittal, the present appeal has been filed.

4. The learned counsel appearing for the Appellant would submit that the Trial Court has committed error in accepting the case of the respondent. According to him, the respondent has clearly admitted in his evidence that he had money transactions with the complainant and that therefore, the question of financial capacity to lend money did not arise in this case. He would also point out that Dw2 is an interested witness, as a case under Section 138 of Negotiable Instruments Act has been filed against his wife by the father of the complainant.

5. The learned counsel appearing for the respondent advanced his arguments in support of the judgment of the Trial Court. According to him, the Trial Court was justified in acquitting the accused on the fact that there is no material to show that the complainant has lent Rs.10,00,000/- to the respondent.

6. It is not in dispute that the cheque in question belongs to the respondent and it bears his signature. Therefore, it should be presumed that the cheque was issued for the discharge of legally enforceable liability. However, the

presumptions drawn under Section 138 and 139 of Negotiable Instruments Act are rebuttable presumptions. In *in Bharat Barrel and Drum Manufacturing Company V.Amin Chand Payrelal* reported in (1999) 3 SCC 35, it has been held thus:-

"....The respondent can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, here the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may

not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt."

Bearing in mind the dictum laid down by the Supreme Court, I have carefully analyzed the material on record. The respondent has given evidence in support of his defence. He has clearly stated that he has borrowed Rs.2,00,000/- in the year 2012 and at the instance of the complainant, he received Rs.1,00,000/- from one Kutti @ Selvaraj and another Rs.1,00,000/- from one Mathu @ Mathappan. Dw2 in his evidence has stated that he borrowed Rs.2,00,000/- from the complainant during 2011 and at the instance of the complainant, he paid Rs.1,00,000/- to the respondent.

7. In the light of the above decision of the Supreme Court, it is open to the respondent to rely upon the evidence of the complainant also. Admittedly, except the disputed cheque Ex.P1, there is no other document to show that the complainant actually paid the loan amount of Rs.10,00,000/- i.e. Rs.5,00,000/- on 13.04.2014 and Rs.5,00,000/- on 13.05.2014 to the respondent. The cheque in question is dated 13.06.2014. The complainant did not charge any interest. It is impossible to believe that the complainant has lent Rs.10,00,000/- without any agreement for payment of interest.

8. Admittedly, the complainant is an income tax assessee. He would admit that he has not shown the loan in question in his income tax account. The complainant in his evidence claimed that he raised money from Thuluva Vellalar Sangam and by pledging his wife jewelery paid the loan amount to the respondent. However, he has not produced any document to show that he has borrowed money from the said Thuluva Vellalar Sangam and by pledging his wife's jewelery. The circumstances noticed above are sufficient to hold that the respondent has rebutted the presumptions drawn against him, in terms of Section 118 and 139 of Negotiable Instruments Act.

9. Once the presumptions drawn against the respondent have been rebutted, the onus shifts on to the complainant and it is for him to prove that he has in fact lent Rs.10,00,000/- to the respondent. Except the interested oral testimony of the complainant, there is no dependable evidence to show that he has actually lent Rs.10,00,000/- to the respondent. The complainant has admitted that he has not shown the loan in question in his income tax account.

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10. The Hon'ble Supreme Court in ***KRISHNA JANARDHAN BHAT vs. DATTATRAYA G. HEGDE [(2008) 4 SCC 54]*** has held that Courts have to take notice that ordinarily in terms of Section 269-SS. Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- had to be made by an account payee cheque only.

In view of the above mentioned circumstances, I have no hesitation to hold that the appellant has failed to prove his case beyond reasonable doubt. The Trial Court has taken a reasonably possible view. I do not find any ground to hold a different view. The appeal is liable to be dismissed.

11. In the result, the Criminal Appeal is dismissed and the judgment of acquittal passed by the learned Judicial Magistrate, Fast Track Court, Athur, in S.T.C.No.3 of 2015 on 11.12.2015 is hereby confirmed.

06.09.2017

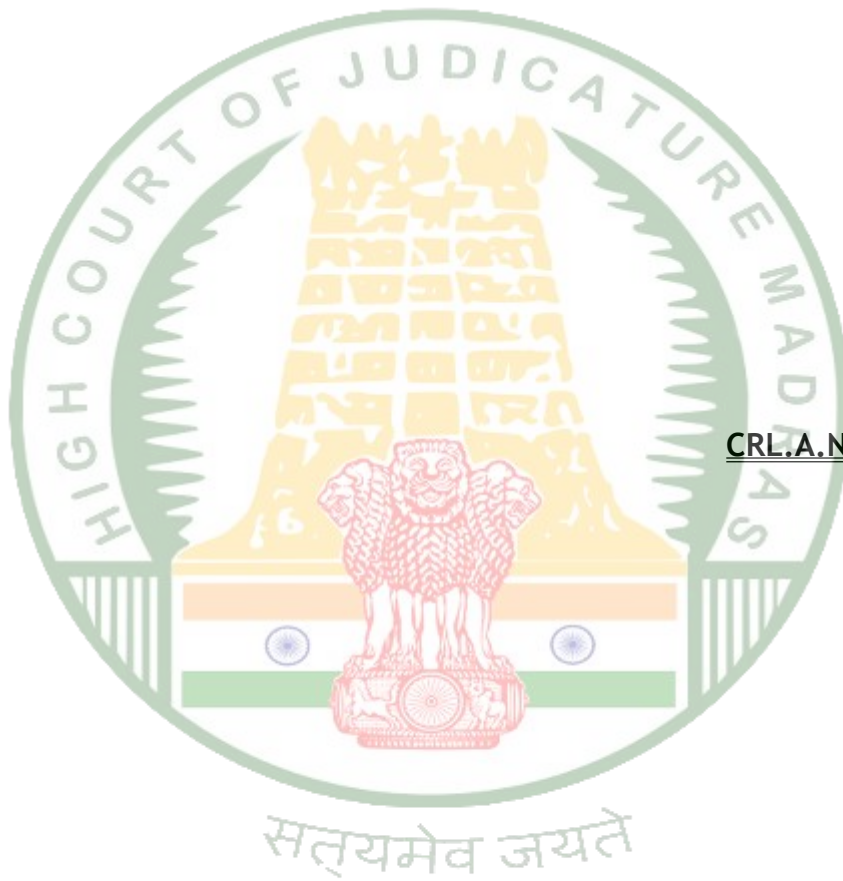
Index : Yes/No
Internet : Yes
Speaking order/Non speaking order
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To

1. The Judicial Magistrate,
Fast Track Court,
Athur.



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