

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 11.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal Nos.49 and 50 of 2016

Gunasekaran

... Appellant
[in both Crl.As.]

versus

Arunachalam

... Respondent
[in both Crl.As.]

Common Prayer: Criminal Appeals filed under Section 378 of the Code of Criminal Procedure, to set aside the order of acquittal dated 06.07.2015 made in C.C.Nos.137 and 138 of 2009, on the file of the learned Judicial Magistrate No.II, Cuddalore.

For Appellant : Mr.K.A.Vimalkumar
[in both Crl.As.]

For Respondent : Mr.A.Malathdevapriyam
[in both Crl.As.]

COMMON JUDGMENT

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As the parties in both the appeals are the same and common questions of fact and law arise between the same parties in these two appeals,

with the consent of the learned counsel for the parties, these appeals were heard together and are being disposed of by this common judgment.

2. These appeals are directed against the order of acquittal in C.C.Nos.137 and 139 of 2009, on the file of the learned Judicial Magistrate No.II, Cuddalore. The appellant is the complainant. He has filed two complaints. C.C.No.137 of 2009 relates to dishonour of the Cheque bearing No.114205 dated 15.04.2009 for Rs.9,00,000/-. C.C.No.138 of 2009 relates to dishonour of the Cheque bearing No.114204 dated 04.03.2009 for Rs.3,50,000/-.

3. The case of the complainant is as follows:-

[i] The respondent is a Building Contractor. For his business purposes, the respondent used to borrow money from the complainant. He agreed to pay interest at the rate of 18%. The respondent received a sum of Rs.4,00,000/- during the financial year 2006-07 and another sum of Rs.7,95,000/- during the financial year 2007-08 and Rs.87,000/- during the financial year 2008-09. A total sum of Rs.12,82,000/- was due from the respondent. However, the complainant agreed to receive Rs.12,50,000/-. The respondent issued two cheques for Rs.12,50,000/- for the discharge of the said loan [one cheque bearing No.114204 dated 04.03.2009 for Rs.3,50,000/- and

another cheque bearing No.114205 dated 15.04.2009 for Rs.9,00,000/-]. Those cheques were dishonoured when presented for collection through UCO Bank, Cuddalore due to “funds insufficient” in the account of the respondent. Hence, after issuing legal notices, the complainant filed the complaints. The appellant examined himself as P.W.1 in both the cases and examined his Auditor [P.W.2] and marked 9 documents [Ex.P.1 to Ex.P.9].

[ii] The case of the respondent is that he in partnership with the complainant constructed a building for the Government under works contract and they suffered loss and the complainant compelled him to bear the entire loss and thereafter, misunderstanding arose between them, the complainant used to deal with his [respondent] Bank Accounts and he used his Pass Books and cheque books and withdrew money. In support of his case, the respondent examined Officer from the UCO Bank, Cuddalore [D.W.1] and Hand Writing Expert [D.W.2] from the Forensic Science Department. The respondent denied the execution of the cheques.

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[iii] The Trial Court has held that the respondent has rebutted the presumptions drawn in terms of Sections 138 and 139 of the Negotiable Instruments Act and that, thereafter the appellant failed to prove that the cheques were issued for the discharge of legally enforceable debt. The

respondent was found not guilty. Aggrieved by the order of acquittal, the appellant filed the present appeals after obtaining leave.

4. The learned counsel appearing for the appellant would submit that the signatures of the respondent on the cheques in question was proved by the Hand Writing Expert. The evidence of the appellant was corroborated by the Income Tax Returns [Ex.P.8 and Ex.P.9] and that, therefore the Trial Court erred in coming to the conclusion that the respondent rebutted the presumptions.

5. The learned counsel appearing for the respondent would submit that the respondent rebutted the presumptions drawn against him and that, the complainant has failed to prove that he has lent money to the respondent as claimed by him and the cheques were issued for the discharge of any legally enforceable liability.

6. The respondent disputed his signatures on the cheques. The cheques were examined by Forensic Science Department Experts. They found similarities on the disputed signatures and the admitted signatures. In view of the findings of the Forensic Science Department, the Trial Court has held that the cheques bear the signatures of the respondent.

7. As it has been shown that the cheques belong to the respondent and that, they bear his signatures, in the light of the judgments of the Hon'ble Supreme Court in *T.VASANTHAKUMAR vs. VIJAYAKUMARI [(2015) 8 SCC 378]*, *R.MOHAN vs. A.K.VIJAYA KUMAR [(2012) 8 SCC 721]*, and *K.N.BEENA vs. MUNIYAPPAN [(2001) 8 SCC 458]* it can be presumed that the cheques were issued for the discharge of legally enforceable liability. It is to be seen whether the respondent has rebutted the said presumptions.

8. The respondent has taken a defence that his bank accounts and the bank records were used by the complainant. The complainant in his evidence would also state that he received Rs.3,00,000/- by means of cheque on 14.11.2006 through UCO Bank, Cuddalore. He would also admit that on 18.10.2008, he received Rs.2,26,000/- by means of cheque issued by the respondent. It is well settled that the onus of proof on the respondent is not as heavy as that of the prosecution. For rebutting the presumption, the respondent has to raise a probable defence and for that purpose, he can rely on the evidence adduced by the complainant. The standard of proof is preponderance probability [vide *M.S.NARAYANA MENON ALIAS MANI vs. STATE OF KERALA AND ANOTHER [(2006) 6 SCC 39]*].

9. The definite case of the complainant is that the respondent lent a sum of Rs.4,00,000/- during the financial year 2006-07 and another sum of Rs.7,95,000/- during the financial year 2007-08 and Rs.87,000/- during the financial year 2008-09. According to him, a total sum of Rs.12,82,000/- was due from the respondent. For the discharge of the said loan, the respondent has issued two cheques in question. He has examined his Auditor [P.W.2] and through him Income Tax Returns [Ex.P.8] for the assessment year 2007-08 and assessment year 2008-09 [Ex.P.9] have been marked.

10. A careful perusal of the Income Tax Returns would show that they were filed only on 26.02.2009. The cheques are dated 04.03.2009 / 15.04.2009. As per the Balance Sheet as on 31.03.2008, a sum of Rs.8,82,000/- was due from the respondent. It does not show that a sum of Rs.12,82,000/- was due from the respondent. The complainant, in his evidence has stated that, the respondent acknowledged the receipt of loans and made entries in his own hand writing in his note book. However, the complainant has not chosen to produce the said note books. Admittedly, he is an income tax assessee. He ought to have produced his accounts. Therefore, adverse inference should be drawn against him. Under these circumstances, it can be safely held that the respondent has rebutted the presumptions drawn under Section 138 and 139 of the Negotiable Instruments Act.

11. It is pertinent to note that though the complainant claimed that the respondent agreed to pay interest at the rate of 18%, the cheques were issued only for Rs.12,50,000/- for the discharge of the alleged liability. The entry in the Returns are not by itself sufficient to fasten criminal liability, in the absence of any other supporting contemporaneous records. It appears from the evidence of the Auditor that the complainant has not furnished any proof to show that the respondent borrowed money as shown in the Returns. It is significant to note that the complainant has not been able to show the dates, on which the respondent received money. The complainant has also not been able to show any clinching evidence to show that he has lent money to the tune of Rs.12,82,000/-.

12. The Trial Court carefully considered the testimony of the witnesses and took into account the facts and circumstances of the case and held that the complainant failed to prove his case. It is well settled unless the Appellate Court finds that the view taken by the Trial Court is unreasonable or perverse, it should not interfere with an order of acquittal. In the case at hand, the view taken by the Trial Court is permissible on the evidence of record. As the Trial Court has taken a reasonably possible view, I hold that the order of acquittal cannot be interfered with.

13. In the result, these Criminal Appeals are dismissed.

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Index : Yes/No

Internet : Yes

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To

1.The Judicial Magistrate No.II,
Cuddalore.

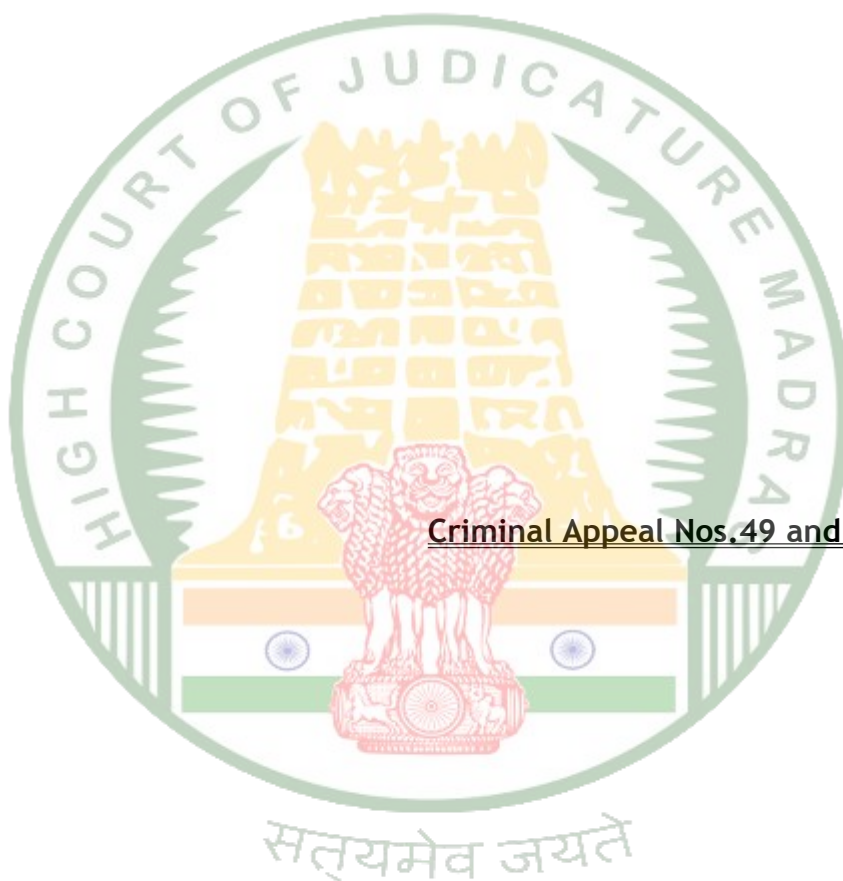
2.The Public Prosecutor,
High Court of Madras,
Chennai.



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N.AUTHINATHAN, J.,

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