

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :31.01.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.683 of 2016

K.C.Periyasamy

... Appellant/Complainant

Vs

S.Anandan

... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 Cr.P.C., against the Order passed in S.T.C.No.80 of 2015 dated 17.03.2016 on the file of Judicial Magistrate, Fast Track Court at Magisterial Level, Attur.

For Appellant : Mr.R.Nalliyappan

For Respondent : No appearance

JUDGMENT

The Appellant/Complainant has focussed the instant Criminal Appeal before this Court as against the Judgment dated 17.03.2016 in S.T.C.No.80 of 2015 passed by the Learned Judicial Magistrate, Fast Track Court (Magisterial Level), Attur.

2.Although the Respondent was served with the notice, today, there is no appearance on his behalf either in person or through Learned Counsel, when the matter is taken up for hearing. Therefore, this Court proceeds with the hearing of the Criminal Appeal on merits.

Preface:

3.The Learned Judicial Magistrate, Fast Track Court (Magisterial Level), Attur, while passing the impugned Judgment in S.T.C.No.80 of 2015 on 17.03.2016, at paragraph 10(c), had, inter alia, observed that '... no endeavour was made on the side of the Appellant/Complainant to examine the aforesaid Palanisamy' and at paragraph 10(d) had opined that '... when counter argument was projected to the effect that the present case was filed at the instance of one Palanisamy and when the first notice was sent in the name of Palanisamy, the possibilities of accepting the Accused side was more. Also, at paragraph 10(e), the trial Court had proceeded to observe that

when a counter argument was advanced that loan was not obtained from the Complainant (Appellant) and that cheque was not issued in his favour and when the said loan amount was given to the Respondent/Accused to substantiate the fact that at that time his wife was there, no attempt was made to examine the wife of the Complainant and resultantly, came to the conclusion that there was no possibility of relationship between the Complainant and the Accused in regard to the aspect of legally enforceable debt and found the Accused (Respondent) not guilty under Section 138 of the Negotiable Instruments Act and acquitted him under Section 255(1) Cr.P.C.

4. Challenging the Judgment of Acquittal passed in S.T.C.No.80/ 2015 dated 17.03.2016 by the trial Court, the Learned Counsel for the Appellant/Complainant that the trial Court had committed an error in acquitting the Respondent/Accused, by not taking into a very vital fact that the Respondent had borrowed a sum of Rs.3,00,000/- from the Appellant/Complainant towards his urgent family expenses and to discharge the said amount, the latter issued a cheque on the same day (a post dated cheque dated 02.05.2015).

Appellant's Submissions:

5. The Learned Counsel for the Appellant urges before this Court that the 'onus' is on the Respondent/Accused to prove that Ex.P1 - Cheque dated 02.05.2015 was not legally enforceable one.

6. It is represented on behalf of the Appellant that initially, the Appellant/Complainant taken into account a demand notice by mentioning the name as K.C.Palanisamy instead of K.C.Periyasamy without appreciating the fact that before the issuance of reply notice, the Appellant/Complainant had issued another notice to the Respondent by mentioning the name of the Appellant (Complainant) as K.C.Periyasamy.

7. The prime plea taken on behalf of the Appellant is that the Respondent had not denied the execution of Ex.P1 - Cheque but stated that he gave the cheque to one Palanisamy and not to the Appellant. In this regard, to substantiate the same, the Respondent/ Accused had neither marked any document nor examined any one of his side.

8. The Learned Counsel for the Appellant brings it to the notice of this Court that the Appellant had presented the cheque for collection and the same was returned and therefore, the Appellant issued a demand notice to the Respondent/Accused demanding the cheque amount, but the said notice was refused and subsequently, a complaint was filed by the Appellant under Sections 138 and 142 of the Negotiable Instruments Act.

9.It is to be pointed out that this Court in Crl.O.P.No.9134 of 2016 in Crl.A.Sr.No.17898 of 2016, had granted Leave to the Appellant to prefer an Appeal as against the Judgment dated 17.03.2016 in S.T.C.No.80 of 2015 passed by the trial Court.

Analysis:

10.At this stage, this Court, on perusal of the complaint filed under Section 138 of the Negotiable Instruments Act by the Appellant (as Complainant) before the trial Court, finds that the Appellant had averred at paragraph 3 that the Respondent is the business man and based on acquaintance, he borrowed a sum of Rs.3,00,000/- from him on 03.04.2015 to meet out his urgent business and family expenses and assured to repay the same within one month. As a matter of fact, to discharge the debt, the Respondent/Accused had issued a post dated Syndicate Bank Siruvachiyur Branch Cheque bearing No.094381 drawn in favour of the Appellant (Complainant) dated 02.05.2015 for a sum of Rs.3,00,000/- and gave an assurance to the Appellant on or after 02.05.2015 to present the cheque before the Bank for collection and to collect the cheque amount from the Bank.

11.It comes to be known that when the cheque was deposited by the Appellant (Complainant) in the Indian Overseas Bank Aragalur Branch on 02.05.2015, the cheque was returned on 18.05.2015 for the reason "Account Closed/Refer to Drawer".

12.The stand of the Appellant is that the Return Memo dated 18.05.2015 was received by him on 18.05.2015 itself from the Indian Overseas Bank, Aragalur Branch and after the Appellant/Complainant intimated the same to the Respondent/Accused and asked him as to why he had issued an account closed cheque and further, demanded the Respondent/Accused to pay the cheque amount due to him or otherwise he would take action before the concerned Court, the Respondent/Accused had informed him that due to business dull season, he was not unable to repay the cheque amount and within a week, he would pay the said sum to him, but the cheque amount was not paid as per assurance given by him. Later, the Appellant issued a Lawyer's Notice - Ex.P4 dated 06.06.2015 to the Respondent/Accused requiring him to pay the cheque amount within 15 days from the date of receipt of legal notice. After receipt of legal notice, the Respondent/ Accused issued a Reply Notice - Ex.P6 dated 16.06.2015 contending untenable allegations.

13.In this connection, a closer scrutiny of the Complaint at para 4 indicates that the Appellant/Complainant had come out with a version that at the time of issuance of Ex.P4 - Notice dated 06.06.2015, his name was wrongly typed as K.C.Palanisamy instead of K.C.Periyasamy and the said error was a typographical one and therefore, on 09.07.2015, the Appellant/Complainant

issued a Rejoinder Notice - Ex.P7 to the Respondent/Accused Counsel to change the name from K.C.Palanisamy to K.C.Periyasamy. The said Ex.P7 - Rejoinder was received by the Respondent/Accused Counsel as per Ex.P8 - Acknowledgement dated 13.07.2015 and since there was no reply to Ex.P7 - Rejoinder Notice by the Respondent/Accused, a complaint was laid by the Appellant in respect of an offence under Section 138 of the Negotiable Instruments Act.

14.Before the trial Court, the Appellant/Complainant had examined himself as P.W.1 and Exs.P1 to P8 were marked. The Respondent/Accused got himself examined as R.W.1. In so far as the present case is concerned, before the trial Court, when P.W.1 (Appellant) was cross examined on the side of Respondent/accused, he had deposed that he and Palanisamy are not friends and but belong to same community and got acquaintance for 25 years. Apart from that, it is the evidence of P.W.1 that it was correct to state that he had purchased one property from Palanisamy and in this regard, it was correct to state that the matter is pending before a Court of Law.

15.Continuing further, P.W.1 (in his cross examination), had deposed that between him and one Palanisamy, it was correct to state there was money transaction (like giving and taking) and it was correct to state in the year 2014, there arose a problem between the Respondent/Accused and Palanisamy and on one occasion, he spoke to them to settle the problem and on 28.04.2015 in regard to the problem between the Respondent/Accused and Palanisamy at Thalaivasal Police Station in his presence, the petition was closed at the Police Station and that was a true one and that he does not know the date. Besides the above, P.W.1 adds in his evidence that at the time when the Respondent/Accused demanded a loan and when he gave money to the latter, at the time his wife was present and it was correct to state that in Ex.P4 - Notice ,it was mentioned as K.C.Palanisamy.

16.Before the trial Court, the categorical plea of the Respondent/ Accused is that when Palanisamy was a Partner and when he was a Managing Director in a Finance, at the time of himself availing the loan, he received three cheques and a stamp paper of Rs.20/- and when he settled the loan and demanded for the return of documents, he informed that the said cheques were not in force/use and he informed that he would return the same and in the year 2015, when Palanisamy demanded money and created a problem, he informed that the money was already paid and when Palanisamy created a problem by using one of the cheques with the aid of Complaint, the present case was filed.
Object of N.I. Act & Onus of Proof:

17.It is to be pointed out that the object of bringing

Section 138 of the Negotiable Instruments Act, 1881, is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Moreover, as per the ingredients of Section 138 of the Negotiable Instruments Act whenever any cheque for any legally enforceable plea dishonoured by the bank for want of funds and the payment is not made by the Drawer inspite of a legal notice of demand, it shall be deemed to be a criminal offence. In this connection, it is to be remembered that where a cheque is issued not for the purpose of discharge of any debt or other liability, the maker of the cheque is not liable for prosecution, as opined by this Court.

18. Further, Section 138 of the Negotiable Instruments Act speaks of 'Dishonour of Cheque' for insufficiency of funds in the accounts and since it is the penal offence, it provides a strict liability. Furthermore, the presumption under Section 138 of the Negotiable Instruments Act is not an automatic one, in the considered opinion of this Court.

19. It cannot be forgotten that an offence under Section 138 of the Negotiable Instruments Act is committed on the happening of certain specified contingencies visualised in Section 138 of the Negotiable Instruments Act. Moreover, to constitute an offence under Section 138 of the Negotiable Instruments Act, the following aspects need to be specified: (i) a cheque should have been issued towards the discharge, in whole or part, of any debt or other liability; (ii) the cheque ought to have been presented within a period of six months or within the period of its validity whichever is earlier; (iii) a Payee or Holder in Due Course ought to have been issued with a notice in writing to the Drawer within 30 days of the receipt of information by him from the bank in regard to the return of the cheque as unpaid. After the receipt of the said notice by the Payee or Holder in Due Course, the Drawer should have failed to pay the cheque amount within 15 days of the receipt of the said notice. On non-payment of the amount due on the dishonoured cheque within 15 days of the receipt of the notice by the Drawer, the complaint should have been filed within one month from the date of expiry of the grace time of 15 days before a Metropolitan Magistrate or not below the rank of a Judicial Magistrate of the I class. Indeed, the cognizance of a complaint may be taken by the Competent Court concerned, after the prescribed period, if a Complainant specifies that the Court that he had sufficient reason for not filing a complaint with such period.

20. It is well settled in Law that when an individual had paid an amount payable by him, he ought to have been discharged his obligation and a creditor is bound to accept the tender. In fact, under Section 138 of the Negotiable Instruments Act, a Court of Law is to presume that a cheque was issued towards a

debt or liability and in reality, the said presumption is a rebuttable one, the onus of proving that the cheque was not issued for a debt or liability is on an Accused. A Drawer has to establish the same in the course of trial of a main case by adducing a cogent, coherent and convincing evidence.

21. Dealing with the aspect of Section 139 of the Negotiable Instruments Act, it is to be pointed out that mere proof of consideration would not suffice to succeed in a prosecution under Section 139 of the Negotiable Instruments Act. It cannot be said that a consideration must be of a specific variety. The presumption under Section 139 of the Negotiable Instruments Act is available to a Payee and it cannot be said that only a holder is entitled to the advantage of such presumption. A presumption under Section 138(a) of the Negotiable Instruments is against the Maker or Drawer or Endorser and not a presumption specifically in favour of the Payee, a Holder or a Holder-in-Due Course.

22. A mere running of the eye over the ingredients of Section 138 and 139 of the Negotiable Instruments Act unerringly point out that in order to raise a presumption under Section 139 of the Negotiable Instruments Act, the Complainant has to establish the fact that 'he received the cheque' in question from the Accused and thereby he became its Holder. An acceptance of a legally enforceable or recoverable debt is not a matter of presumption under Section 139 of the Negotiable Instruments Act. One has to keep in mind a prime fact that Section 139 of the Negotiable Instruments Act merely rest a presumption in favour of a holder of the cheque and that the same was issued for discharge of any debt or other liability. Section 139 of the Negotiable Instruments Act is to be read with Section 138 and a combined reading of both the Sections would show that the presumption would arise only in respect of the amount.

23. Indeed, the object of the Negotiable Instruments Act is for quick disposal of summary cases filed under Section 138 of the Negotiable Instruments Act. Even though, it is a civil liability, fastening of criminal liability is there, in respect of an offence under Section 138 of the Negotiable Instruments Act. An offence under Section 138 of the Negotiable Instruments Act is to be established like any other criminal offence and the onus is on the Complainant side to prove to the subjective satisfaction of the trial Court that the Respondent/Accused had committed an offence. Also that, it is to be remembered that the 'onus of proof' is not static. Even the ingredients of Section 106 of the Indian Evidence Act, 1872, burden of proving fact especially within knowledge, can be availed of by a Respondent/Accused in a given case (notwithstanding the fact that an Accused in our Constitutional Theme of Scheme is entitled to maintain silence in a criminal prosecution).

24.To put it precisely, the ingredients of Section 106 of the Indian Evidence Act, 1872 ought to be confined to those cases where a fact is specially within the knowledge of any person if a matter is within the knowledge of the Defendant he is to establish the same, in the considered opinion of this Court.

25.At this stage, this Court aptly points out that Section 106 is not meant to be used to place upon an Accused the onus of proving his innocence as per decision Narayanan Nambiar V. Executive Officer, Cherukunnu, Panchayat Board, AIR 1965 Kerala 73.

26.If a Court of Law is subjectively satisfied that either direct or circumstantial evidence is trustworthy and acceptable one against an Accused and if the Respondent/Accused take up a plea based on facts which are within its knowledge it is for him to prove those facts under Section 106. The onus of proof by an Accused is not so high as in the case of prosecution as per decision Arjun Tiwari V. State reported in 1977 Cri.L.J. 1751.

27.One cannot brush aside a very significant fact that it is not for the prosecution to eliminate and anticipate all possible defence circumstances which may exonerate an accused. In this regard, this Court relevantly points out that if an Accused had a different intention [a fact especially within his knowledge] then, he must establish the same as per decision Sattiah V. State of Andra Pradesh reported in AIR 1960 A.P. 153.

28.It is true that an Appellate Court is not meant to fill up the gaps/lacunae in a prosecution case. However, when it is the duty of a concerned Court of Law to ascertain the factual aspect/truth in a given case, then, an Appellate Court can re-appreciate the evidence available on record and to come to its independent conclusion.

Maintainability of Appeal:

29.It may not be out of place for this Court to make a significant mention that the objection in regard to the maintainability of an Appeal on legal plane can be raised at any stage and the permission which was granted from filing an Appeal cannot be pleaded as a bar at the time of hearing. Just because a Leave was granted it does not fetter the Court when real facts were brought before it from going into the issue whether an Appeal is maintainable.

Some other provisions of N.I. Act:

30.Section 144 of the Act was incorporated for 'quick

service of summons'. Section 145 of the Act was incorporated for taking Evidence on Affidavit. Section 145 and 146 of the N.I. Act are not mandatory in character. The option has been left open to the parties in taking recourse to these provisions or the normal provisions envisaged under Civil Procedure Code. As a matter of fact, the provisions of Cr.P.C. are to be harmoniously read in respect of Sections 142 to 146 of the Negotiable Instruments Act. Admittedly, the Negotiable Instruments Act is not an inbuilt and incomplete one and does not envisage the filing of Revision or Appeal.

31. In the decision of the Hon'ble Supreme Court in M/s. Mandvi Co-operative Bank Ltd., V. Nimesh B. Thakur, AIR 2010 SC 1402, it is held that 'permitting an Accused to file an Affidavit in lieu of chief examination is illegal'.

32. In the decision C. Saseendran Nair V. General Manager (Operations) State Bank of Travancore, Thiruvananthapuram and others, it is held that 'An offence under Section 138 of the Negotiable Instruments Act, need not necessarily take within its wings the offence of cheating as defined in Section 415 I.P.C.' Also, in the aforesaid decision, at page 4291, at paragraph 12, it is, inter alia, observed as follows:

"12. We approve the said principle and hold that the question whether an offence would involve moral turpitude has to be decided on the facts of each case. All offences do not necessarily involve moral turpitude. Section 138 of the Act is no exception to the said principle."

33. For 'Dishonour of Cheque' prior to Act 66 of 1998 a Civil action could be resorted to under Section 30 and 117 of the Negotiable Instruments Act. The object of Section 143 of the N.I. Act (with effect from 06.02.2003) was inserted to provide for summary trial of cases under the Negotiable Instruments Act, for speedy disposal of cases.

34. This Court relevantly points out that the Law pertaining to an Act is required to be interpreted in the light of the objects intended to be achieved by it, despite there being deviations from the general law and procedure provided for redressal of grievances.

Definitions:

35. Section 2(n) Cr.P.C. defines 'offence' as under:

"(n) "Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made

under Section 20 of the Cattle-trespass Act, 1871 (1 of 1871)."

36. Section 2(d) Cr.P.C. defines 'Complaint' in respect of an ordinary crime any one can set the Law in motion and no specific authorisation is necessary to file the complaint no specified format is prescribed which the Complainant may take. But in respect of an offence under the Special enactment it is only the Complainant who is to file the complaint, after satisfying the necessary ingredients, before the Competent Court concerned.

37. It is to be pointed out that a Complainant refers to a person who applies to a Court of Law for legal redress by filing a complaint, of course in the form of statement. After all, a complaint is an allegation that a wrong has been done or a grievance suffered. The essence of complaint is the statement of facts relied upon as constituting an offence. It is sufficient that the Complainant shall state the true facts in his own language and it is for the Magistrate to apply the law to those facts. More importantly, it is to be noted that a complaint is made for the seek of obtaining redress an acquisition is made for the seek of ascertaining a fact or bringing of punishment. A complaint may be a frivolous one and an acquisition may also be a false one.

Grant of Special Leave and its legal position:

38. If a Special Leave to Appeal is granted ex parte without hearing, the concerned Respondent is well within his rights to assail the same on his entering appearance.

39. In the decision State of Kerala V. Sreekumar, (2001) M.L.J. (Cr1.) 843 (DB), it is observed and held as follows:

"For filing an appeal by the State against an order of acquittal, only application for leave is necessary under Sec.378(3) and the provisions of Art.114 of the Limitation Act will apply and no specific period of limitation is provided under Sec.378(1) or Sec.378(3). Limitation prescribed under Sec.378(5) is applicable only when an appeal is filed with special leave application under Sec.378(4) and the above period is not applicable to appeal and leave application under Sec.378(1) and 378(3)."

Birds Eye view of relevant provisions of Cr.P.C.:

40. At this stage, this Court relevantly points out that where an acquittal in Appeal was recorded by the Sessions

Judge, an application for Leave to have under sub-section (4) of Section 378 Cr.P.C. by the Complainant is maintainable. In fact, Section 378(4) Cr.P.C. applies as much to cases instituted upon complaints for the offences under I.P.C. as it does to complaints involving any other offence under any special enactment, as per Parvati Devi V. State reported in 2005 CrLJ 1615 (1617) (Delhi-DB). Sub-section (3) speaks of 'Leave of the High Court'. Section 378(4) Cr.P.C. places no restriction on the complainant.

41. It is to be borne in mind that Section 4(2) Cr.P.C. enjoins that all offences under any other Law, other than I.P.C. shall also be enquired into or tried and otherwise dealt with the provisions of the Code, subject to any other enactment which contemplates a different mode of trial for such offence. Furthermore, the non-obstante clause in Section 142 of the Negotiable Instruments Act clearly spell out that the three matters mentioned in Section have an overriding effect on the ingredients of Criminal Procedure Code. Apart from that, in an exercise of an Appellate Jurisdiction, the Court has power not only to correct an error in the Judgment under Appeal but to make such disposition of the case, of course according to equity, good conscience, fair play and Justice.

42. The expression any case instituted upon a complaint under Section 378(4) Cr.P.C. means only that class of cases where not merely a Complainant comes to a Court with a petition of complaint but the Magistrate takes cognizance of the offence or offences alleged on the basis of that complaint as per decision Sannanaik V. M.S. Prakash reported in 2006 Cri.L.J. 1386(DB).

43. In the decision Kishan Swaroop V. Government of NCT, AIR 1998 SC 999, it is observed that 'In cases where there is glaring defect or manifest error in point of law in exceptional cases the High Court can allow a private party to file an Appeal against acquittal'.

44. At this stage, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court Satyapal Singh v. State of M.P., (2015) 4 MLJ (CrL.) 219 (SC), at special page 223, at paragraph 11, whereby and whereunder, it is observed as follows:

"11. The Full Bench of the High Court of Delhi after examining the relevant provisions under Section 2(wa) and proviso to Section 372 of Cr.P.C., in the light of their legislative history has held that the right to prefer an appeal conferred upon the victim or relatives of the victim by virtue of proviso to Section 372 is an independent statutory right. Therefore, it has held that

there is no need for the victim in terms of definition under Section 2(wa) of Cr.P.C. to seek the leave of the High Court as required under sub-Section (3) of Section 378 of Cr.P.C. to prefer an appeal under proviso to Section 372 of Cr.P.C. The said view of the High Court is not legally correct for the reason that the substantive provision of Section 372 of Cr.P.C. clearly provides that no appeal shall lie from any judgment and order of a Criminal Court except as provided for by Cr.P.C. Further, sub-Section (3) to Section 378 of Cr.P.C. provides that for preferring an appeal to the High Court against an order of acquittal it is necessary to obtain its leave. We have to refer to the rules of interpretation of statutes to find out what is the effect of the proviso to Section 372 of Cr.P.C., it is well established that the proviso of a statute must be given an interpretation limited to the subject-matter of the enacting provision. Reliance is placed on the decision of this Court rendered by four Judge Bench in Dwarka Prasad v. Dwarka Das Saraf[2], the relevant para 18 of which reads thus:

"18. ... A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context" (Thompson v. Dibdin, 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw

light on each other and result in a harmonious construction."

45. In the decision of the Hon'ble Supreme Court in V.S. Achuthanandan V. R. Balakrishna Pillai and others, 2011 AIR SCW 1400, it is observed and held that 'In view of the importance involved in the Appeal against acquittal by a third party was held to be maintainable'.

46. In the decision Thangaraj v. S. Aruljothi and another, (2008) 2 MLJ (Cr1) 339, at special page 342 and 343, whereby and whereunder, at paragraph 11, it is observed as under:

"11. In the considered opinion of this Court the phrase 'such an order of acquittal' found in Section 378(4) Criminal Procedure Code refers not only an original order, but also an appellate order of acquittal passed by the subordinate Court as adumbrated in Sub-section (1) of Section 378 of the Criminal Procedure Code. As Sub-section 1 to 3 of Section 378 of the Criminal Procedure Code specifically refers to the state Appal, the legislature in its wisdom has though it fit to refer an order of acquittal culminated in the case originated based on a complaint by a private party under Section 378(4) of the Criminal Procedure Code. Just because the word 'complaint' has been mentioned in sub-section (4) of Section 378 of the Criminal Procedure Code, by no stretch of imagination, this Court can jump to a conclusion that Sub-section (4) of Section 378 of the Criminal Procedure Code refers only to the order of acquittal passed by the trial Court on the case launched by a private complainant and not the acquittal recorded by the appellate forum."

47. In the decision of the Hon'ble Supreme Court in Damodar S. Prabhu V. Sayed Babalal, 2010 (5) SCC 663, it is held that 'case under Section 138 of the Negotiable Instruments Act is in civil nature, but by introducing Section 138, a criminal colour is given'.

48. In the decision of the Hon'ble Supreme Court in State of Maharashtra V. Sujay Mangesh Poyarekar, (2008) 9 Supreme Court Cases 475 at special page 477, it is observed that 'The principle of right to first appeal lies in the doctrine of human fallibility that "Men are fallible" and "Judges are also men".'

49.It is to be remembered that the High Court can hear the Appeal in the absence of an Accused, as per decision Rambachan Hardwar V. The State of Gujarat, (1975) 3 Supreme Court Cases 139.

Result:

50.Be that as it may, as far as the present case is concerned, this Court is of the considered opinion that an opportunity is to be provided to the Appellant/Complainant to examine Palanisamy on his side to repel/repudiate the stand of the Respondent/Accused. Also that, when it is a case of the Appellant/Complainant that at the time of loan amount being paid to the Respondent/Accused, his wife was present, then, this Court is of the cocksure view that the Appellant/ Complainant is to examine his wife to speak about the transaction in issue (especially when it was disputed on the side of Respondent/Accused). Admittedly, except the Appellant/Complainant, who got himself examined as P.W.1, no one was examined on his side as further witnesses. Considering the facts and circumstances of the present case, which float on the surface, this Court, with a view to provide an opportunity to the Appellant/Complainant to establish his case, apart from that, Palanisamy and his wife are necessarily to be examined by the Appellant and therefore, this Court, without expressing any opinion on the merits of the matter, for an effective and efficacious adjudication, to prevent an aberration of Justice, simpliciter, remands the entire subject matter in issue to the trial Court [since based on the existing materials available on record, it is not possible for this Court of pronounce a Judgment] for hearing the matter afresh, by setting aside the Judgment of the trial Court. Consequently, the Appeal succeeds.

51.In fine, the Criminal Appeal is allowed. The Judgment of the trial Court dated 17.03.2016 in S.T.C.No.80 of 2015 is set aside by this Court for the reasons assigned in this Criminal Appeal. The entire subject matter in issue is remanded back to the Learned Judicial Magistrate, Fast Track Court (Magisterial Level), Attur for fresh consideration in the manner known to Law and in accordance with Law. The Appellant/Complainant is directed to examine Palanisamy and the Appellant's/Complainant's wife as witnesses on his side to substantiate his version of the case. Also that, the Respondent/ Accused is directed to examine himself as a witness before trial Court in the main case and to examine any other person as witness on his side (since he had taken a stand before the trial Court that he had given three cheques and a Rs.20/- stamp papers at the time of receipt loan to Palanisamy). Moreover, it is open to him to bring to the fore necessary facts which are specially within his knowledge (notwithstanding the fact in a criminal case an Accused is entitled to maintain silence in our acquisitorial system of

Jurisprudence). The trial Court shall provide adequate opportunities to the respective sides to adduce further oral and documentary evidence. The trial Court shall dispose of the matter in S.T.C.No.80 of 2015 afresh with a free, open, unbiased and in a dispassionate manner, within a period of four months from the date of receipt of copy of this Judgment, [of course, uninfluenced and untrammelled with any of the observations made by this Court in this Appeal].

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

- 1.The Judicial Magistrate,
Fast Track Court at Magisterial Level,
Attur.
- 2.-Do Thro the Chief Judicial Magistrate
Salem.
- 3.The Section Officer,
Criminal Section,
High Court, Madras.

+1cc too Mr.R. Nalliappan, Advocate Sr. 5820

EU(CO)
VR(16/02/2017)

Crl.A.No.683 of 2016

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