

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.11.2017

PRONOUNCED ON: 30.11.2017

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Criminal Appeal No.550 of 2013

A.N. Chandru

Appellant/Complainant

vs.

K. Jayasankar

Respondent/Accused

Criminal Appeal filed under Section 378 (2) Cr.P.C. seeking to set aside the judgment dated 20.02.2013 passed by the II Additional District and Sessions Court, Ranipet, in CrI.A. No.45 of 2011 conforming the judgment dated 10.02.2011 passed in C.C.No.108 of 2010 on the file of the District Munsif-cum-Judicial Magistrate, No.I, Walajahpet.

For appellant Ms. Usha Ramman

For respondent Mr. T.K. Kulasekaran

JUDGMENT

This Criminal Appeal has been filed seeking to set aside the judgment dated 20.02.2013 passed by the II Additional District and Sessions Court, Ranipet in CrI.A. No.45 of 2011 against the judgment dated 10.02.2011 passed in C.C.No.108 of 2010 on the file of the Additional District Munsif-cum-Judicial Magistrate Court No.I, Walajahpet.

2 For the sake of convenience, the appellant and the respondent will be referred to as the complainant and the accused respectively.

3 A vignette of the case of the complainant is as under:

3.1 The accused borrowed a sum of Rs.50,000/- on 15.06.2005 and executed a promissory note (Ex.P.1) agreeing to repay the amount on demand with interest at 24% per annum. Towards the discharge of the said liability, the accused issued the impugned

cheque (Ex.P.2) bearing no. 097337 dated 15.04.2006 drawn on Indian Bank, Amoor Branch, for a sum of Rs.60,000/-. On 17.04.2006, the complainant presented the cheque in his account held with Canara Bank, Ranipet Branch and the same was dishonoured for insufficiency of funds vide cheque return memo dated 21.04.2006 (Ex.P.3).

3.2 The complainant issued a statutory notice (Ex.P.5) dated 05.05.2006 under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") to the accused. Since the accused was a junior lawyer in the local Bar and was a junior under one Senthamarai, Advocate, the statutory notice was sent by Registered Post with Acknowledgment Due as well under Certificate of Posting.

3.3 The notice under Certificate of Posting was sent to the residential address of the accused, viz., 60/53, Sitarama Iyer Street, Arcot and the notice under Registered Post with Acknowledgment Due was sent to K.Jayasankar, S/o late Krishnamoorthy Rao, Advocate, C/o R. Senthamarai, Advocate, 13/4, Jayarama Chetty Street, Vellore.

3.4 The notice that was sent by Registered Post with Acknowledgment Due was received by R. Senthamarai, Advocate on 22.05.2006, as could be seen from the acknowledgment (Ex.P.6). The Certificate of Posting was marked as Ex.P.7.

3.5 The accused neither replied to any of the notices nor repaid the amount towards the impugned cheque and therefore, the complainant initiated a prosecution under Section 138 of the NI Act against the accused in C.C.No.161 of 2006 before the Judicial Magistrate No.II, Wallajapet.

4 On the side of the accused, he was questioned about the substance of accusation which he denied. In order to prove his case, the complainant examined himself as P.W.1 and filed proof affidavit dated 23.08.2006 before the Judicial Magistrate No.II, Wallajapet. The accused did not choose to cross-examine the complainant. Therefore, the complainant's side evidence was closed and the accused was questioned under Section 313 Cr.P.C. on 31.08.2006 about the incriminating circumstances appearing against him in the evidence adduced by the complainant. In his examination under Section 313 Cr.P.C., the accused completely denied the allegations of the complainant and further stated that he had not issued the impugned cheque at all. Thereafter, the accused filed an application under Section 311 Cr.P.C. for cross-examining the complainant, which was allowed by the Trial Court, pursuant to which, the complainant was cross-examined on 05.02.2007. Then, the case did not have any progress and it was transferred to the file of the District Munsif-cum-Judicial Magistrate No.I, Wallajapet and was re-numbered as C.C. No.108

of 2010. Once again, the accused filed an application under Section 311 Cr.P.C. to recall P.W.1, which was allowed by the Magistrate, pursuant to which, on 06.12.2010, the complainant was once again cross-examined by the accused. Then, the accused examined himself as D.W.1 on 06.12.2010, in which, he admitted that he had issued the impugned cheque, but, had stated that he had given it only as a security, to the complainant and not towards discharge of liability.

5 The District Munsif-cum-Judicial Magistrate No.I, Walajahpet considered the evidence adduced by either side and by judgment dated 10.02.2011, convicted the accused under Section 138 of the NI Act and sentenced him to undergo one year rigorous imprisonment and to pay a compensation of Rs.75,000/- to the complainant under Section 357(3) Cr.P.C.

6 Challenging the said conviction and sentence, the accused filed CrI.A. No.45 of 2011, in which, the II Additional District and Sessions Court, Ranipet, acquitted the accused by judgment dated 20.02.2013, challenging which, the complainant is before this Court in this appeal against acquittal, special leave having been granted by this Court at the time of admission of the appeal.

7 Heard the learned counsel for the complainant/appellant and the learned counsel for the accused/respondent.

8 The learned counsel for the complainant submitted that both the Courts below have held that:

a the accused had borrowed a sum of Rs.50,000/- from the complainant;

b the impugned cheque was issued by the accused towards a legally enforceable debt;

c the impugned cheque was dishonoured for insufficiency of funds; and

d the complainant had issued the statutory notice dated 05.05.2006 (Ex.P.5);

9 However, according to the learned counsel for the complainant, the Trial Court has held that there was proper service of notice on the accused, whereas, the First Appellate Court has held that the service of notice on the accused was improper and had acquitted the accused on that short ground. Therefore, the learned counsel for the complainant submitted that though both the Courts have substantially agreed on all the facts that would constitute the offence under Section 138 of the NI Act, yet, the First Appellate Court had erroneously chosen to

hold that there was no proper service of statutory notice on the accused.

10 Per contra, the learned counsel for the accused submitted that in an appeal against acquittal, this Court need not confine itself only to those facts adverted to by the First Appellate Court, but, can also go into other aspects like as to whether the complainant had proved the debt properly.

11 This Court gave its anxious consideration to the rival submissions.

12 It is the consistent case of the complainant that the accused had borrowed Rs.50,000/- from him and had executed a promissory note (Ex.P.1) dated 15.06.2005. In this case, the original promissory note was not marked. However, the photocopy of the promissory note was marked as Ex.P.1.

13 The learned counsel for the accused placed reliance on certain judgments which are catalogued as under together with the ratio decidendi therein:

S.No.	Citation	Cause Title	Ratio Decidendi
1	2007 (3) CTC 781	J. Yashoda vs. K. Shobha Rani	Secondary evidence of contents of a document cannot be admitted without non-production of original being first accounted for in such a manner as to bring it within one or other of cases provided for in Section 65 of the Evidence Act.
2	2011 (4) CTC 343	H. Siddiqui (dead) by LRs vs. A.Ramalingam	High Court should not have relied upon photocopy of Power of Attorney.
3	2016 (3) MWN (Cr.) DCC 150 (Mad.)	Andrews Jayakumar vs. V. Jaganathan	The complainant should have proved the promissory note by examining a witness mentioned therein.

14 Per contra, the learned counsel for the complainant placed strong reliance on the 3 Judge Bench judgment of the Supreme Court in Rangappa vs. Sri Mohan [(2010) 11 SCC 441], wherein, the Supreme Court has held that when the accused admits issuance of cheque, a presumption under Section 139 of the NI Act would arise and that, that presumption would include the debt also and that it is for the accused to discharge the burden under Section 139, *ibid*, which can be done by preponderance of probability and not necessarily by proof beyond reasonable doubt.

15 The complainant, who examined himself as P.W.1, has stated that the accused had borrowed from him a sum of Rs.50,000/- on 15.06.2005, to prove which, he had marked the photocopy of the promissory note (Ex.P.1). The accused never objected to it at the time of marking. Very recently, in *Sonu alias Amar vs. State of Haryana* [(2017) 48 SCC 570], the Supreme Court has relied upon *Gopal Das vs. Thakurji* [AIR 1943 PC 83] and *R.V.E.Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.Temple* [(2003) 8 SCC 752] and discussed in detail the relevancy and admissibility of a piece of evidence and has held that if a piece of evidence is relevant when the mode of proof is via secondary evidence, objection should be taken at the earliest, so that the opposite party would get an opportunity to rectify the deficiency.

16 In this case, this objection was not taken when the exhibits were marked by the complainant. Even if we were to close our eyes to the photocopy of the promissory note (Ex.P.1), yet, the complainant, in his oral evidence, has stated that Rs.50,000/- was borrowed by the accused on 15.06.2005 and he had given the impugned cheque for Rs.60,000/- on 15.04.2006, which amount is inclusive of interest as well. When the accused was questioned under Section 313 Cr.P.C., he stated that the impugned cheque was not at all issued by him. However, the accused examined himself as D.W.1 and stated that he had issued the impugned cheque, but, the cheque was issued only as a security. Thus, the accused has been taking two conflicting stands on his own. In his evidence, the accused (D.W.1) has stated that he had joined a chit for Rs.50,000/- with the complainant on 23.03.2004. This clear admission of the accused in the dock reinforces the case of the complainant that the former had borrowed Rs.50,000/- from the latter on 15.06.2005. However, the accused has stated that he had issued the cheque only as a security, but, had not actually taken the loan.

17 One must bear in mind that the accused in this case is not an ordinary rustic farmer or an illiterate peasant, but, an advocate practising in the local Bar. Therefore, the contention of the accused that he issued the impugned cheque just like that, without obtaining loan from the complainant is too big a pill to swallow. Ergo, this Court has no hesitation in holding

that the accused had borrowed Rs.50,000/- from the complainant and had issued the impugned cheque towards discharge of the said liability, as has been held by both the Courts below.

18 Now, coming to service of notice, in the cross-examination of the accused, he has stated that he had enrolled as an advocate on 25.01.2006. But, he had cleverly stated that he had joined as junior of Senthamarai, Advocate, only from August 2006. This Court will be legitimate in applying Section 114 of the Evidence Act to infer that when a person enrolls as an advocate, he would join a senior's office immediately unless he shows that he was doing some other avocation or working as a junior under some other senior. In the cross-examination, he has stated that he was a junior under Senthamarai, Advocate, for two years. It may be relevant to state here that Senthamarai, Advocate, who had received the notice, did not send any reply notice to the counsel for the complainant stating that he has no junior by name Jayasankar (the accused herein). The complainant would have seen the accused working as a junior in the office of Senthamarai, Advocate and has therefore, thought it fit to send the statutory notice to that address, as well to the address of the accused in his village by Certificate of Posting. In a given situation where an advocate is an accused, the complainant cannot be expected to act in any other better manner.

19 In such view of the matter, the order of acquittal passed by the First Appellate Court on the ground that the statutory notice (Ex.P.5) was not properly served on the accused, is unsustainable. From 2005 to 2011, the accused, an advocate by profession, has been protracting this prosecution, as could be seen from the dates and events catalogued in paragraph no.4 above.

20 In the result, this appeal preferred by the complainant is allowed and the judgment of the trial Court is restored. As a sequel, the accused should have to serve one year Rigorous Imprisonment and pay a compensation of Rs.75,000/- to the complainant, as ordered by the trial Court.

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21 In my opinion, whenever the news of an Advocate getting involved in an offence appears in public domain, I squirm and shudder inside and slip into bouts of depression and despondency at the sorry state of affairs, because, it was this noble profession that has catapulted me to this exalted position under the Constitution of India. Every such episode would bring down the esteem of the Bar in the eyes of the public and that would

also have a cascading effect on the Bench. The society expects an Advocate to be its guardian against State tyranny and not become a tyrant himself.

22 Since cheque bounce case is quasi civil in nature, the Parliament had thought it fit to make it compoundable at any time via Section 147 of the NI Act. Therefore, the sentence is suspended till 15.01.2018, by which time, if the accused deposits the sum of Rs.75,000/- towards compensation and Rs.1 lakh towards exemplary costs [totally Rs.1.75 lakhs] to the credit of C.C.No.108 of 2010 before the trial Court, the learned Magistrate may compound the offence in terms of Section 147 of the NI Act and disburse the sum to the complainant, if he is alive, or otherwise, to his legal heirs.

23 This Court has devised this mechanism only to give an opportunity to the accused to avoid the ignominy of serving the sentence of imprisonment. It is made clear that there shall not be any further extension of time. In the event of the accused not depositing the amount of Rs.1.75 lakhs on or before 15.01.2018, the trial Court shall take steps to secure him and commit him to prison.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

cad

To

1 THE II ADDITIONAL DISTRICT AND SESSIONS JUDGE
RANIPET

2 THE DISTRICT MUNSIF-CUM-JUDICIAL MAGISTRATE
WALAJHPET.

[HE IS REQUESTED TO SERVE COPY OF JUDGMENT ON THE
RESPONDENT/ACCUSED]

3 THE PUBLIC PROSECUTOR
HIGH COURT OF MADRAS
CHENNAI 600 104

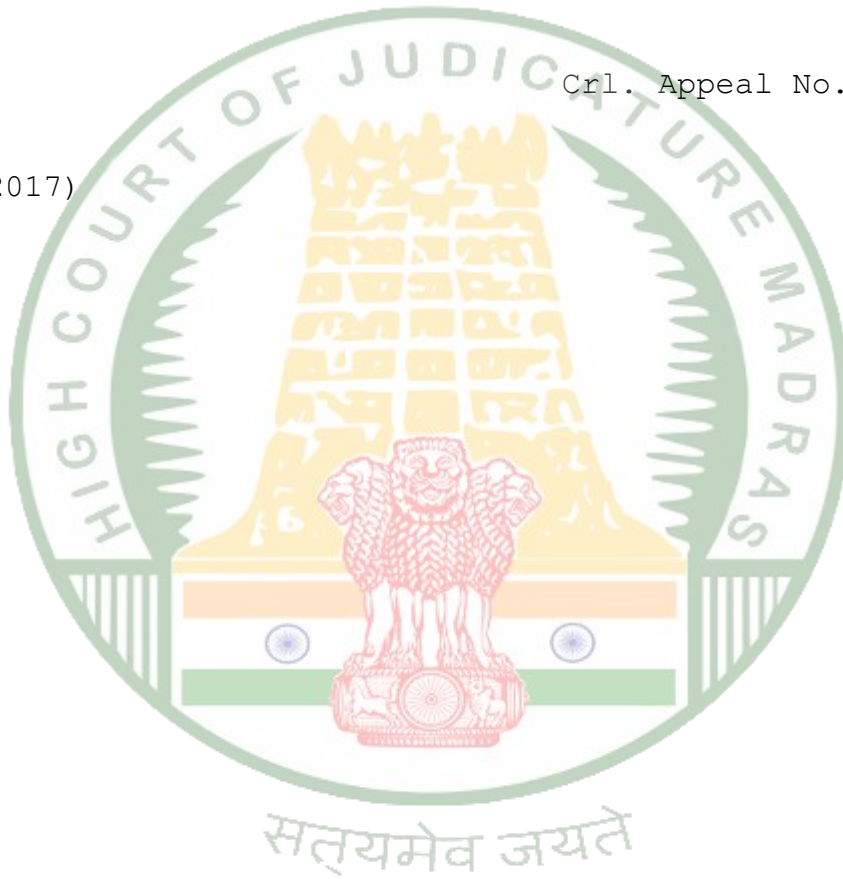
4 THE CHIEF JUDICIAL MAGISTRATE,
VELLORE.

5 THE PUBLIC PROSECUTOR,
HIGH COURT OF MADRAS
CHENNAI 600 104.

+1cc to Mr.T.K.KULASEKARAN Advocate, S.R.No. 85047
+1cc to M/S.USHA RAMAN Advocate, S.R.No. 85509

Cr1. Appeal No.550 of 2013

RV(CO)
TR(04/12/2017)



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