IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.11.2018

CORAM:

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.297 of 2004

A.A.Arughadhoss … Appellant/Respondent/Complainant

Vs.

S.Mani … Respondent/Appellant/Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., against the judgment of the learned Additional Sessions Judge (Fast Track Court Court No.I), Thindivanam, dated 02.01.2004 made in Crl.A.No.52 of 2003 reversing that of the learned Judicial Magistrate No.I, Villupuram made in C.C.No.62 of 2002.

For Appellant : Mr.D.Ravichander

For Respondent : Mr.A.Edwin Prabakar

JUDGMENT

This Criminal Appeal is directed as against the Order of acquittal dated 02.01.2004, made in Crl.A.No.52 of 2003 by the Learned Fast Track Court No.I-cum-Additional District and Sessions Judge, Thindivanam, reversing the order of Conviction and Sentence imposed on the respondent herein in C.C.No.62 of 2002 dated 12.06.2003 on the file of the learned Judicial Magistrate No.1, Villupuram.

2.It is appellant's case that his wife A.Padma is proprietor of an establishment namely "Swasthik Agro Service" and the appellant/ complainant looked after its business on behalf of his wife.

3.Between the respondent herein/accused who then was working as Deputy Manager (Marketing) in SPIC Company at Villupuram during 1992-1995 and the appellant, there was cordial and close relationship.

4.Out of said relationship, the appellant / complainant and the accused / respondent started business in the Name and

Style of “East Coast Fertilizers” at Villupuram as a partnership Firm and the said business was being managed by the accused. The accused and complainant being friends, the accused had transactions with the complainant in “Swasthik Agro Service”. While so, subsequently the accused had started a new concern in the Name and Style of “Srivari Fertilizers”. Thereupon the complainant decided to retire from the partnership concern of “East Coast Fertilizer” and the accused also agreed to relieve the complainant from the said partnership concern.

5.It is further case of complainant that as the accused has promised to settle the amount due to him from their business in the near future, the complainant got relieved from the partnership concern of “East Coast Fertilizer” by executing a release deed on 02.05.1998. Thus the accused is liable to pay a sum of Rs.13,52,817.10/- as on 16.12.1997 towards his settlement for relieving from the partnership business.

6.Out of the said amount, the accused have paid Rs.60,000/- to the complainant on 04.05.1998 and subsequently two cheque were issued by the accused for a sum of Rs.1,00,000/- and Rs.35,000/- dated 23.07.1998 and the same were issued by the accused from “Srivari Fertilizer” account and the said two cheques were encashed by the complainant on 22.08.1998.

7.Thereafter the accused towards the said liability had issued a cheque for Rs.2,00,000/- dated 30.09.1998 bearing No.414800 drawn on Tamil Nadu Mercantile Bank Limited, Villupuram Branch.

8.When the said cheque was presented before the Bank for collection by the complainant through his banker namely S.B.I., Gingee on 06.11.1998, the same was returned on 17.11.1998 stating “payment countermanded by the drawer”. On verification, the complainant was informed by the bank that the accused has instructed for Stop Payment.

9.As the cheques remained dishonored, the complainant issued Statutory Notice to the accused on 25.11.1998 and on receipt of the same, the accused sent reply notice to complainant on 03.12.1998. Thereupon since the accused has not honored the cheque amount, the complainant filed a Complaint against the respondent and the same was taken on file in C.C.No.62 of 2002 for the offence punishable under Section 138 (b) of N.I. Act r/w section 420 of IPC.

10.The accused was questioned in respect of charges framed against him and he denied the same. Accordingly trial was commenced and on the side of the complainant, he was examined as PW-1 and one Santhakumar was examined as PW-2. Totally 22 documents were marked on his side as EX-P1 – Ex-P-22. On the side of the accused two witnesses were examined as RW`-1 and Rw-2, including the accused and 11 documents were marked as Ex-D1-Ex-D11.

11.Upon considering oral and documentary evidence adduced on either side the Learned Magistrate found guilty of the accused for the offence punishable under Section 138 of N.I. Act and sentenced to undergo 6 months Simple Imprisonment and fine of Rs.5000/- and in default to pay the fine amount the accused shall undergo one month Simple Imprisonment.

12.As against the said Order of Conviction and Sentence, the respondent filed an appeal in Crl.A.No.52 of 2003 and the Learned Appellate Judge considering the rival submission made on either side, by a Judgment dated 02.01.2004 reversed the Judgment of the Trial Court and thereby acquitted the accused / respondent. Aggrieved over said Order of Acquittal, the appellant/complainant has come forward with this Criminal Appeal.

13.I heard Mr.D.Ravichander, learned counsel for the appellant and Mr.A.Edwin Prabakar, learned counsel for the respondent and perused the entire materials available on record.

14.It is found that it is the specific case of the complainant that he and the accused started a partnership concern under the name and style of "East Coast Fertilizer" and that the complainant wanted to relieve from said partnership concern. In this regard complainant also has executed release deed in favour of the accused.

15.It is complainant's case that in respect of his share and profit in the said partnership business, the accused was then liable to pay Rs.13,52,871.10/- and towards its part payment the accused issued a cheque of "Srivari Fertilizers" for Rs.2,00,000/- dated 30.09.1998 and the said cheque was dishonored.

16.Per contra, it is the contention of the Learned Counsel for respondent that the complainant has executed Ex-D6 release deed only on receipt of amount due to him in the said partnership business. Further, it is his contention that in Ex-D6 it has been clearly and candidly mentioned that on the date of execution of release deed, there is no due for the complainant/appellant.

17.It is further contention of the learned counsel for the respondent that the accused has sent a reply under Exhibit-D5, wherein he has specifically stated that the subject cheque was issued to the complainant as a security deposit for supply of 50 metric ton of Potash by the complainant to M/s.Sreevari Fertilizers.

18.According to the respondent, since the complainant failed to supply the materials, he instructed his banker to stop payment of cheque bearing No.414800 dated 30.09.1998 vide Ex-D1 letter. That apart it is also pointed by the learned counsel for the respondent that the complainant is having business transaction with the accused company. In this regard the complainant during his cross examination deposed that post dated cheques will be issued for business transaction.

19.From the above facts stated in the preceding two para, this Court is able to see that during the above period, there was a business transaction between the complainant and the accused. Thus in my considered opinion the subject cheque would have been given as security to the complainant as a security for business transaction and the same has been established by preponderance of probabilities.

20.From the version of the accused, it is clear that there was a business transaction between the complainant and accused and in that transaction the subject cheque was given as a security and the same is now misused by the complainant as if the accused is liable to settle the profit and share in the "East Coast Fertilizers" partnership concern.

21.Thus it is needless to say that the burden of proof has shifted on complainant to prove that the cheque was issued to discharge legally enforceable debt or liability.

22.More so, on perusal of Ex-D7 it is seen that the subject cheque was issued only as security purpose. Though the signature in Ex-D7 was denied by the complainant, it has been compared with his admitted signature found in Exs-D8 and D11 by the appellate Court.

23.The Learned Counsel for the appellant in support of his contention that the appellate Court ought not to have compared the signatures on its own, relied upon the following decisions:

(1) 2008 1 CTC 816 Ammani Ammal Vs Dhanalakshmi Bank Ltd., Tiruppur & Others holding that

> "33.The Debts Recovery Appellate Tribunal took the task of comparing the signature of the petitioner and observed that there is no variation between the admitted signature and the disputed signature. When there is a serious dispute with regard to the signature, it is always advisable for the Court or Tribunal to refer the matter to an expert. Of course,

Section 73 of the Indian Evidence Act permits the Court to compare the signature. However in cases like the present one, where the signatures are found in so many documents, and execution of mortgage itself is in dispute, it is better to send those documents for expert opinion.

34. In O. Bharathan v. K. Sudhakaran, AIR 1996 SC 1140, the Apex Court, relying on an earlier judgment reported in AIR 1979 SC 14, held that it is not advisable that a Judge should take upon himself the task of comparing the admitted handwriting with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.

35. Even though Section 73 of the Indian Evidence Act permits the Court to compare the disputed signature with that of the admitted signature, such signature can be compared only with admitted signatures available which are prior in point of time. The Debts Recovery Appellate Tribunal did not compare the signature with the admitted signature which were contemporaneous and therefore, the learned Senior Counsel appearing for the petitioner is right in his submission that there may be some difference in the signature of a person by lapse of time and as such, the petitioner was justified in objecting to the comparison of her signature in the disputed documents with that of her present signature."

24.In 2006 4 CTC 850 N. Chinnasamy Vs P.S.Swaminathan is that

"31. In 2005 (3) ctc 12 (cited supra), a Division Bench of this Court held that when the defendant denied the signature in the written statement, the plaintiff should take steps to ascertain the genuineness of the disputed signature by sending the same to a handwriting expert.

32. From the above judgments, the following principles have emerged:-

(1) Sec.73 of the Indian Evidence Act authorises the Court to compare the disputed signature with the admitted signature in order to come to its own conclusion.

(2) It is always safe for the Court to take the aid of handwriting expert to have the expertise to scientifically compare such handwriting with reasons.

(3) The practice of sending original documents in the custody of the Courts to the handwriting experts is a highly objectionable one and a very very bad

procedure.

(4) The proper procedure would be to permit the handwriting expert to inspect the document in the Court premises itself in the presence of some responsible officers of the Court.

(5) If necessary, the expert may be permitted to have photographic copies of documents in the presence of the responsible officers of the Court.

(6) When examination of the disputed documents within the Court's premises, is not possible due to genuine difficulties expressed by the expert, the Court has to find out the alternative way of achieving the object for the purpose of doing justice.

(7) In such circumstances as mentioned above, the application has to be treated as an application for an appointment of the commissioner in whose presence the examination of the disputed document has to be conducted by the expert.

(8) When the investigation cannot be conveniently conducted within the premises of the Court and the same has to be carried out in the laboratory of the Forensic Department of the Government of Tamil Nadu, it is necessary to appoint a commissioner to conduct the investigation of the document in his presence.

(9) Filing application for examination of documents by handwriting expert at a late stage thereby protracting and holding up the proceedings is highly objectionable.

(10) Merely because of the reasons that the trial Court has by itself compared the admitted signature and the disputed signature invoking Sec.73 of the Indian Evidence Act there is no bar or ban for the first appellate Court for sending the documents to get the expert opinion.

(11) Expert opinions could give much more clarity for arriving at a decision upon the truth and genuineness of a disputed document.

(12) When the defendant denies the signature in a particular document which is very much relied on by the plaintiff, it is for the plaintiff to take steps for examination of the disputed signature by sending the document to a handwriting expert." and vide para 37 it was held as following that

"37.It is not in dispute that the written statement was filed on 10.6.99 and the application was filed on 19.10.2004 only. But in the affidavit filed in support of I.A.No.1531 of 2004 no explanation much less an acceptable explanation was given by the defendant for taking out the application under Section 45 of the

Indian Evidence Act after nearly more than 5 years. Further, even though it was stated in the affidavit that the signature in the sale agreement dated 15.2.1994 should be compared with his admitted signature by handwriting expert, there was no mention about the document containing his signature which was admitted by him and which should be compared with the disputed signature. In such circumstances the trial Court has rightly observed that the application lacks bonafide. This Court in T.A.Narasimhan's case (cited supra) has deprecated the practice of filing applications for examination of documents by handwriting experts at a late stage and thereby protracting and holding up the proceedings. This decision is applicable to the facts of the present case and I do not find any illegality nor infirmity in the order of the trial Court."

25.The Judgments cited supra, relied on by the learned counsel for the appellant deals with section 73 of the Evidence Act. In the present case on hand the appellate Court compared the signature found in Exs-D7, D8 and D11 and found that the signature found in Ex-D7 is matched with in other admitted signatures of the complainant in Exs-D8 and D11. It is settled law that the Courts are having power to the compare the signatures with naked eye. The said exercises have been done by the appellate Court and the same is found to be legally correct.

26.In my considered view, the decision relied by the appellant which is reported 2006 4 CTC 850 N. Chinnasamy Vs P.S.Swaminathan is inapplicable to the present case for the reason that vide para-37, it is seen that comparison of disputed signature was not compared with an admitted signature of party.

27.In as much as the decision made in 2008 (1) CTC 816 relied by the appellant, it is candidly held in para 35 that Section 73 of Indian Evidence Act permits the Courts to compare a disputed signature of a party with his admitted signature.

28.It is noteworthy that an ineffective argument was made by the appellant that the Appellate Court ought not to have decided the aspect of matching of signature in Ex-D7 with Exs-D8 and 11, in actual the Courts are empowered to compare the signature and accordingly I find nothing wrong in such signature comparison by the appellate Court. I do not find any error or perversity over the order passed by the lower appellate Court.

29.In as much as the contention of the respondent that he cannot be held for any Offence under section 138 of N.I. Act as there was no supply of goods and consequently there is no legal liability to pay, the respondent's counsel relied upon a decision of the Hon'ble Apex Court made in M/s.Indus Airways Pvt. Ltd. & Others Vs M/s.Magnum Aviation Pvt. Ltd. & Another reported in 2014(12) SCC 539, wherein it is held as follows:

> "14.In Swastik Coaters [M/s. Swastik Coaters Pvt. Ltd v. M/s. Deepak Brothers and others; [1997 Cri. L.J. 1942 (AP)]] , the single Judge of the Andhra Pradesh High Court while considering the explanation to Section 138 held:
>
> "……..Explanation to Section 138 of the Negotiable Instruments Act clearly makes it clear that the cheque shall be relateable to an enforceable liability or debt and as on the date of the issuing of the cheque there was no existing liability in the sense that the title in the property had not passed on to the accused since the goods were not delivered. ……..." and in para 19 it was held that:
>
> "19.The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."

30.Furthermore the defense taken by the accused is found to be justifiable. The content of Ex-D7 clearly denotes that the subject cheque was issued as security for supply of 50 MT of potash.

31.Therefore quiet naturally, since the complainant has not supplied the above said potash, the accused has instructed his banker to stop payment. The same is corroborated vide Ex-D7 dated 30.07.1998 which is a letter sent by the complainant to the accused wherein it is written as follows:-

> "As you need potash, I will arrange to deliver 50 MT of potash through my suppliers. Please send me a cheque for Rs. 2,00,000/- for the same to keep it with me, till deliver is over. After delivery of stocks please pay me cash/DD @ Rs. 4000/- MT immediately and will return this cheque to you".

32.It is seen that the Appellate Court after discussing the entire evidence available on record has rightly come to the conclusion that the subject cheque was not issued to discharge legally enforceable debt.

33.In view of the above, this Court does not find any ground to interfere with the order passed by the appellate Court and the appellate Court has rendered a well considered judgment while reversing the order of conviction and sentence passed by the trial Court.

34.In the result, this Criminal Appeal is dismissed by confirming the Judgment passed in Crl.A.No.52 of 2003 dated 02.01.2004, on the file of the Learned Additional Sessions Judge, (Fast Track Court No.I), Thindivanam.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

vs

To

1.The Additional Sessions Judge
(Fast Track Court Court No.I), Thindivanam.

2. -do- Through' The Principle Session Judge, Villupuram

3.The Judicial Magistrate No.I, Villupuram.

4. - do - through'The chief Judicial Magistrate, Villupuram.

Copy To

The Section Officer, Criminal Section, High Court, Madras.

+1cc to Mr.D.Ravichandder, Advocate SR.No.77336

Crl.A.No.297 of 2004

VG I(CO)
GMY(24/01/2019)