

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.07.2018

PRONOUNCED ON : 19.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.No.577 of 2011

Shree Finance,
Rep by its Proprietor
Mr.Poonam Chnad,
No.33, General Muthiah Street,
Sowcarpet, Chennai - 600 079.
Rep by its Power agent Mr.Mukesh ... Appellant/Complainant

Vs

S.M.Haneefa
S/o.Syed Mohammed ... Respondent/Accused

Prayer:

Criminal Appeal filed under Section 378 of Cr.P.C., to call for the records relating to the judgment passed in C.A.No.148 of 2010 dated 08.04.2011 on the file of the Additional District Sessions Court (Fast Track Court, No.II) Chennai reversing the Judgment of conviction passed in C.C.No.5885 of 2003 on the file of the VIII Metropolitan Magistrate Court, George Town, Chennai.

For Appellant : Mr.S.T.Rajah
for M/s.Om Sairam

For Respondent : No appearance

सत्यमेव जयते
J U D G M E N T

This appeal is directed as against the judgement dated 08.04.2011 passed in C.A.No.148 of 2010, on the file of the learned Additional District and Sessions Judge, FTC-II, Chennai, reversing the judgment of the conviction dated 05.08.2010, passed in C.C.No.5885 of 2003 on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai.

2. The case of the complainant is that the accused availed hire purchase facility for the purchase of vehicle Bajaj Tempo to the tune of Rs.1,65,000/- and entered into hire purchase agreement on 04.06.2001. As per the hire purchase

agreement, the accused has to repay the dues in 25 monthly instalments. But the accused has defaulted in payment of monthly dues. The complainant seized the vehicle and sold out for a sum of Rs.1,00,000/-. After adjusting the sale consideration, there was a sum of Rs.99,000/- was due. It was intimated to the accused. In payment of the said balance due, the accused issued cheque for a sum of Rs.80,000/- dated 24.03.2003, and it was presented through the complainant's bank and it was returned dishonour with an endorsement of insufficient funds. After causing statutory notice, the complaint was lodged for the offence under Section 138 of Negotiable Instruments Act against the accused.

3. The trial Court after furnishing the copies to the accused, since the accused pleaded not guilty, examined the witnesses P.W.1 and marked Ex.P.1 to Ex.P.7. The trial Court after considering the evidences and materials available on record, convicted the accused for the offence under Section 138 of Negotiable Instruments Act and sentenced him to undergo imprisonment of six months and to pay compensation of Rs.80,000/-. Against which, the accused preferred an appeal in C.A.No.148 of 2010 and the learned Additional District and Sessions Judge, FTC-2, Chennai after hearing the arguments on both sides reversed the judgement of the conviction and sentence passed by the trial Court and acquitted the accused. As against the same, the present appeal has been filed by the complainant.

4. The learned counsel for the appellant/complainant submitted that P.W.1 has clearly proved that the accused entered into hire purchase agreement to purchase a vehicle for a sum of Rs.1,65,000/- and he defaulted in payment of monthly dues. Therefore, the vehicle was seized and sold out for Rs.1 lakh and after adjusting the same, the accused ought to pay a sum of Rs.99,000/- to the complainant. In repayment of the said balance, the accused had issued a cheque for a sum of Rs.80,000/- and it was returned dishonour. After issuance of statutory notice, the accused neither repay the amount nor issue any reply.

5. Ex.P.1 - Power of Attorney; Ex.P.2 - letter issued by the accused to the complainant requested to re-schedule the monthly instalments, after deducting the margin amount paid by him; Ex.P.3 - after sold out the vehicle, the complainant informed the sale consideration amount by telegraphic intimation to the accused and requested to settle the balance amount; Ex.P.4 - the cheque issued by the accused; Ex.P.5 - the return memo issued by their bank; Ex.P.6 - Legal notice caused by the complainant and Ex.P.7 the acknowledgment card to prove the receipt of said notice by the accused. Hence, the learned counsel appearing for the appellant/complainant prayed to

restore the conviction and sentence passed by the learned VIII Metropolitan Magistrate, George Town, Chennai-1, by setting aside the judgment passed by the first appellate Court.

6. The case of the respondent/accused is that admittedly, the accused entered into hire purchase agreement to purchase the vehicle for a sum of Rs.1,65,000/-. Thereafter, he requested the complainant to re-schedule the monthly instalments, since he paid a sum of Rs.30,000/- as margin, from the total amount of Rs.1,40,000/-. Therefore, the hire purchase amount is Rs.1,10,000/- only. Admittedly, the vehicle was sold out for a sum of Rs.1,00,000/- by the complainant and whereas by Ex.P.3 - telegraphic communication stated that the vehicle was sold out for a sum of Rs.55,000/-. Therefore, there is no balance amount to be paid by the accused and the impugned cheque was issued at the time of entering into the hire purchase as security purpose. After realizing all the due amounts by selling the vehicle, the said cheque was presented to extract more money from the respondent/accused.

7. Heard the argument advanced by Mr. S.T.Rajah, learned counsel appearing for the appellant and none appeared for the respondent and perused the materials available on records.

8. Admittedly, the accused availed hire purchase facility to purchase a vehicle - Bajaj Tempo for a sum of Rs.1,65,000/- and entered into a hire purchase agreement on 04.06.2001 with the complainant. Thereafter, the said amount reduced to Rs.1,40,000/- and the accused paid a sum of Rs.30,000/- as margin money. It is seen from Ex.P.2, letter sent by the accused, requested the complainant to reduce the hire purchase amount from Rs.1,40,000/- to Rs.1,10,000/- and accordingly, re-schedule the monthly instalments. Thereafter, the accused was defaulted in payment of monthly instalments, the complainant seized the vehicle and sold out for a sum of Rs.1,00,000/-. Whereas the telegraphic intimation Ex.P.3 issued by the complainant to the accused stated that the vehicle was sold out for a sum of Rs.55,000/- and requested to settle the balance amount. But the complainant stated in the complaint that the vehicle was sold out for a sum of Rs.1 lakh and the balance due from the accused is for a sum Rs.90,000/-. Therefore, there is no evidence to show that what is the original sale consideration of the vehicle, which is seized from the accused. Further, when the vehicle was seized, the hire purchase agreement came to an end and the complainant cannot claim further towards the high purchase agreement.

9. More over, the hire purchase amount, as per Ex.P.2

is only for Rs.1,10,000/- and the vehicle was sold out for a sum of Rs.1,00,000/-. But according to the complainant, the cheque was issued for a sum of Rs.80,000/- towards the payment of balance payment. It clearly shows that the alleged cheque was not issued by the accused towards the payment of balance dues and it might have issued at time of entering into the hire purchase agreement with the complainant for the purpose of security. After realizing the amount from selling the vehicle, the cheque was presented by the complainant, as such, the complainant has failed to prove his case beyond any doubts.

10. In this regard, it is appropriate to consider the judgment rendered by the Hon'ble Supreme Court of India reported in "CDJ 2009 SC 1411 - Jugesh Sehgal v. Shamsheer Singh Gogi" in which the Hon'ble Apex held as follows :-

"9. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the

payee or the holder in due course of the cheque within 15 days of the receipt of the said notice; "

11. Further, the Hon'ble Supreme Court of India held in the judgment reported in "(2008) 4 SCC 54 - Krishna Janardhan Bhat v. Dattatraya G.Hegde" in paragraph Nos. 34, 35 and 44 which reads as follows:

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

35. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

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44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P., Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Rajesh Ranjan Yadav v. CBI) Article 6(2) of the European Convention on Human Rights provides : "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the

interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact."

12. In view of the above discussions, this Court is of the considered opinion that the complainant did not fulfil the requirements under Section 138 of Negotiable Instalments Act and failed to prove his case. Accordingly, the lower appellate Court rightly acquitted the accused and the judgment passed by the lower appellate Court does not warrant any interference from this Court and accordingly, this criminal appeal is liable to be dismissed.

13. In fine, this criminal appeal is dismissed and the judgment of acquittal passed in C.A.No.148 of 2010 dated 08.04.2011 on the file of the Additional District Sessions Court (Fast Track Court, No.II) Chennai is hereby confirmed.

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Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

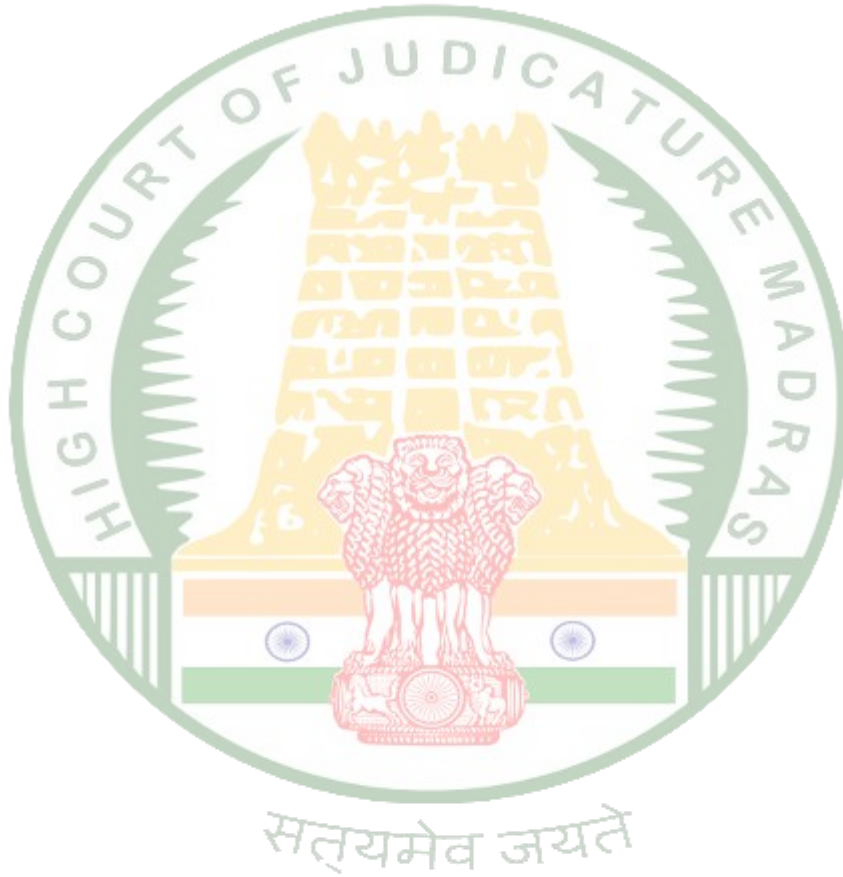
1. The Presiding Officer
The Additional District Sessions Court
Fast Track Court, No.II, Chennai

2. The Presiding Officer,
VIII Metropolitan Magistrate Court,
George Town, Chennai.

+1cc to Mr.G.S.Dhanalakshmi, Advocate, S.R.No.47832

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VBA (CO)
CS/01/08/18



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