IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :24.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL.A.No.482 of 2007

M. Santhi ... Appellant/complainant

Vs.

1. M.Ganesh Shankar
2. K. Geetha ...Respondents/Accused

PRAYER: The Criminal Appeal has been filed under Section 378 (1) of Cr.P.C., to set aside the order of acquittal dated 09.04.2007 in C.C.No.107 of 2004 on the file of the Judicial Magistrate No.1, Salem.

For Appellant : Mr. K. Selvaraj
For Respondents : Mr. T. Balaji

J U D G M E N T

This Criminal Appeal has been directed against the order of acquittal dated 09.04.2007, passed in C.C.No.108 of 2004, by the Judicial Magistrate No.I, Salem.

2. The case of the appellant/complainant, is as follows:
It is averred in the petition that on 16.07.2003, both the accused have borrowed a sum of Rs.3,00,000/-(Rupees Three lakhs only) from the complainant and to that effect, they executed a Pronote on the same day. Besides that, they had issued a cheque dated 18.11.2003 for a sum of Rs.3,00,000/- drawn on State Bank of Mysore, Salem Branch. When the above cheque was presented for encashment on 19.11.2003 through complainant bank, it has been returned as "funds insufficient" under Ex.P2 and the memo was marked as Ex.P3. Therefore, on 20.11.2003, a legal notice-Ex.P4 was issued to the accused, but the same has been returned as "unserved" and the acknowledgment of the said notice was marked as Ex.P5. Since the accused have committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881, the present complaint has been filed for getting the relief sought for therein.

3. Before the trial court, on the side of the complainant, complainant was examined as PW1 and Exs.P1 to P7 were marked. Whereas on the side of the accused, one witness was examined and marked as DW1 and two exhibits were marked as Exs.D1 & D2. The

Trial Court, after completion of evidence, questioned the accused u/s.313 Cr.P.C., Accused denied complicity to the offence. After analysing the available evidence on record, acquitted both the accused u/s.255 (1) Cr.P.C., Against the order of acquittal, the present Criminal Appeal has been preferred at the instance of the complainant as appellant.

4. The learned counsel appearing for the appellant/complainant has contended that the power of attorney of the complainant advanced the loan amount in favour of the accused No.1, in order to repay the loan amount, they issued a cheque in favour of the complainant. The said cheque was presented before the concerned bank and the same was returned as "funds insufficient". The said complainant has been examined as P.W.1, he categorically stated before the Trial Court that the complainant has sufficient means to lend money to the accused and under these circumstances, the order of acquittal passed by the Trial Court is totally erroneous and the same is liable to be set aside and the respondent/accused shall be imposed maximum punishment u/s.138 of Negotiable Instruments Act and the appellant/complainant may be awarded compensation u/s.357 Cr.P.C.,

5. Per contra, the learned counsel appearing for the Respondent/Accused has contended that the Trial Court has look into the evidence adduced by the complainant and also by D.W.1. The specific evidence given by D.W.1-Mallikeswaran, the Branch Manager of Indian Overseas Bank, Chevvapet Branch, Salem, shows that the account No.2309 stands in the name of Prasad Agency, Chevvapet and the owner of the Prasad Agency is one Kirubakaran and the said account does not belong to the accused persons. However, the accused persons had never borrowed any loan amount from M.Santhi. The said M.Santhi has worked as a clerk in PSK Finance Company and thereafter, due for difference of opinion, she left the said company and thereafter the said company filed a case through the other employee viz., Venkatachalam. The accused persons did not know the complainant Venkatachalam and there is no transaction between the accused and the complainant. In fact, some of the family members of the accused persons enrolled in the PSK Chit Company as a member of the Company and in order to give guarantee to the said Company, the Company forged the family members cheques and filed several cases against several persons. But in the present case, the accused persons did not issue any cheque in favour of the complainant M.Santhi. The abovesaid case was filed when M. Santhi was employed in the PSK Finance Company. She was examined at the time of presentation. However, the PSK Finance Company forged the power of attorney as if M.Santhi executed a power of attorney in favour of the power agent Venkatachalam for filing the present case. Infact, the said M.Santhi was not examined as witness in the present case since the specific complaint that

the accused person has borrowed loan from M.Santhi. However, during the cross examination of PW1, M.Santhi was employed as a clerk in the PSK Finance Company and later, she left the job. However, he categorically admitted that PW1 did not work under M.Santhi in the said Company and further, PW1 categorically admitted that there is a difference in the signature in the power of attorney document and sworn statement. He did not mark the pronote and he marked only alleged cheque issued by the accused persons. Further during cross examination, he admitted that the said cheque was returned on the ground that signature does not belong to the account holder.

6. It is an admitted fact that the present complaint has been filed under Section 138 of the Negotiable Instrument Act, 1881. For invoking Section 138 of the said Act, the cheque in question must be given in respect of an enforceable debt.

7. In the present case, a specific defence taken on the side of the accused is that the cheque in question is not issued by the accused person further the appellant/complainant is not an authorised person of the cheque holder, and there was a discrepancy in the signature of the said M.Santhi in the power of attorney and the sworn statement. The said cheque was misused by the company by setting up the complainant by filing a case under Section 138 of the Negotiable Instruments Act against the accused persons.

8. At this juncture, it would be condign to look into the evidence adduced by the complainant. The complainant has been examined as P.W.1. P.W.1 said that the cheque was issued by the accused for repayment of loan obtained under pronote, but he did not establish in what consideration, the accused person borrowed the amount and what is the contents of the Pro-note and the same was not established through documentary evidence.

9. In view of the above, the Court can easily come to a conclusion that the alleged money transaction put forth by the complainant is nothing but false.

10. On the side of the accused, the Bank Officer was examined as P.W.1 and his evidence clearly established that the accused do not have any account in his Bank. The Account No.2309 belongs to one Prasad Agency, Chevvapet Branch, Salem and the account holder is Kirubakaran. Hence, the entire complainant is a malicious one. Without ascertaining the bank account, the complainant filed a false case against the accused person and PW1 has not put forth any evidence and document to show that the accused is not an account holder in the Bank and that the complainant has not establish that he lend money in favour of the accused person.

11. Since on the side of the appellant/complainant, it has not been positively established that he had advanced loan on the date of issuance of the alleged cheque and since on the side of the respondents/accused, it has been established to the fact that the appellant/complainant has not advanced loan, this court is of the considered view that Ex.P1 has not been given in respect of any legally enforceable debt and therefore, Section 138 of the Negotiable Instruments Act 1881, is not attracted.

12. When the evidence of the accused probabilise the case that there is no privity of contract between the complainant and themselves, the burden shifted on the complainant to establish passing consideration. From the evidence of PW1, I am unable to find any material to substantiate passing of consideration. The Trial court, on proper appreciation of evidence has rightly arrived at a conclusion. Unless the Judgment of the trial court is either perverse or wholly unsustainable in law, the order of acquittal cannot be interfered with by the appellate court, as per the dictum laid down by the Hon'ble Supreme Court (2009) 10 SCC 206 (Arulvelu & Another Vs. State Represented by the Public Prosecutor & Another) which reads as follows:

> "Unquestionably, the appellate court has power to review and reappreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be a perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallised by the aforementioned judgments of this Court. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court."

13. On considering overall evidence available on record, the trial court has rightly come to the conclusion that the cheque in question is not supported by consideration and therefore, dismissal order passed by the trial court is legally correct and the same does not call for any interference.

14. Further, the presumption available under Section 118 of the Negotiable Instruments Act, 1881 is nothing but rebuttable and in the present case, on the side of the respondent/accused rebuttal evidence is available so as to

disprove the case of the appellant/complainant.

15. The trial court, after considering the available evidence on record has rightly dismissed the complaint and there is no need to interfere with the order passed by the trial court.

In the result, the Criminal Appeal is dismissed and the order of acquittal dated 09.04.2007 in C.C.No.108 of 2004 on the file of the Judicial Magistrate No.1, Salem, is confirmed.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

gv

To
1. The Judicial Magistrate No.1,
Salem.

2. Do Thro The Chief Judicial Magistrate
Salem.

3. The Section officer
Criminal Section, High Court, Madras.

+1 CC to Mr.K. Selvaraj, Advocate sr 14405.
+1 CC to Mr.A. Thiyagarajan, Advocate sr 14209.

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AK(CO)
SP(04/04/2018)