



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 04.09.2018
DELIVERED ON : 12.09.2018
CORAM:

WEB COPY

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Cr1.A(MD)No.195 of 2014

R.Dennis Raja : Appellant/Complainant

Vs.

T.Subbiah : Respondent/ Accused

PRAYER: Criminal Appeal is filed under Section 378(2)(b) read with 386(a) of the Code of Criminal Procedure, praying to set aside the Judgment passed in C.A.No.86 of 2013, dated 06.02.2014 on the file of the Second Additional Sessions Judge, Thoothukudi and restore the Judgment passed in C.C.No.32 of 2013, dated 20.09.2013 by the learned Judicial Magistrate, Fast Track Court (Magistrate Level), Thoothukudi and consequently punish the accused and award compensation to the complainant.

For Appellant : Mr.N.Mohideen Basha

For Respondent : Mr.V.Kathirvelu
Senior counsel for Mr.K.Prabhu

JUDGMENT

The appeal under consideration is in respect of reversing judgment of the first appellate court, acquitting the respondent herein by holding the respondent not guilty of charge under section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as 'N.I. Act'].

2.The brief facts as found in the complaint filed under Section 138 of the N.I. Act are as follows:

(i)The complainant (Dennis Raja) and the accused (T.Subbaiah) are friends from college days and belong to same community. In the year 1993, Hindustan Petroleum Corporation Limited (herein after called as 'HPCL') invited applications from prospective dealers for distribution of LPG at Tuticorin. The complainant applied under general category. The accused applied under Physically Handicap priority quota. HPCL allotted distributorship to the accused. The complainant provided required logistic and finance to establish the firm by name " Sudha Gas Agency". Sudha is the sister-in-law of the complainant. The land owned by the mother-in-law of the complainant was leased to Sudha Gas Agency and he constructed godown at his

expense. Later for the improvement of the business, working capital of Rs.10,00,000/- for the agency was availed in the name of Sudha Gas Agency furnishing the property of his wife as security. Power of attorney was given by the accused in favour of the complainant to run the day to day affairs of the agency. The accused in the year 2002 during the month of March wrote to HPCL to record the name of the complainant as partner of Sudha Gas Agency. However, when dispute arose within the family members of the complainant, the accused took side with his in-laws and tried to throw him out from the affairs of Sudha Gas Agency. Therefore, to settle the issue amicable between them, panchayat was held in the presence of elders on 12.07.2002. Compromise arrived between them. The complainant agreed to relinquish his right and claim in the business of Sudha Gas Agency in lieu of Rs.31,00,000/- and on repayment of Rs.9,00,000/- he has invested in the business, totally Rs.40,00,000/-. The accused paid Rs.1,00,000/- in cash on 14.07.2002 and issued the following seven cheques all dated 01.04.2003 for the balance of Rs.39,00,000/-.

Sl. No.	Cheque No.	Amount	Bank
1.	037675	Rs.2 lakhs	Karur Vysya Bank, Tuticorin.
2.	037676	Rs.2 lakhs	Karur Vysya Bank, Tuticorin.
3.	037677	Rs.12 lakhs	Karur Vysya Bank, Tuticorin.
4.	682780	Rs.10 lakhs	Karur Vysya Bank, Tuticorin.
5.	708696	Rs.9 lakhs	Canara Bank, Tuticorin.
6.	063544	Rs.2 lakhs	State Bank Travancore, Tuticorin.
7.	063545	Rs.2 lakhs	State Bank Travancore, Tuticorin.

(ii)The terms of agreement was reduced into writing in the presence of witnesses on 14.07.2002. During the month of March 2003, the complainant called the accused and informed him to arrange for fund in his account since he is going to present the cheques on the due date. Instead of arranging for the funds to honour the cheques, the accused gave complaint to the police as if he is threatening the accused. The Thoothukudi North Police called the complainant and after enquiry closed the complaint directing the parties to workout their remedy as per law. While so, when the cheques re-presented for collection, they were returned with endorsement "Account closed".

(iii)The accused after issuing cheques for discharging his debt has dishonestly closed the account before the cheques were payable. To the statutory notice dated 08.04.2003, the accused issued a reply notice dated 21.04.2003 denying liability and issuance of cheques. Before reply, the accused issued a paper publication on 06.04.2003 under the caption "PUBLIC NOTICE" advertising that the signed blank cheques of Sudha Gas Agency mentioned thereunder were found missing one year back and the respective banks were already informed about it. It is suspected that the cheques were taken away by Dennis Raja's (complainant) erstwhile staff of Sudha Gas Agency. To this public notice issued in the name of M.Kanagamani, wife of of



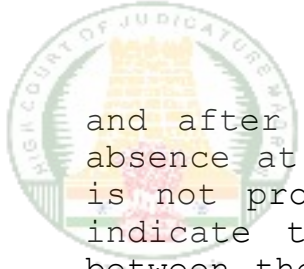
Mukkandi Nadar and T.Subbaiah, by advocate Mr.A.W.D.Tilak, the complainant has issued counter public notice denying the allegations.

3.Evidence let in by the respective parties:

(i)The complainant to prove his case has deposed as P.W.1 and examined 5 witnesses as P.W.2 to P.W.6. In support of his contention that the cheques Ex.P.3 to Ex.P.9 were issued to discharge a legally enforceable debt besides ocular evidence, he has relied upon 48 exhibits. Athinarayanan (P.W.2) and Ganesan (P.W.3) were the witnesses to the panchayat and agreement Ex.P.2 dated 14.07.2002. Subramaniam (P.W.4) Assistant Manager, State Bank of Travancore and Dhamodaran (P.W.5), Manager, Canara Bank, were examined to prove that on the date of presentation of cheques the respective accounts were closed on the instruction of the accused. Jagadeeswar, Senior Manager, HPCL (P.W.6) examined to prove that the complainant was managing the affairs of Sudha Gas Agency and signed in the stock verification register on behalf of Sudha Gas Agency. This witness has identified Ex.P.36 and Ex.P.46, the letters of the accused addressed to the Regional Manager, HPCL expressing his intention to induct the complainant as partner of Sudha Gas Agency.

(ii)In defence, the accused has examined two witnesses. Marked 12 exhibits. (The Trial Court has marked the defence documents under 'A' series. The error has been pointed out by the first appellate Court and corrected as 'D' series.). D.W.1 Franklin Asir is the Chief Manager of Tamilnadu Mercantile Bank, Tuticorin, who has deposed about Ex.D.7, which is a letter dated 23.12.2002 in the letter pad of Sudha Gas Agency signed by the accused informing the Manager of Tamilnadu Mercantile Bank, Tuticorin to close his Current Account No.315131. The reason stated in the letter is that, he has to draw cheques daily for the Company at Palacat. Tamilnadu Mercantile Bank have no branch at Palacat, there is no need for him to maintain account in Tamilnadu Mercantile Bank. D.W.2, Olimuthu is examined to mark Ex.D.8, which is the general diary extract of the North Crime Branch Police Station, Tuticorin. This document marked with objection, indicates that CSR No.16/2003 registered on the complaint of Subbaiah on 05.04.2003 alleging that the cheques given to Dennis Raja while he was employed in his company, retained by him instead of submitting it to the bank. The complaint closed on 12.04.2003 recording the direction given to the parties to settle the dispute through Court.

4.The Trial Court, based on the evidence, held that the accused admits the signatures in the cheques Ex.P.4 to Ex.P.9. Agreement (Ex.P.2) and the issuance of cheques pursuant to the agreement alone is denied. However, the execution of agreement Ex.P.2 is proved through the evidence of P.W.2 and P.W.3, who are the witnesses to the agreement. No contra evidence let in by the accused to disprove the agreement. The allegation that the complainant misused the signed cheques given to him, while he was working as Manager of Sudha Gas Agency not proved. No complaint immediately after missing of cheques laid by the accused. The police complaint after one year

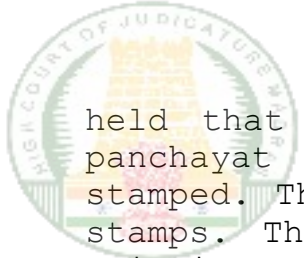


and after closure of accounts falsify the defence. Alibi for his absence at Tutucorin on 12.07.2002 the alleged date of Panchayat, is not proved. The income tax returns of the respective parties indicate that they had sufficient income and money transactions between them. The Trial Court, considering other exhibits relied by the complainant, held that the Gas Agency established in the premises of complainant property, raising loan mortgaging the property of the complainant's wife, power of attorney executed in favour of the complainant and the letter given to HPCL to induct the complainant as partner in Sudha Gas Agency, all proves the subject cheques were issued in discharge the debt. Having issued the cheques for discharge of debt as found in Ex.P.2, the accused is liable to pay it. The attempt to rebut the presumption failed in view of falsity and contradictions.

5. On appeal, the first appellate Court on re-appreciation of evidence reversed the finding of the Trial Court on the ground that the complainant is not consistent in his case about the actual amount he invested in the business. The contradiction about the amount he invested falsifies his case. No document produced by the complainant to prove he invested Rs.10 lakhs for establishing Sudha Gas Agency. The reason to pay additional sum of Rs.30 lakhs to relinquish from the business, sounds improbable, since the income tax return filed on behalf of the Sudha Gas Agency does not indicate its income worth to pay Rs.30 lakhs for the partner, who relinquishes his right. Without proper account, the amount arrived at settlement is unbelievable. Ex.P.2 has not been drawn in a stamp paper. On comparison of the signatures of the attesting witness P.W.3 found in Ex.P.2 and Ex.P.6. varies. No corroborative evidence with regard to the contents of Ex.P.2. In the absence of documentary proof to show that the complainant was a partner or shareholder in Sudha Gas Agency, the theory of the accused that the subject cheques and the letter pad given to the complainant when he was employed as Manager of Sudha Gas Agency is used to grab some amount from the accused, found probable.

6. The lower appellate Court has also pointed out that different inks is used to sign different cheques and to fill the date and amount, which improbabilises the evidence of P.W.2 and P.W.3 that the cheques Ex.P.3 to Ex.P.9 were given by the accused on the same day, i.e., 14.07.2002. Further, the lower appellate Court has also taken note of the paper advertisements dated 06.04.2003 given by the accused regarding missing cheques, which probabilises the defence.

7. Aggrieved by the finding of the lower appellate Court, the learned counsel for the complainant would submit that the finding of the lower appellate Court is improper. The minor variation in the amount invested by the complainant has been given undue weightage to disbelieve the case of the complainant. The appellate Court failed to appreciate the evidence of P.W.2 and P.W.3, who have spoken about the execution of Ex.P.2 and its contents. Despite their clinching evidence on this aspect, the lower appellate Court has erroneously

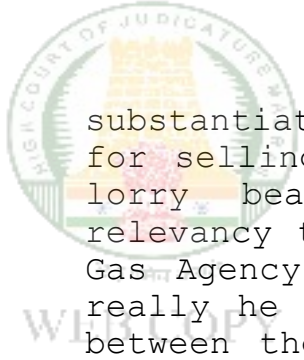


held that their evidence needs corroboration. The result of the panchayat (mediation) reduced into writing (Ex.P.2) need not be stamped. The lower appellate Court has wrongly construed the law on stamps. This document is relied by the complainant to show pre-existing contract between the parties and the promise to discharge the debt. To prove the execution of it, two attesting witnesses were examined. While so, there is no legal sense in disbelieving their testimony.

8.The alleged theft or misappropriation of the cheques has not been raised till the presentation of the cheques and its return for the reason 'account closed'. For the first time, the accused through his Advocate has placed a paper advertisement alleging certain cheques were missing and he has given complaint to the bank about it a year back. This paper publication is an afterthought after knowing the cheques presented for collection returned on account of closure of account. The lower appellate Court has failed to take note of this fact, while reversing the well considered judgment of the trial court.

9.The accused initially gave letter to HPCL admitting the fact that the complainant is his partner and helpful in establishing the business both financially and physically, so the partnership has to be recognized by HPCL. He gave paper advertisement through his lawyer Mr.D.Thomson on 23.04.2002 that Tmt.Kanagamani has no right in Sudha Gas Agency. She has no right to remove Dennis Raja from the service of Sudha Gas Agency, who is still the Manager of the said Agency. Later in the Public notice made on 05.04.2003 given through his Advocate Mr.A.W.D.Tilak, he claims that Sudha Gas Agency is owned by him and Tmt.Kanagamani. While these inconsistency in the accused version improbabilises his defence, the lower appellate Court has erroneously reversed the trial Court's finding. Hence, it has to be set aside.

10.Per contra, the learned Senior counsel appearing for the respondent/accused would submit that, the judgement of the lower appellate court needs no interference. The complainant failed to prove any debt enforceable against the accused. The alleged agreement Ex.P.2 is a fabricated documents. The complainant while employed as Manager was entrusted with signed letter pad and cheques to meet out urgent exigencies. He misused it to fabricate Ex.P.2 agreement and cheques Ex.P.3 to Ex.P.9. The friendship between the parties, later distrust and dispute are admitted. The complainant was a paid employee under the accused, a fact, well proved from the income tax returns filed by the complainant as well the accused. While the alleged compromise agreement Ex.P.2 say that the complainant had invested Rs.10 lakhs, in the statutory notice Ex.P.14 and in his complaint he has stated that he invested Rs.9 lakhs in Sudha Gas Agency. In the cross examination, he admits that his investment in Sudha Gas Agency may be less than Rs.9 lakhs. <https://hcservices.ecourts.gov.in/hcservices/> Though the complainant claims he sold his jewels, lorry and borrowed loan from friends to invest in Sudha Gas Agency, no documents to



substantiate this statement are filed. The exhibits like receipts for selling jewels (Ex.P.18 to Ex.P.20) and the R.C. book copy of lorry bearing Registration No.TN-69-B-0099, Ex.P.21 have no relevancy to the case. They are not proof for investment in Sudha Gas Agency. Admittedly the complainant had his own businesses. If really he had invested in Sudha Gas Agency and compromise arrived between them, there should have been proper documentation to that effect. The complainant is not a layman. Entering into compromise settlement for Rs.39 lakhs and recording it in a letter pad, is quite unnatural. P.W.1 to P.W.3 had deposed that post dated cheques were issued on 14.07.2002 itself when the compromise was finalised, but in Ex.P.2, details of 7 cheques and amount have not been mentioned. Further, below the signature of the accused in Ex.P.2, date is not mentioned. The lower appellate court after taking note of all these lacunae in the complaint, had held that the cheques Ex.P.3 to Ex.P.9 were not issued to discharge any legally enforceable debt. Therefore, the lower appellate Court has rightly reversed the judgment of the trial Court which failed to consider the above lacuna in the case of the complainant.

11.The learned senior counsel appearing for the respondent pointed out that the complaint is only against the accused Subbaiah in his personal capacity, while the cheques were issued for Sudha Gas Agency and signed by the accused as its proprietor. Therefore, not impleading Sudha Gas Agency for which the cheques were issued, is fatal to the case of the complainant. Though it is a fresh plea, it being a question of law, he is entitled to raise this plea at the appellate stage.

12.Heard the learned counsels appearing for the parties. Records perused.

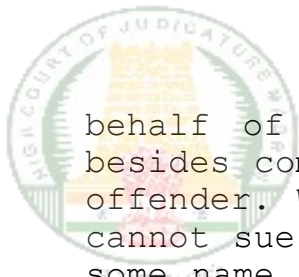
13.The following two points arise in this appeal, which need consideration.

(i)Does the complaint not maintainable for its omission to array the Proprietary concern Sudha Gas Agency as accused ?

(ii)Does mere denial of facts regarding transaction, sufficient to hold the accused has rebutted the statutory presumption under Section 139 of N.I. Act ?

14.Point (i):

This plea is liable to be rejected outright for the simple reason that Section 141 of N.I. Act contemplates procedure in case of offence committed by company. Proprietor concern cannot be equated to a company. The concept of vicarious liability is alien to criminal jurisprudence with few exceptions. N.I. Act is one such exception. Company is a legal entity by itself. Being a juristic body it can sue or be sued. Though company being a juristic body and can sue and be sued, it cannot operate itself. Some human agency is required. Therefore company being the principal, the human agency who operates the company become its agent. So, the natural person either individual or group of individuals who operates on behalf of the company is vicariously held liable for the act he do for or on



behalf of the company. Hence Section 141 of the N.I. Act, say, besides company, whom else to be prosecuted when the company is the offender. Whereas Proprietorship concern is not a juristic body. It cannot sue or be sued. It is the individual who runs the concern in some name. Though he issues cheque as proprietor of the concern, it is he and he alone is liable for prosecution, since there is no Principal-Agent characters in proprietorship unlike in a company or partnership firm. The explanation (a) and (b) to Section 141 of the N.I. Act make it clear what a company means under this Act.

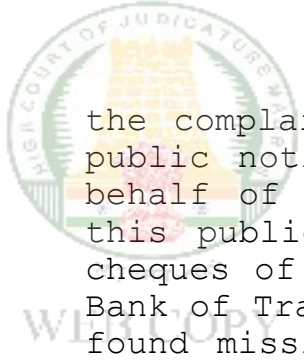
15. The Judgment of the Hon'ble Supreme Court in *Aneeta Hada v. Godfather Travels and Tours (P) Limited* reported in 2012 (5) SCC 661 is in respect of a company incorporated under the Companies Act, 1956, wherein the Hon'ble Supreme Court has laid law indicating that there cannot be any vicarious liability unless there is prosecution against the company. The said dictum does not cover proprietary concern.

16. Point (ii):

The cheques which are marked as Ex.P.3 to Ex.P.9 are related to the accounts maintained by the accused. The signatures in these cheques are not denied. The writings on the cheques date and amount are denied. For the said purpose, the variation in the writings and the colour of the ink are taken into consideration by the appellate Court to disbelieve the purpose for which the cheques were allegedly given to the complainant. Sections 20 of N.I. Act reads as follows:

"20. Inchoate stamped instruments. Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 2[India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument any thing in excess of the amount intended by him to be paid thereunder".

The lower appellate Court without adverting to the statutory presumption found in Section 20 had arrived at a wrong conclusion without any basis. In this case, the contention of the complainant is that post dated cheques were issued on 14.07.2002 with specific instruction to be presented on 01.04.2003. It is proven fact that the accused has closed the accounts maintained by him in the name of Sudha Gas Agency much before the cheques were presented for collection. For the first time, only on 05.04.2003 through a public notice in the newspaper through his Advocate Mr. A.W.D. Tilak, the accused has alleged that the cheques were suspected to be stolen by



the complainant. This paper publication is marked as Ex.P.45. This public notice is issued in the name of Advocate Mr.A.W.D.Tilak on behalf of M.Kanagamani, wife of Mukkandi Nadar and T.Subbaiah. In this public notice, it is informed to the public that few signed cheques of Sudha Gas Agency maintained at Karur Vaisiya Bank, State Bank of Travancore and Tamilnadu Mercantile Bank (South Branch) were found missing a year back. Concern banks were intimated about the missing. Now they come to know these cheques were taken away by Dennis Raja, son of Rajendiran, former employee of Sudha Gas Agency. If Dennis Raja or any other person try to encash these cheques, they will be proceeded with criminal action for cheating.

17.Through Ex.P.45, the accused has positively admitted two facts. First, Sudha Gas Agency is jointly owned by Tmt.Kanagamani and himself. Secondly, they have informed the concern banks about the missing of cheques mentioned in the notice to the respective banks a year before.

18.First of all, it is to pertinent to note that all the 7 cheques Ex.P.3 to Ex.P.9 are dated 01.04.2003. The complainant had presented these cheques for collection through his bank at Tuticorin on 03.04.2003. Same were returned as 'account closed' on 04.04.2003. Whereas the public notice Ex.P.45 is issued on 05.04.2003 after the cheques were presented and returned as account closed. Further, the accused has not produced any document to show he has intimated the banks concern about the missing of these cheques a year back as mentioned in the public notice. The only document he has produced is Ex.D.7, which relates to his account in Tamilnadu Mercantile Bank. It is a letter, dated 23.12.2002 written by the accused requesting the Manager of Tamilnadu Mercantile Bank to close the account since Tamilnadu Mercantile Bank have no branch at Palacode. None of the cheques Ex.P.3 to Ex.P.9 are drawn from the account maintained by the accused in Tamilnadu Mercantile Bank. Therefore, this document has no relevancy or bearing to the case.

19.To disprove the case of the complainant that the cheques were issued to him by the accused on 14.07.2002 pursuant to the panchayat held on 12.07.2002, the accused has taken a plea that on the relevant date he was at Chennai staying in Imperial Hotel at Egmore. A suggestion to that effect is put to complainant (P.W.1), which has been denied by the witness. When a plea of alibi is taken by the accused, it is his burden to prove that on the alleged date of handing over the post dated cheques, he was not at the place where it was allegedly to have been given. In this case, the accused except putting a suggestion to the complainant during the cross examination that he was in Chennai staying at Imperial Hotel on 14.07.2002 , no evidence to substantiate the plea adduced.

20.Section 139 of the N.I. Act, reads as under:

"139.Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to

in section 138 for the discharge, in whole or in part, of any debt or other liability".

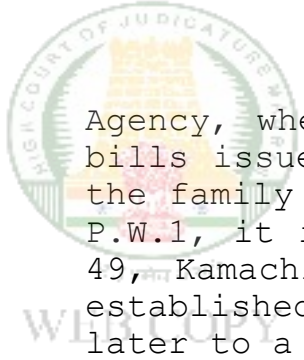
21. In *Kumar Exports v. Sharma Carpets* reported in 2009(2) SCC 513, the Hon'ble Supreme Court had considered the provisions of NI Act as well as the Evidence Act regarding presumption and rebuttal of the presumption. It is observed in paragraph 20 of the Judgment as under:

"20. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist."

This preposition of law is again reiterated by the Hon'ble Supreme Court recently in *Kishan Rao v. Shankargouda* reported in AIR 2018 SC 3173. With the aid of the above precedent, the facts of the case has to be analyzed.

22. The reverse burden to prove the none existence of any debt or liability need not be beyond reasonable doubt, mere preponderance of probability is sufficient. To that extent the degree of proof is lenient. In this case, the conduct of the accused as seen from the documents exhibited as evidence reveals that the LPG distributorship is allotted to him on certain terms and conditions. From the offer letter dated 15.02.1994 from HPCL (Ex.D.1 series), it could be seen that the accused was asked to procure or get into lease for a suitable land measuring 32m x 29 m for construction of godown for storing minimum 8000 LPG and a show room with telephone connection preferably in a prominent locality within distributorship's area of operation.

23. To comply the requirements, i.e., (i) land with specific extent for godown purpose, the mother in law of the complainant (Tmt. Kanagamani) has entered into a lease agreement on 9th May 1994 with the accused in respect of her 8 cents land at R.S No 561/1C, Meelaveetan Village, Tutucorin Taluk and (ii) Show-room with telephone connection. The phone number 323353 which stands in the name of the complainant was installed at the office premises of Sudha Gas Agency, 49, Kamatchiamman Koil Street, Tuticorin. This fact is proved from the bottom of the letter pad of Sudha Gas

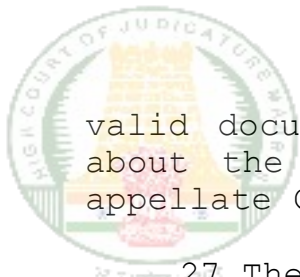


Agency, where the contact numbers are given and from the telephone bills issued by BSNL which are marked as prosecution exhibits. From the family card issued to the complainant and from the deposition of P.W.1, it is established by the complainant that he was residing at 49, Kamachiamman Koil Street, till Sudha Gas Agency show room was established. Thereafter, he shifted his house to the upstairs and later to a different location.

24.Further, the wife of the complainant Tmt.Navaneethi has stood as guarantor/co-obedient for the working capital loan of Rs.10 lakhs availed by Sudha Gas Agency from Karur Vaisya Bank, Tuticorin. From Ex.P.32, it could be seen that land and building worth about Rs.32 lakhs owned by Navaneethi has been charged under equitable mortgage for loan extended to Sudha Gas Agency. Further the accused has given letters Ex.P.36 and Ex.P.46 to HPCL to treat the complainant as partner of Sudha Gas Agency. However, as per the letter of offer in clause 1.2, there is a specific bar to induct any partner in case of individuals. Therefore, obviously HPCL has not acted upon the request of the accused to induct the complainant as partner of Sudha Gas Agency. From Ex.P.36 and Ex.P.46, it is clearly proved by the complainant that the accused attempted to formalise the induction of the complainant into the business.

25.The documents such as Ex.D.1 series and Ex.D.2, the power of attorney executed by the accused to the complainant to look after the affairs of the business and the lease agreement entered with the mother in law of the complainant and the stock verification records show it was the complainant and his family had been contributing for the business. This further fortified through Ex.D.11 the income tax return filed on behalf of Sudha Gas Agency which indicates payment of salary to the complainant, complainant wife Navaneethi and complainant's mother in law Kanagamani. These documents indicate that the complainant was not merely a paid employee of Sudha Gas Agency, as contented by the accused. In such circumstances, when the complainant has proved the agreement Ex.P.2 through attesting witnesses and the claim of alibi not proved by the accused, the lower appellate Court has erroneously held that Ex.P.2 is titled as Agreement, it is not written in stamp papers, the agreement required stamp duty, so Without getting stamp duty penalty, the trial Court has wrongly admitted the same in evidence and marked as exhibit.

26.It is very unfortunate that the lower appellate Court has failed to appreciate the document Ex.P.2 in proper perspective. It is always the content of the document decides the nature of the document, but not the title it carries. Ex.P.2 is recording of the compromise of the panchayat held on 12.07.2002. It is not relied to enforce the content of the document, which disclosed existence of a liability. For collateral purpose to show the cheques in dispute were issued pursuant to the panchayat, it is marked. While so, the lower appellate Court has found fault with the Trial Court regarding the admissibility of the document. Not stopping with that, after holding that Ex.P.2 is not admissible in evidence and it is not a

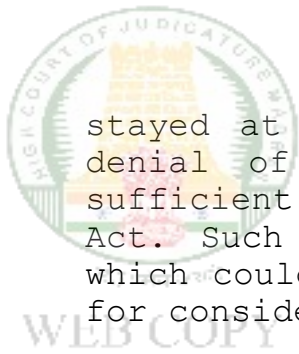


valid document in the eye of law, he has gone further to discuss about the content of Ex.P2. Thus, the illegality in the lower appellate Court's order bristles.

27.The accused in this case, has attempted to probabilise there was no passing of consideration to issue cheques and the cheques were stolen by the accused while he was employed as Manager. From the evidence let in by the complainant as pointed out earlier, the complainant has established to the core that he was not mere a Manager in Sudha Gas Agency, he and his family members have contributed to the business and the same has been acknowledged by the accused himself in his letters to HPCL just few months before the trouble started. The stock verification records and the power of attorney also lend support to the case of the complainant. Whereas, the accused has denied the issuance of the cheques through public notice in a newspaper alleging theft of the cheques by the complainant one year back. This notice is clearly an afterthought. It miserably fails to clear the test of prudence since, no document to show he informed about the theft/missing of those cheques either to the bank or to the police, immediately. His conduct of closing the accounts after issuing the cheques and not intimating the bank about the cheques held by him, does not lend any support to probabilise his defence.

28.Apart from his public notice and reply notice, yet another document he relies to rebut the presumption, is the complaint to police Ex.D.8. The extract of the complaint as found in the general dairy indicates the accused accepts that he knowingly handed over the cheques to the complainant for presenting it in the bank, but he has retained it and trying to misuse it. This complaint has been closed to work out the remedy in the Court of law. If what is found in the case dairy is correct, then the case of the accused that the cheques were missing and stolen by the complainant while he was serving as Manager of Sudha Gas Agency gets falsified. Thus, the contradictory statement of the accused which is mutually destructive coupled with the fact his failure to prove alibi, to wit, his absence at Tuticorin on 14.07.2002 and presence at Imperial Hotel, Egmore, Chennai, not only failed to rebut the presumption by preponderance of probability, but add more credence to the case of the complainant.

29.It is relevant to point out at this juncture, when the accused denies the execution of Ex.P.2, document, the same is proved through attesting witnesses P.W.2 and P.W.3. These two witnesses have deposed that panchayat held in the presence of elders of the community and locality. The father in law of the complainant, father of the accused and others were present, while P.W.2 and P.W.3 signed the document as witnesses for its execution. This Court only wonders what prevented the accused to examine any of those persons mentioned by these attesting witnesses to disprove their evidence or what prevented him from producing documents to show he was not at Tuticorin on 12.07.2002 and 14.07.2002, but was at Chennai and



stayed at Imperial Hotel. Therefore, this Court holds that mere denial of liability or passing of consideration will not be sufficient to rebut the presumption under section 139 of the N.I. Act. Such a rebuttal should be backed by some material evidence which could probabalise the facts content in it. The points framed for consideration answered accordingly.

30. In the result, this Criminal Appeal is allowed. The Judgment of the learned Second Additional Sessions Judge, Tuticorin, dated 06.02.2014, passed in C.A.No.86 of 2013 is set aside and the Judgment of the learned Judicial Magistrate, Fast Track Court (Magistrate Level), Tuticorin passed in C.C.No.32 of 2013, dated 20.09.2013 is restored. The Trial Court is directed to secure the respondent/accused and commit him to prison to undergo the period of sentence.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar(CS-II)

To

1. The Second Additional Sessions Judge,
Thoothukudi.
2. The Judicial Magistrate,
Fast Track Court (Magistrate Level),
Thoothukudi .
3. The Record Keeper,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (**2copies**)

+1CC to Mr.K.PRABHU, Advocate, SR.No.84119

+1CC to Mr.N.MOHIDEEN BASHA, Advocate, SR.No.83964

Crl.A(MD)No.195 of 2014
12.09.2018

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