

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :09.04.2019

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Criminal Appeal Case No.172 of 2014

D.Rajeswari ... Appellant/Respondent/
Complainant

Versus

1.K.T.Murugesan
S/o thulasimani gounder
Proprietor,
Ever green Earthmovers. ... Respondent/Appellant/
Accused
2.The Public Prosecutor,
Coimbatore. ... Respondent/Respondent

The Memorandum of Criminal Appeal has been filed under Section 378 of the Code of Criminal Procedure, against the order of acquittal passed by the Principal District and Sessions Judge Coimbatore in C.A.No.201 of 2012 dated 13.12.2012 thereby reversing the Order of the Judicial Magistrate No.1, Pollachi in S.T.C.No.2681 of 2010 dated 18.06.2012.

For Appellant : M/S.S.Senthil Kumar
For Respondent-1 : Mr.V.Perarasu
For Respondent 2 : Mrs.Kritika Kamal.P, GA

O R D E R

Heard, the learned counsel for the Appellant and the Respondents.

2.The appellant herein is the complainant before the Trial Court; alleging that the respondent herein borrowed a loan of Rs.13 lakhs on 26.11.2009, for his business purpose and to discharge the said loan, issued cheque dated 26.11.2009 for Rs.13,00,000/- (Rupees Thirteen lakhs only). The said cheque was presented for collection on 31.03.2010, but returned with an endorsement 'insufficient fund'. It is alleged that the respondent has committed an offence under Section 138 of Negotiable Instrument Act. the complaint was filed before the Judicial Magistrate-I, Pollachi, before the Trial Court.

3.The respondent/accused contended that the statutory notice was not sent to the address of the accused. Hence the complaint itself is defective and not maintainable. Further contended that he has no transaction with the complainant. A blank cheque given to one Balu for loan of Rs.30,000/- has been misused by the complainant herein, who is unknown to him. Before the Trial Court, the complainant has examined herself as PW-1, marked four exhibits, namely subject cheque (Ex.P1), Memo of the Bank (Ex.P2), Bank Statutory Notice issued through Advocate(Ex.P3) and Postal Acknowledgement card(Ex.P4). On behalf of the accused three witnesses were examined, 11 exhibits marked to substantiate that the complainant had no financial capacity to advance loan of Rs.13 lakhs. Her average Bank balance was less than Rs.21,000/-. The residential address of the Accused was at old No.113, New No.7, Mariyamman Koil Street, P.P. Akgrakaram, Erode whereas the statutory notice was sent to No.7, Pachai Paraimedu, Erode post. To prove that he is residing at P.P Akragharam at Erode, the family card of the accused was marked as Ex.D11.

4.The Trial Court after considering the case of the complainant and the defence version, held that the accused has not proved that the subject cheque was issued to one Balu on 04.09.2009 for loan of Rs.30,000/- and the same was misused by the complainant by filing the complaint in the alleging loan of Rs.13 lakhs.

5.On appeal, the Lower Appellate Court has considered the defence taken by the accused, though held that there is no acceptable evidence to show that the cheque was handed over in blank form to said Balu. The Lower Appellate Court taken note of the fact that the address of the accused, as found in his family card is different from the address to which the statutory notice was served. Relying upon the Judgment of the Hon'ble Supreme Court reported in 2011 ACD 1507 (SC) [MD Thomas V. P.S.Jaleel and anr]. The Lower Appellate Court held that the notice sent to different address and received by one Rathinam on behalf of the accused is not a proper compliance of the statutory requirements. On the said ground, the Lower Appellate Court has allowed the appeal and dismissed the complaint. Aggrieved by same, the present Revision petition is filed.

6.The learned counsel appearing for the revision petitioner would submit that the Judgment laid down in MD Thomas case (cited supra) is not proper law and the subsequent judgment of the Supreme Court rendered in 2017 (4) CTC 107 [N.Parameswaran Unni V. G.Kannan and others] has laid that notice sent by registered post deemed to be proper service, even if the notice returned with Postal

endorsement "refused" or "not available in house" or "house locked" or "Shop closed" or "addressee not in station".

7. The learned counsel appearing for the respondent who was appointed by the Legal Service Authority, pursuant to the request made by this Court, since the respondent has failed to engage counsel of his own, would submit that the Lower Appellate Court has dismissed the complaint for want of proper service of the statutory notice and also has not accepted the case of the complainant that a sum of Rs.13 lakhs was given by cash to the accused, who was PWD Contractor and having trade relationship with her, in connection with supply of sand. Taking note of the fact that a huge sum of Rs.13 lakhs given by cash and not been reflected in her Income Tax Returns, whereas the accused by the preponderance of the possibility has rebutted the presumption that cheque was not issued for discharge of any debt.

8. Perused the records and the evidence. It is a specific case of the complainant is that on 26.11.2006, she advanced a loan of Rs.13 lakhs in cash to the accused and on the same day, he gave a cheque for Rs.13 lakhs, which she has presented for collection on 31.03.2003, the subject cheque which is marked as Ex.P1 is issued by the accused from the account maintained by M/s.Evergreen Earthmovers. He had signed the cheque in the capacity of proprietor to M/s. Evergreen Earth Movers. In the cross examination of PW1 (complainant) it has been elicited that she is an income tax assessee, but has not shown the transaction of Rs.13 lakhs with the accused in her income tax return. Though this may not be a ground to presume that accused has rebutted the presumption under Section 139 of Negotiable Instruments Act, the case of the complainant that she know the accused as a PWD contractor and she has supplied sand to him has been disproved by the accused through the letter of PWD Executive Engineer, who was informed under the Right to Information Act that KT.Murugesan S/o, Thulasimani Goundar, Evergreen Earth Movers, Coimbatore is not registered contractor under PWD.

9. As far as the notice sent to the accused in the cross examination of DW-3, the prosecution has marked a original document of the Sale Deed perpetuated to have enter between the accused and one Shanmugam and his wife Sarojini. In the said Sale Deed, the accused has shown his residential address at No.7, Pachai Paraimedu, Periya Themoor Post, Erode. The statutory notice has been sent by the complainant to the said address and the same has been received by one Rathinam, who is admitted by the accused that she is his maternal aunt. Therefore, there is some

material to show that the notice was served to the address of the accused and received by Rathinam, the representative of the accused. Notice service on the adult member of the house is proper service. Therefore, though the Lower Appellate Court stated that the statutory notice was not served on the accused and dismissed the complaint relying upon the MD.Thomas case(cited supra) Judgment, the correct legal position is that a notice served on any one of the adult member of the family residing in the place is sufficient.

10.However on the other ground, the revision petition is liable to be dismissed since the complainant has failed to prima facie establish that the cheque was issued for discharge of enforceable debt. The presumption under Section 139 of Negotiable Instruments Act will attract only when the prima facie case of debt is established by the complainant. In this case, except the cheque for Rs.13 Lakhs there is no evidence to show that it has been given to discharge of any debt. Despite denial of issuance of cheque to the complainant, the complainant has not taken any further steps to establish that there was some transaction between her and the accused. Even the alleged acquaintance with each other not been proved by the complainant.

11.In the said circumstances, the finding of the Lower Appellate Court cannot be construed as illegal or perverse finding. When the revision petitioner is unable to point out any perversity, or illegality in the order of the Lower Appellate Court, this Court cannot exercise its service in jurisdiction to interfere the finding of fact by the Court below, which is also a possible view. Hence the revision is dismissed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

jrs/rst

To

1. The Principal District and Sessions Judge,Coimbatore
- 2.The Judicial Magistrate No.I, Pollachi
- 3.The Public Prosecutor,
Coimbatore.

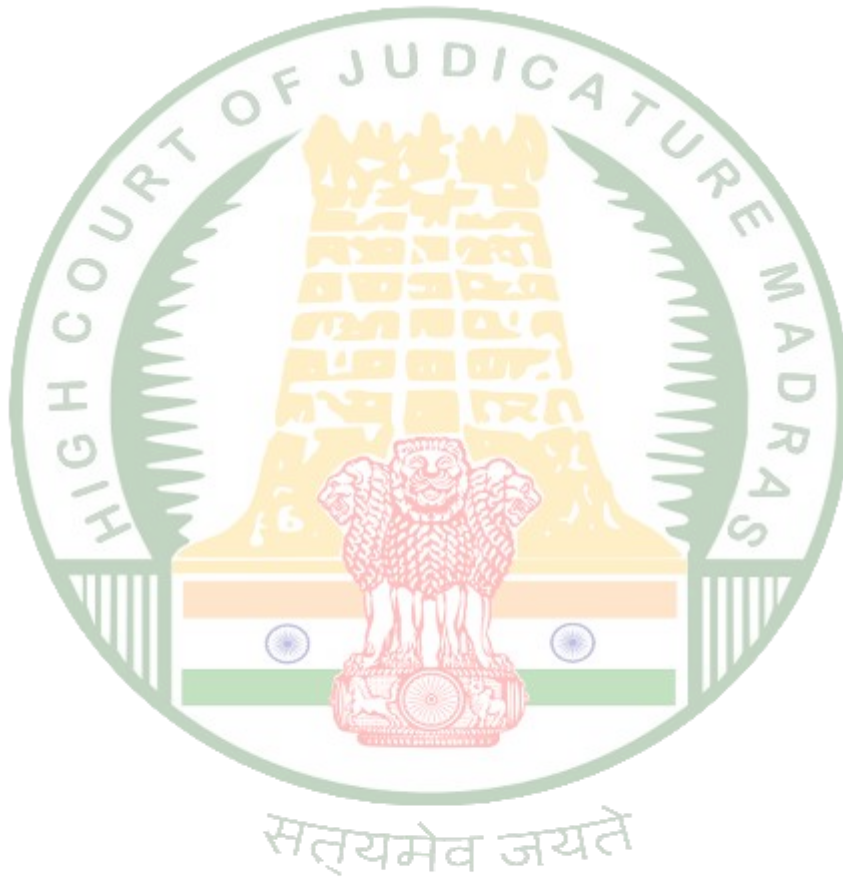
4. The Section Officer,
Criminal Section,
High Court, Madras

+1cc to M/S.S.Senthil Kumar , Advocate SR.No. 34968

+1cc to Mr.V.Perarasu , Advocate SR.No. 34882

CrI.A.No.172 of 2014

A.SK(11/07/2019)



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