



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.08.2019

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl.A.(MD)No.254 of 2013

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M/s.Sree Gokulam Chit and Finance Co. (P) Ltd.,
Chennai,
Represented by its
Authorised Agent,
R.Rabinson.

... Appellant/Respondent/Complainant

Vs.

M.Poolpandian

... Respondent/Appellant/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C, to call for the records relating to the judgment passed in Crl.A.No.111 of 2011, dated 17.11.2011 on the file of the learned District Judge/Fast Track Court No.II, Tirunelveli, set aside the same and restore the judgment passed in S.T.C.No.163 of 2008, dated 15.06.2011 on the file of the Judicial Magistrate Court No.IV, Tirunelveli by allowing this appeal.

For Appellant : Mr.B.Brijesh Kishore
For Respondents : Mr.S.Sundara Pandian

J U D G M E N T

The appellant herein filed S.T.C.No.163 of 2008, on the file of the learned Judicial Magistrate No.IV, Tirunelveli against the respondent herein under Section 138 of the Negotiable Instruments Act.

2.The case of the complainant is that the accused herein had joined a chit group floated by the complainant on 22.06.2005. The chit value was Rs.2,00,000/-. The chit group comprised of 20 members. The chit period was 20 months. The accused had taken the chit amount of Rs.1,50,000/- on 28.11.2005. Till then, he had been promptly paying the monthly chit installments. But after taking the chit amount of Rs.1,50,000/- in November, 2005, he began to default. As per the accounts mandated by the complainant, the liability of the subscriber/accused as on 29.10.2007 came to Rs.1,54,713/-. The case of the complainant is that the accused issued Ex.P.2/complaint cheque towards the discharge of his enforceable liability. The cheque was presented on 31.10.2007 with Axis Bank, Tirunelveli Town Branch. The cheque was returned unpaid for the reason of insufficiency of fund in the account maintained by the accused. Thereupon, the complainant issued Ex.P.5/statutory notice dated 23.11.2007 and the same was served on the accused. The accused did not file an endorsement "unclaimed". Thereafter, the



complainant filed S.T.C.No.163 of 2008. The summon was issued to the accused and he entered appearance. He however denied the charge framed against him under Section 138 of Negotiable Instruments Act.

3.The complainant examined their official namely., Robinson as P.W.1 and Exs.P.1 to P.7 were marked. On the side accused two witnesses were examined and one of them was the accused himself. The accused marked Ex.D.1/ passbook.

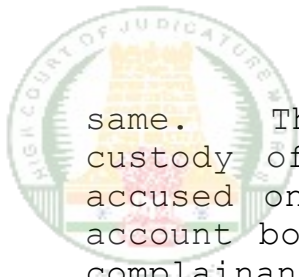
4.The defence of the accused was that he had been remitting the chit dues and that he owed to pay only a sum of Rs.17,900/-. His contention is that he had given the complaint cheque only for security purpose and that it was filled up for a figure higher than actual liability.

5.The Trial Magistrate by judgment dated 15.06.2011 rejected the defence of the accused and found him guilty of the offence and sentenced him to undergo one year simple imprisonment and also levied fine. Further, the accused was directed to pay the cheque amount of Rs.1,54,713/- as compensation. Challenging the judgment dated 15.06.2011, passed by the learned Trial Magistrate, accused filed Crl.A.No.111 of 2011, before the learned District Judge/Fast Track Court No.II, Tirunelveli. The Appellate Court by judgment dated 17.11.2011 allowed the appeal and set aside the judgment of the Trial Court and acquitted the accused. Challenging the same, this criminal appeal came to be filed at the instance of the complainant.

6.Heard the learned counsel on either side.

7.The learned counsel appearing for the accused submitted that since this is an appeal against acquittal, this Court should be rather slow in interfering with the same. He pointed out that if two views are possible, the one that favours the accused should be adopted. His pointed contention is that as per the entries made in Ex.D.1/passbook, the accused had cleared a substantial portion of his liability and only a sum of Rs.17,900/- alone remained to be paid.

8.This Court carefully went through entries made in the passbook. It is true that the entries had been made as if the accused had paid a sum of Rs.1,51,900/-. But in the cross examination, the authenticity and genuineness of the entries made in the passbook from page 25 have been challenged. The learned counsel for the complainant admits that the entries made upto 09.06.2006 are accepted. The entries made from 12.06.2016 are under challenge. When the entries made in passbook are challenged, the burden is squarely on the accused to prove the



same. This is because, Ex.D.1/passbook is in the exclusive custody of the accused. The Appellate Court had acquitted the accused on the ground that the complainant had not produced the account books. As rightly pointed by the learned counsel for the complainant, since the entire accounting system has been computerised, they can only produce the computer generated account statements. However, during the pendency of this appeal, an application for adducing additional evidence under Section 391 of Cr.P.C. was taken out and pursuant to the direction given by this Court, Ex.P.8/money lecture extract and Ex.P.9/account statements have been marked.

9. There is another formidable circumstance starring at the accused. Ex.P.7 is the insolvency petition filed by the accused. The accused had filed I.P.No.2 of 2008 before the Sub Court, Tirunelveli, seeking a declaration that he may be declared as an insolvent. In the schedule, his liability has been set out. The complainant has been shown as fifth respondent in the insolvency petition. The accused had admitted that the amount due to the complainant herein is Rs.1,30,000/-. The insolvency petition was filed on 26.02.2008. The learned counsel appearing for the accused would come out with an ingenious explanation. He submitted that even before filing of the insolvency petition, the complainant had issued a notice dated 23.11.2007, making a certain demand and that this figure only represented the demand of the complainant. I am not impressed with this explanation. In the insolvency petition, the petitioner is expected to quantify his actual liability and not the demand of creditors. In fact, no such averment is found in the petition also. Thus, even according to the accused, he owed a sum of Rs.1,30,000/- to the complainant as on 26.02.2008. Hence, the allegation of the complainant that false and fabricated entry had been made in Ex.D.1/passbook has to be accepted. That apart, when the complainant had issued Ex.P.5/statutory notice, the same was returned with an endorsement "unclaimed". The accused did not bother to receive the notice. The lacuna pointed out by the Appellate Court has since been set right. The judgment of the Appellate Court acquitting the accused is set aside. I hold that the respondent herein is guilty of the offence under Section 138 of Negotiable Instruments Act.

10. At this stage, the learned counsel appearing for the respondent submitted that he would not challenge the finding of guilt and he would only pray for modification in the matter of sentence. He submitted that the respondent is aged about 60 years and that he is in serious financial difficulties. He had admittedly paid a sum of Rs.58,000/- by November, 2006. He had taken the cheque of amount of Rs.1,52,000/-. He therefore undertakes to pay a sum of Rs.1,00,000/- within a period of six weeks from the date of receipt of a copy of this judgment. In



view of the undertaking given by the accused through his counsel, even while restoring the judgment of the Trial Judge, convicting the respondent for the offence under Section 138 of Negotiable Instruments, the sentence of imprisonment is set aside and instead the respondent is directed to pay a sum of Rs.1,00,000/- directly to the complainant. The accused will take a demand draft favouring the complainant for a sum of Rs.1,00,000/-. The accused will pay the said amount within a period of six weeks from the date of receipt of a copy of this judgment. If the accused fails to do so, he will have to undergo default sentence of six months simple imprisonment. With this modification, this criminal appeal is partly allowed.

Sd/-

Assistant Registrar (RECORDS)

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Sub Assistant Registrar (CS)

ias

To:

1.The Additional District and Sessions Judge,
Fast Track Court No.II,
Tirunelveli.

2.The Judicial Magistrate No.IV,
Tirunelveli.

3.The Principal District Judge, Tirunelveli.

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Criminal Section,

Madurai Bench of Madras High Court, Madurai.

+1 CC to Mr.S.SUNDARA PANDIAN, Advocate (SR-84724[F] dated 30/08/2019)

+1 CC to Mr.B.BRIJESH KISHORE, Advocate (SR-84727[F] dated 30/08/2019)

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