

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2020

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CrI.A.No.582 of 2012

Sri Sujies Benefit Funds Limited,  
Represented by its  
Managing Director,  
S.Bupathi,  
S/o.M.N.Sangappa Konar,  
No.58, A Race Course,  
Coimbatore. ... Appellant/Complainant

Vs.

M.Jaganathuan ... Respondent/Accused

Criminal Appeal filed under Section 378 (4) Cr.P.C.  
against the judgment and order dated 20.06.2012 passed in  
C.A.No.186 of 2010 on the file of the V Additional District  
and Sessions Court, Coimbatore, reversing the judgment and  
order dated 16.08.2010 passed in C.C.No.379 of 2003 on the  
file of the Judicial Magistrate Court No.VII, Coimbatore.

For Appellant : Mr.R.Venkatesh

For Respondent : Mr.Venkatraman

JUDGMENT

Challenge in this criminal appeal is to the judgment and  
order dated 20.06.2012 passed in C.A.No.186 of 2010 on the  
file of the V Additional District and Sessions Court,  
Coimbatore, reversing the judgment and order dated 16.08.2010  
passed in C.C.No.379 of 2003 on the file of the Judicial  
Magistrate Court No.VII, Coimbatore.

2. For the sake of convenience, the appellant and the  
respondent will be referred to as complainant and accused,  
respectively.

3. The complainant is a chit company and it is alleged  
that the accused was a subscriber. It is the case of the  
complainant that the accused had borrowed loans on several

dates for about eight years and a total sum of Rs.21,09,000/- was due, towards which, he gave a cheque (Ex-P14) dated 03.02.2003 for a sum of Rs.19,00,000/-; the complainant presented the cheque on 04.02.2003 and it was returned unpaid with the endorsement "Account Closed" vide bank's return memo (Ex-P15) dated 05.02.2003; therefore, the complainant issued a statutory demand notice (Ex-P17) dated 20.02.2003, for which, the accused issued a reply notice (Ex-P19) dated 27.02.2003 repudiating the debt; since the accused did not comply with the demand, the complainant initiated a prosecution in C.C.No.379 of 2003 before the Judicial Magistrate Court No.VII, Coimbatore, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act"), against the accused.

4. Before the trial Court, on behalf of the complainant, one Boopathi, Manager, was examined as PW1 and nineteen exhibits were marked. On behalf of the accused, no witness was examined, however, five exhibits were marked.

5. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 16.08.2010 in C.C.No.379 of 2003, convicted the accused of the offence under Section 138 of the NI Act and sentenced him to undergo one year simple imprisonment and to pay a fine of Rs.38,00,000/- as compensation to the complainant.

6. Challenging the above conviction and sentence, the accused filed C.A.No.186 of 2010. At the appellate stage, the accused filed a petition under Section 391 Cr.P.C., for letting in additional evidence for the purpose of marking some receipts to show that payments were made to the complainant company. The appellate Court allowed the petition and the complainant took the matter to the High Court. However, the High Court dismissed the petition filed by the complainant and confirmed the order passed by the appellate Court under Section 391 Cr.P.C. Before the appellate Court, the accused examined himself as DW1 and marked thirteen exhibits in order to show that substantial amounts were repaid by him to the complainant. The accused was subjected to cross-examination by the complainant.

7. After considering the entire evidence, the appellate Court, by judgment and order dated 20.06.2012 in C.A.No.186 of 2010, acquitted the accused, challenging which, the complainant has preferred the present appeal against acquittal.

8. Heard Mr.R.Venkatesh, learned counsel for the complainant and Mr.Venkatraman, learned counsel for the accused.

9. The learned counsel for the complainant submitted that the accused had not adduced any evidence in the trial Court

and had also not given any satisfactory explanation when he was examined under Section 313 Cr.P.C. by the trial Court, whereas, he has used the appellate forum to his advantage by filing documents for the purpose of repudiating the complainant's case and therefore, the order of the appellate Court deserves to be reversed.

10. Per contra, the learned counsel for the accused refuted the submission made by the learned counsel for the complainant.

11. This Court gave its anxious consideration to the rival submissions.

12. It is true that the accused had not adduced any evidence from his side before the trial Court. However, the accused filed an application under Section 391 Cr.P.C. before the appellate Court, which was allowed. Thereafter, the complainant challenged the order passed by the appellate Court before this Court. This Court confirmed the order passed by the appellate Court, thereby permitting the accused to adduce additional evidence.

13. At this juncture, it is necessary to state here that an appeal is continuation of trial, as held by the Supreme Court in Yakub Abdul Razak Memon Vs. State of Maharashtra<sup>1</sup>, the portion of which reads as under:

"84. So far as the grievance of the accused/convict that an opportunity of hearing was not given by the court below and, thus, he failed to address the court appropriately on the issue of sentence, may not have any substance for the reason that the legislative policy discernible under Section 235(2) read with Section 354(3) CrPC is that the quantum of punishment is to be determined on considerations and circumstances not merely connected with a particular crime but a court is also bound to give due consideration to the other circumstances of the criminal. It is for this reason that the court while hearing a convict on sentence is required to give a party an opportunity of producing evidence or materials relating to the various factors having some bearing on the question of sentence. The court, while determining the quantum of sentence, acts in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction. Therefore, there is bifurcation of trial as an accused has a right of pre-conviction hearing under Section 234 and secondly, right of pre-sentence hearing under Section 235 of the Code. For pre-conviction hearing, the accused must be well informed

as to what the exact prosecution case is and what evidence has been adduced by the prosecution to prove its case. It is for the prosecution to prove its case beyond reasonable doubt, as in case the pivot of the prosecution is not accepted, a new prosecution case cannot be made to imperil the defence. The prosecution as well as the convict has a right to adduce evidence to show aggravating grounds to impose severe punishment or mitigating circumstances to impose a lesser sentence. More so, appeal is a continuity of trial..... (emphasis supplied) "

Therefore, both parties can adduce additional evidence before the appellate Court in a criminal case after obtaining leave. The legality of the order passed by the appellate Court in allowing the petition filed by the accused under Section 391 Cr.P.C. cannot be looked into by this Court while dealing with the present appeal.

14. The learned counsel for the complainant placed strong reliance on the recent judgment of the Supreme Court in Uttam Ram Vs. Devinder Singh Hudan & Another<sup>2</sup> and submitted that the complainant need not prove the debt, since the impugned cheque carries with it the presumption under Sections 118 and 139 of the NI Act.

15. There can be no quarrel with the above proposition of but the complainant is required at least to plead the debt. In this case, the complainant has merely stated that a sum of Rs.21,09,000/- is due from the accused as on 31.01.2003. Pleading about the debt is different from proof of the debt. Section 139 of the NI Act, only exempts the complainant from proving the debt and not pleading.

16. It is the case of the accused that he had joined various chits run by the complainant and at that time, the complainant had collected blank cheques and promissory notes which have been misused in this case. In fact, the accused has accepted his signature in the cheque (Ex-P14), but, has taken a stand that he had issued a blank one. As held by the Supreme Court in Bir Singh Vs. Mukesh Kumar<sup>3</sup>, in view of Section 20 of the NI Act, it is not illegal for the complainant to fill up the cheque. However, the appellate Court has gone deeply into the records of the complainant and has returned a finding that the claim of Rs.21,09,000/- is not supported by the document of the complainant themselves. At this juncture, it may be apposite to extract the discussion portion from the judgment of the appellate Court, which reads as under:

"14. Here comes the problem when the first respondent has filed the statement of accounts showing the amount due from the appellant it has to prove that the amount mentioned in the disputed cheque squarely tallies with that of the statement of accounts. But when we compare the same rate of interest mentioned in disputed pronotes with that of the interest mentioned in exhibit D4 statement of accounts we find some sort of difference. For example for loan no.175, the total amount borrowed was Rs.6,00,000/-, the rate of interest is mentioned as Rs.1.80 paise per Rs.100/- per month. But whereas in the statement of accounts the balance amount is calculated at the rate of 3 %. There is no evidence on record to show that the first respondent is entitled to claim increased rate of interest in the event of non payment of the loan within 10 installments. Similarly, for loan no.244, the amount borrowed was Rs.3,00,000/- in the pronote under exhibit P8, the rate of interest is mentioned as Rs.1.80 paise per annum per Rs.100/-. But, whereas the statement of balance has been calculated at 3 % interest. For loan no.430, the total amount borrowed was Rs.1,00,000/-, the rate of interest mentioned in pronote as 2.40 per annum per Rs.100/- again it has been claimed as 3 %. When we compare the rate of interest at random with that of the rate of interest mentioned in the pronotes it appears that inflated rate of interest has been claimed and on that basis the statement of accounts has been prepared. As I said earlier, the respondent is not entitled to claim inflated interest from the one which is agreed. For that purpose the appellant would argue that as per Tamil Nadu Prohibition of Charging Exorbitant Rate of Interest Act, 2003. A person cannot claim interest, above which has been prescribed under the government order G.O.No.406 cooperation 05.07.1997. In respect of unsecured loan the maximum interest will be 12 %. Rate of interest calculated at the rate of 3 % per month per Rs.100/- will work out to 36 % per year. For example if we calculate the interest payable at the rate of 36 % for Rs.1,00,000/- the interest alone works out to Rs.2,16,000/-. When we add the principle amount the total payable amount is Rs.3,16,000/-. He has paid Rs.1,00,000/- towards the loan. The balance payable is Rs.2,16,000/-. This calculation appears to have been made in the statement of accounts. This clearly shows that the respondent has claimed inflated rate of interest and has arrived at the fanciful figure.

During argument an opportunity was given to the first respondent to explain how the rate of interest has been claimed. But there is no positive response.

15. Even if we accept that Exhibit P1 cheque has been issued towards liability then it must tally with that of the legally due amount. Here Exhibit P1 do not tally with the legally due amount."

17. In Rangappa Vs. Sri Mohan<sup>4</sup>, the Supreme Court has held that the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability. In this case, the accused has demonstrated to the appellate Court that the account statement filed by the complainant themselves does not support the cheque amount.

18. It is trite that, from the evidence on record, when two views are possible, the view that probablises the defence case merits acceptance. In this context, it may be relevant to refer to the judgment of the Supreme Court in Arulvelu and another Vs. State represented by the Public Prosecutor and another<sup>5</sup>, wherein, in paragraph no.36, it is held as follows:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two view are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial Court is either perverse or wholly unsustainable in law."

19. In such perspective of matter, this Court does not find any infirmity in the acquittal of the accused by the Sessions Court, warranting interference.

In the result, this criminal appeal is dismissed.

Sd/-  
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

nsd

To

1. The V Additional District and  
Sessions Judge,  
Coimbatore.

2. The Judicial Magistrate No.VII,  
Coimbatore.

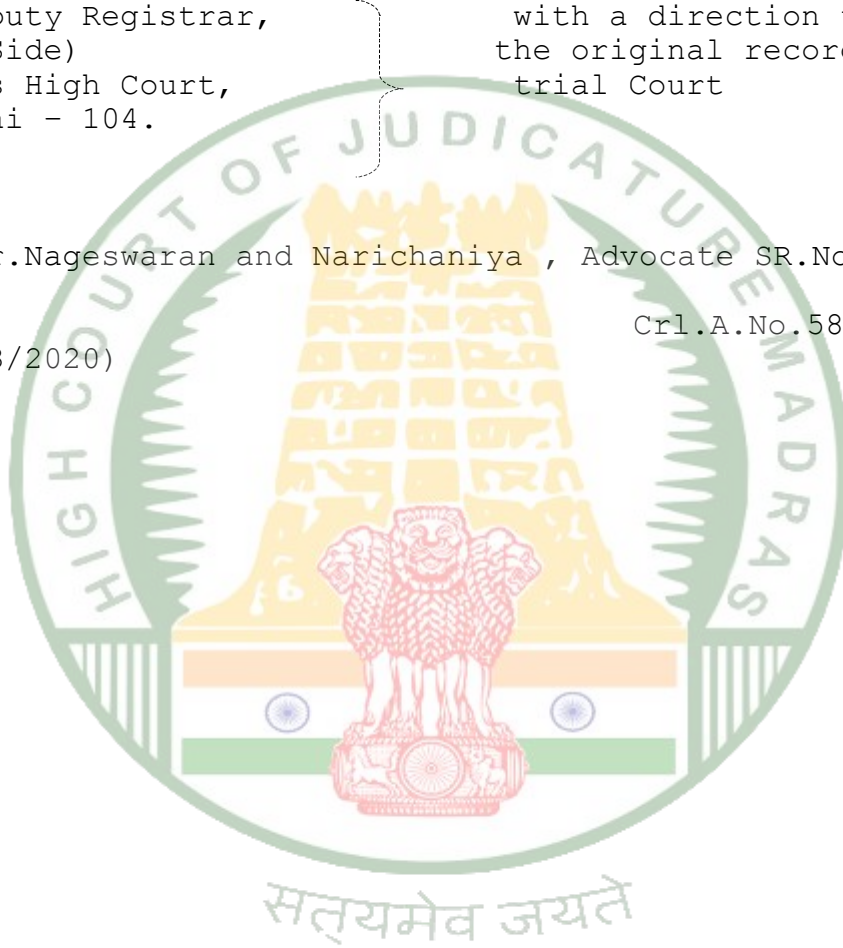
3. The Deputy Registrar,  
(Crl.Side)  
Madras High Court,  
Chennai - 104.

with a direction to return  
the original records to the  
trial Court

+lcc to Mr.Nageswaran and Narichaniya , Advocate SR.No. 6626

Crl.A.No.582 of 2012

A.SK(05/03/2020)



WEB COPY