

Bail Slip

The Appellant/Accused namely M.Sampath Kumar, S/o Mohan was directed to be released on bail as per order of this Court dated 01/02/2019 in Crl.M.P.No.1886/2019 in Crl.A.No.70 of 2019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.02.2021
PRONOUNCED ON : 10.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.70 of 2019 and
Crl.M.P.Nos.1886 and 1888 of 2019

M.Sampathkumar ... Appellant/Respondent/Accused

.Vs.

A.K.Khaja Imam ... Respondent/Appellant/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure to set aside the conviction imposed in the Judgment dated 28.11.2018 made in C.A.No.3 of 2018 on the file of the learned III Additional Sessions Court, Salem by sentencing him to undergo one year rigorous imprisonment and to pay the cheque amount of Rs.4,50,000/- as compensation under Section 138 of the Negotiable Instruments Act by reversal of the Judgment dated 15.11.2017 made in S.T.C.No.132 of 2016 on the file of the learned Judicial Magistrate No.1, Sankari acquitting the appellant/accused.

For Appellant : Mr.Vishnu R.T.
for Mr.N.Manoharan

For Respondents: No appearance

J U D G M E N T

The respondent filed a private complaint against the appellant herein under Section 138 of the Negotiable Instruments Act, before the Judicial Magistrate No.1, Sankari. The learned Magistrate taken cognizance of the complaint in S.T.C.No.132 of 2016 and after issuing summons to the appellant and after conducting enquiry dismissed the complaint filed by the respondent herein and acquitted the appellant. Challenging the

said Judgment of acquittal, the respondent herein filed an Appeal before the learned Principal Sessions Judge, Salem. The learned Principal Sessions Judge taken the Criminal Appeal No.3/2018 on file and made over to the III Additional District Judge, Salem and the learned III Additional Sessions Judge, after hearing arguments on either side, allowed the Appeal filed by the respondent and convicted the appellant herein for the offence punishable under Section 138 of the Negotiable Instrument Act and sentenced him to undergo rigorous imprisonment and to pay compensation of Rs.4,50,000/-. Challenging the said conviction and sentence passed by the Appellate Court. the accused has filed the present appeal before this Court.

2. The learned counsel for the appellant would submit that the respondent has not proved the transaction between the appellant and the respondent. He would further submit that the First Appellate Court wrongly proceeded on the basis that Section 139 of the Negotiable Instruments Act (In short 'the Act') raises a presumption in regard to the existence of legally enforceable debt and the First Appellate Court has failed to consider the legal position to the effect that existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act, which merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of the debt or other liability. He would further submit that there is no legal obligation to let in negative evidence to prove the innocence of the criminal case and the accused can discharge his burden on the basis of the material already brought on record as the accused has a constitutional right to maintain silence. He would further submit that the First Appellate Court has not considered that as per Section 269 SS of the Income Tax Act, any advance taken by way of any loan of more than Rs.20,000/- was to be made by way of payee cheque only and Section 271 D of the Income Tax Act says that non compliance of Section 269 SS is penal in nature. He would further submit that the First Appellate Court failed to take note of the circumstance under which the subject cheque was issued has not been proved, because "execution" is totally different from "issuance" of the cheque and therefore the case of the complainant cannot be accepted on the basis of evidence of P.W.1 and Ex.P1. He would further submit that the execution of Ex.P1 has been denied, therefore, there was no obligation for the accused to let in negative evidence and eventhough the respondent has failed to establish the initial presumption of law, the Courts below have not considered the infinities in the contention of the respondent. It is his further contention that neither in the complaint nor in the evidence, P.W.1 stated anything about the due execution in the presence of any independent witness and the burden of proof is on the

complainant and there is no need for the accused to let in evidence to prove negative. He would further submit that presumption under Section 20 of the Negotiable Instruments Act cannot be invoked for the cheque transaction, because the holder is entitled to fill up the instrument only when it is a stamped instrument and the cheque in question is not a stamped instrument, therefore the presumption drawn by the First Appellate Court is not correct. He would submit that the decision of the Hon'ble Supreme Court in M.S.Narayana Menon @ Mani Versus State of Kerala and another reported in 2006 3 CTC page 730 has not been properly followed and the onus of the accused in Criminal Case will not heavy as that of the prosecution and the fact that the respondent did not produce any document to establish the transaction would falsify his claim and in the absence of any evidence to prove the execution of the cheque, the respondent cannot be allowed to take shelter under Section 139 of the Act. He would further submit that mere production of Exs.P1 to P8 are not sufficient to sustain the conviction and the evidence of D.W.1 would prove the fact that the complainant has misused Ex.P1, but the Lower Appellate Court has failed to accept the defense version. He would further submit that the Lower Appellate Court being a final Court of fact finding supposed to re-appreciate the evidence and give independent finding. He would vehemently contend that the respondent has given a complaint to the DSP, Tiruchengode alleging that the appellant has to pay a sum of Rs.2,25,700/- but and later, the cheque in question was forcibly obtained in the police station as evident from Exs.D1 to D3 and the Judgment of the trial court is against the decisions of the Hon'ble Supreme Court in the case reported in 2013 (3) SCC 86 and 2011 ACD 1136 and therefore he prays to set aside the Judgment of the I Appellate Court and allow the Appeal. In support of his contentions the learned counsel appearing for the appellant has placed reliance on the following decisions:

- 1) Basappa Versus State of Karnataka reported in (2014) 5 SCC 154.
- 2) M.S.Narayana Menon @ Mani Versus State of Kerala reported in 2006 (3) CTC 760.

3. The learned counsel for the respondent would submit that the appellant has borrowed a sum of Rs.4,50,000/- (Rupees Four Lakh Fifty Thousand only) on various dates between 2013 and 2014 and issued a cheque on 22.11.2015 bearing Cheque No.011151 for a sum of Rs.4,50,000/- (Rupees Four Lakh and Fifty Thousand only) dated 14.12.2015 and when the complainant informed the accused about the presentation of cheque for collection, for that the accused requested the complainant to wait for some time due to financial crisis and asked to present the cheque on 27.01.2016 and when the said cheque was presented on 27.01.2016, it was

returned with endorsement "funds insufficient" and the said fact came to the knowledge of the appellant on 30.01.2016. He would further submit that when the respondent approached the appellant in person to get payment, he evaded to pay and thereafter the respondent issued notice to the appellant on 03.02.2016 to the office address and the residential address and both were returned with an endorsement "Intimation given not received" on 11.02.2016 and 13.02.2016 respectively and therefore since the appellant has neither repaid the loan amount nor sent reply for the notice issued to the appellant, the respondent was constrained to file private complaint before the learned Judicial Magistrate I, Sankari for the offence punishable under Section 138 of Negotiable Instruments Act. He would further submit that the respondent has established his case by producing seven documents and also three witnesses and the appellant has not rebutted his presumption to prove that he has neither received loan from the respondent nor issued cheque and further his cheque was lost and he has also not taken any steps to send the disputed cheque to get expert opinion and not produced any document to prove that he has lost his cheque. He would further submit that though the learned Magistrate failed to appreciate legal presumption and dismissed the complaint, on appeal, the the Lower Appellate Court rightly appreciated the evidence and accepted the case of the respondent/complainant and convicted the appellant and therefore the same does not warrant any interference.

4. Heard. Perused the records.

5. The respondent filed the private complaint before the Magistrate under Section 138 of the Negotiable Instruments Act stating that the appellant borrowed money on various dates between 2013 and 2014 upto Rs.4,50,000/- he has also promised to pay interest at Rs.1.25 ps for Rs.100/- . But, he has not repaid the same and finally he issued the post dated cheque dated 14.12.2015 on 22.11.2015 for a sum of Rs.4,50,000/- and when the complainant informed the accused about the presentation of cheque for collection, for that the accused requested the complainant to wait for some time, due to financial crisis and asked to present the cheque on 27.01.2016 and when the said cheque was presented on 27.01.2016, it was returned with endorsement "funds insufficient" and the said fact came to the knowledge of the appellant on 30.01.2016 and when the respondent approached the appellant in person to get payment, the appellant evaded to pay and thereafter the respondent issued notice to the appellant on 03.02.2016 to the office address and the residential address and both were returned with an endorsement "Intimation given not received" on 11.02.2016 and 13.02.2016 respectively and therefore since the appellant has neither repaid the loan amount nor sent reply for the notice

issued to the appellant, the respondent was constrained to file private complaint.

6. The main defense taken by the appellant is that he has not issued any cheque and he lost the cheque. It is settled proposition of law that any number of defense can be taken by the accused and the accused need not prove his innocence and it is for the complainant to prove his case beyond all reasonable doubt.

7. A careful perusal of the materials shows that the respondent has not stated for what purpose the appellant borrowed money and the specific date on which the appellant has borrowed money from him and any document executed on the date of lending money to the appellant, but simply he has stated that the respondent knows the appellant for six years and during that period in between 2013-2014 on various dates, the appellant borrowed a sum of Rs.4,50,000/- and he promised to pay interest @ Rs.1.25 per Rs.100/- and on 22.11.2014, he issued a post dated cheque for a sum of Rs.4,50,000/- dated 14.12.2015 and at request of the appellant, he presented the cheque on 27.01.2016, but the same was returned with endorsement "insufficient funds". Thereafter, he issued notice but the appellant had not received and the same was returned as unclaimed and subsequently the respondent/complainant has admitted during the cross examination that the respondent has given a complaint to the DSP, Tiruchengode. alleging that the appellant has to pay a sum of Rs.2,25,700/- and the copy of the said complaint was marked as Ex.D1. Further he has admitted that there was an enquiry on 19.11.2015 before the Superintendent of Police, Tiruchengode and he has given a letter to the Superintendent of Police Ex.D2, in that the respondent admitted that the appellant has not paid Rs.2,25,700/-. So, when the respondent has given complaint Ex.D1 prior to 19.11.2015 stating that the appellant has to pay a sum of Rs.2,25,700/-, certainly he would not have given the cheque dated 14.12.2015 for a sum of Rs.4,50,000/- which is highly improbable. Further, it has to be seen that when there is no transaction between the appellant and the respondent, the respondent went upto police station and before the police both the parties appeared on 19.11.2015 prior to the date of issuance of disputed cheque i.e., 22.11.2015 and further the respondent already sent a letter to the Superintendent of Police under Ex.D1 stating that a sum of Rs.2,25,700/- is due from the appellant. When that be the case, after 19.11.2015 i.e., the date of enquiry, the respondent has admitted in his cross examination that thereafter he has not paid any amount to the appellant and further he had only written Ex.D1 in his own hand and further the amount mentioned in the cheque is Rs.4,50,000/-. Therefore, it is highly doubtful whether after 19.11.2015, i.e., the date of enquiry and after Ex.D1 written by

the respondent, under what circumstances the appellant executed a cheque in favour of the respondent on 22.11.2015 for a sum of Rs.4,50,000/- and the said fact has not been explained by the respondent. It is settled proposition of law that the complainant has to prove his case that the presumption under Section 139 is a rebuttable presumption. The accused can rebut the presumption by preponderance of probability and he can establish his defense through cross examination of the prosecution witness. Therefore, from Exs.D1 to D3 when the respondent admitted that the appellant has to pay a sum of Rs.2,25,700/- before 19.11.2015 and subsequently how the appellant can give a cheque on 22.11.2015 for a sum of Rs.4,50,000/- has to be explained by the respondent/complainant. There is no legal obligation to let in negative evidence to prove the innocence of the appellant. In the criminal case, the accused can always discharge his burden by preponderance of probabilities. Therefore, as already stated that the respondent has not proved under what circumstances, the cheque issued for the amount mentioned in the disputed cheque, the burden of proof falls on the complainant and there is no need for the accused to let any negative evidence and the onus of the accused in Criminal case is not heavy as that of the prosecution and the accused can rebut the presumption by way of preponderance of probability. Therefore, in this case when the respondent admitted that as on 19.11.2015 a sum of Rs.2,25,700/- is due from the appellant, he made a complaint before the Superintendent of Police and he appeared for enquiry and subsequently on what basis the appellant executed a cheque for a sum of Rs.4,50,000/- on 22.11.2000 has to be explained by the respondent/complainant. Hence, this Court finds that the respondent/complainant has not proved his case, though the execution has not been disproved by the appellant, there is presumption under Section 139 of the Act. However, the said presumption is a rebuttable presumption. Therefore, this Court finds that the appellant has rebutted the presumption by preponderance of probability again the onus shifted to the respondent/complainant and he has to explain it.

8. In view of the same, this Court finds that the learned Magistrate has rightly appreciated the evidence and dismissed and acquitted the accused, whereas the learned III Additional Sessions Judge failed to appreciate the evidence and applied legal proposition and shifted the onus on the appellant. It is settled proposition of law the Appellate Court should not interfere with the acquittal Judgment unless the perverse or malafides are established. When there are two views, one of which is favourable to the accused and that has to be taken into consideration while deciding an Appeal against acquittal. The appellate court cannot reverse the decision of the trial court merely because other view is possible. The appellate court also

has to bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of reasonable doubt.

9. This Court by considering the oral and documentary evidence of both sides finds that the appellant has rebutted the presumption by preponderance of probability and shifted onus to the complainant and the complainant has not proved his case in the manner known to law.

10. In such view of the matter, the Judgment of the Lower Appellate Court is liable to be set aside and accordingly the same is set aside and the Judgment of the learned Magistrate is confirmed.

In the result, the Appeal is allowed and the conviction and sentence imposed on the appellant/accused is set aside and he is acquitted. The bail bond, if any, executed by the appellant, shall stand cancelled. The fine amount, if any paid by the accused, shall be refunded to him. The compensation amount, if any deposited by the appellant, shall be refunded. Consequently, connected M.P.s are closed.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1. The III Additional Sessions Judge,
Salem.
2. The Judicial Magistrate No.1,
Sankari.
3. The Chief Judicial Magistrate,
Salem.
4. The Public Prosecutor,
Madras High Court.
5. The Section Officer,
Criminal Section,
High Court, Madras.

CRL.A.No.70 of 2019

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srg 01/04/2021