

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.12.2020

PRONOUNCED ON : 19.01.2021

CORAM

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

Crl. R.C.No.350 of 2017
and MP.Nos.3442, 3294 & 11685 of 2017

B.Ramesh Kumar

.. Petitioner

Vs.

S.Murugan

.. Respondent

Prayer: This Criminal Revision petition is filed to call for the records relating to the order made in STC.No.610/2014, Judicial Magistrate cum Fast Track Judge I, Erode dated 06.07.2016 in C.A.No.133 of 2016, on the file of the II Additional District and Sessions Judge, Erode dated 16.02.2017 and set aside the same.

For Petitioner : Mr.Muruganatham Manoharan
for T.Elumalai

For Respondent : Mr.C.Ramkumar

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ORDER

This Criminal Revision Petition is directed against the judgment of the learned II Additional District and Sessions Judge, Erode in CA.No.133 of 2016 which was filed against the judgment of the learned Judicial Magistrate cum Fast Track Judge I, Erode.

2. The respondent as a complainant filed a complaint under Section 138 read with 142 of the Negotiable Instruments Act, 1881 alleging that on 28.09.2014, the petitioner borrowed a sum of Rs.5 lakhs from him and promised to repay the amount on 29.10.2014. The petitioner issued a cheque for Rs.5 lakhs drawn on Karnataka Branch, Gandhiji Road, Erode for discharging his liability. The respondent presented the cheque for collection on 06.11.2014 through State Bank of India, Erode Branch. The cheque was returned as "Funds insufficient" on 11.11.2014. The petitioner issued a cheque without sufficient amount in his account. Therefore, the respondent issued a legal notice on 17.11.2014 calling upon the payment of Rs.5 lakhs within 15 days from the date of receipt of the notice. The petitioner received the notice on 18.11.2014 and gave a reply dated 18.11.2014 with false

allegations. Since, he failed to pay the cheque amount within 15 days, the complaint was filed.

3. After the petitioner entered appearance, he was questioned with regard to the offence alleged against him. He denied the offence and the trial was commenced. During the trial, the respondent was examined as PW.1 and Exs.P.1 to P.7 had been marked. On the side of the petitioner DW-1 to DW-4 were examined and Exs.D.1 to D.4 were marked. On considering the oral and documentary evidence, the learned Judicial Magistrate, found the petitioner guilty under Section 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for six months and to pay a fine of Rs.5,000/- in default to pay fine, he has to undergo 15 days simple imprisonment. Against the said judgment, the petitioner has preferred Criminal Appeal No.133 of 2016, on the file of II Additional District and Sessions Judge, Erode. The learned II Additional District and Sessions Judge, Erode did not interfere with the judgment of the trial court and dismissed the appeal by confirming the judgment of the learned Judicial Magistrate. Against the said judgment, this Criminal Revision Petition is filed.

4. The learned counsel for the petitioner has submitted that the petitioner is one of the members of chit fund run by one Sathyan. The said Sathyan insisted on issuing cheque as security for the chit transaction. He

received amount from many persons and ran out of the village. The respondent is a close relative of the said Sathyan. Using the cheque given to Sathyan as security, the respondent filed this case. Though the petitioner examined four witnesses and produced documents to prove his case, both the courts below have not considered the evidence in proper perspective and wrongly convicted and sentenced the petitioner. The petitioner, as an accused, is not required to prove his case beyond reasonable doubt. It is enough, if he proves his case by preponderance of probability.

5. In fact, the petitioner, did not know the respondent at all. When the petitioner says that he did not know the respondent, it is for the respondent to prove his acquaintance with the petitioner and reasons for lending a huge amount of Rs.5,00,000/-. How could he lend Rs.5,00,000/- to a person, who is not familiar and a stranger to him. It is also seen from the evidence of respondent that he did not take any other document except cheque for lending the sum of Rs.5,00,000/-. The respondent has no means to lend Rs.5,00,000/- and the petitioner has no necessity to borrow such a huge sum. The documents filed by the petitioner establishes the payment of money towards chit instalments. The income tax statement shows that the respondent has no sufficient funds in his account. The petitioner relied on the judgment reported in **(2009) 14 SCC 398 [M.D.Thomas Vs. P.S.Jaleel and Another]**

for the preposition that service of statutory notice on the wife of the petitioner is not a prompt service. He relied on the ruling reported in **(2015) 1 SCC 99 [K.Subramani Vs. K.Damodara Naidu]** for the preposition that unless the source of income is proved, lending of loan cannot be presumed. He also relied on the judgments reported in **(2008) 4 SCC 54 [Krishna Janardhan Bhat]** and **2019 (6) Scale 137 [Basalingappa Vs. Mudibasappa]** for the preposition that the accused is not required to prove his case beyond reasonable doubt but it is enough if he proves his case by preponderance of probability.

6. On the other hand, the learned counsel for the respondent submitted that the Income Tax returns shows that the respondent has capital account worth Rs.20 lakhs and above. The case of the petitioner with regard to the chit transaction is false and not proved by any acceptable evidence. In fact there is no whisper about the chit transaction in the reply notice. When the petitioner said that he did not know the respondent, how did he know the son of the respondent and examined him as a witness. The petitioner accepts the signature in the cheque. The respondent has proved the loan transaction, issuance of cheque towards payment of loan and the return of cheque without sufficient funds. Both the courts below have rightly convicted and sentenced the petitioner. Therefore, the learned counsel for the respondent prayed for

confirming the judgment of the courts below and dismissal of this Revision Petition.

7.Point for consideration in this Revision Petition is whether the Judgments of courts below suffer from any incorrectness,illegality and impropriety in convicting and sentencing the petitioner for the offence under section 138 of Negotiable Instruments Act?

8.It is seen from the case advanced by both the parties that the respondent claims to have lent a sum of Rs.5 lakhs to the petitioner on 29.10.2014 and to discharge of the said loan, the petitioner said to have issued the cheque. The cheque was dishonoured for the reason that there is “no sufficient funds”. However, this case is strongly denied by stating that he did not know the respondent at all and he did not borrow the sum of Rs.5,00,000/- and did not issue the cheque in question. It is his further case that the respondent has no means to lend a sum of Rs.5,00,000/- and there was no necessity for him to borrow Rs.5,00,000/- In fact, it is stated in the reply notice that the cheque leaf of the petitioner is misused and this case is filed on behalf of some other person. During the course of evidence, the petitioner expanded his defence stating that he and his wife were the members of the chit run by one Sathyan and the cheque in question and other cheques had been given to Sathyan along with stamp papers, pro notes as the security

for the chit transaction. He had paid amounts in the account of Sathyan. Sathyan is a close relative of the respondent. Taking advantage of the cheque given to Sathyan, the respondent has filed this case.

9. In support of the case of the petitioner D.W-1 to D.W-4 were examined on his side. Reading the evidence of DW-3, the wife of the petitioner, shows that the signature in the cheque is that of her husband, the petitioner herein. However the borrowing of Rs.5,00,000/- from the respondent by her husband is denied and she stated that she and her husband were subscribers of chit run by Sathyan for a sum of Rs.50,000/- and Rs.1,00,000/-. The cheque in question along with other cheque were given as security to Satyan. The petitioner also stated in his evidence about subscribing the chit run by Sathyan and giving a cheque in question as security for the chit transaction. He also admitted his signature in the cheque. DW-2, the son of respondent, was examined to show that the cheque was issued with regard to the chit transaction and also to show that the respondent was not doing any other business except the textile business. Certain receipts were shown to him to show that those receipts were given in the chit transaction. But, he denied those receipts and said that he did not write those receipts. The account statement and cheque issue register with regard to the cheque in person were marked as Exs.D.1 and D.2 through D.W.1 – Manager

of the Karnataka Bank, Ex.D.3 is produced to show the deposit of amounts in the account of Sathyan by the petitioner towards chit transaction.

10.On the side of the respondent he was examined as PW.1. The returned cheque was marked as Ex.P.1.Return memo, advocate notice, postal receipt, acknowledgement card, reply notice and income tax statement of the respondent are marked as Exs.P.2 to P.7.

11.From the evidence produced in this case, it is clear that the petitioner admitted the cheque as his cheque and the signature in the cheque as his signature. Admittedly, the cheque had been returned, since there was no funds in the account of the petitioner when the cheque was presented for collection.The point to be considered is whether the respondent has sufficient means to lend a sum of Rs.5,00,000/- to the petitioner and the cheque was issued to discharge a loan? The respondent contends that he has sufficient means to lend the sum of Rs.5,00,000/- to the petitioner and to prove his means he has produced Ex.P.7 Income Tax statement. The learned counsel for the respondent submitted that nowhere in the reply, the petitioner has stated with regard to the alleged chit transaction and depositing the cheque as a security for chit transaction. Ex.P.7 Account statement shows that the respondent had sufficient means to lend the amount of Rs.5,00,000/- to the petitioner. Moreover, there is presumption under 139 of the Negotiable

Instruments Act that a cheque had been issued towards discharging the legally enforceable debt or liability, unless the contrary is proved. The petitioner did not prove the contrary fact against the fact of issuance of cheque for discharging the debt and return of the cheque for the reason that there was no funds in the account of the petitioner.

12.The reading of the judgment reported in (2008) 4 SCC 54 (cited **supra**) shows that:

“30. The presumption under Section 139 of the Negotiable Instruments Act merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability. However, this presumption does not extend to the existence of a debt also. Existence of a legally enforceable debt is not a matter of presumption under section 139 of Negotiable Instruments Act”.

With regard to burden of proof, it is said that whereas the prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof to prove a defence on the part of an accused is preponderance of probability. Inference of preponderance of probability can be drawn not only from the materials brought on record by the parties but also by reference to

circumstances upon which he relies. It is further held that,

“45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same. The learned counsel for the petitioner relied on the rulings reported in **(2010) 11 SCC 441** [Rangappa Vs. Sri Mohan] and the judgment of the Supreme Court of India in Crl.A.No.636 of 2019 dated 09.04.2019 in **Basalingappa Vs. Mudibasappa** case for the same position.

13.The ruling reported in **(2015) 1 SCC 99 (cited supra)** is relied by the learned counsel for the petitioner for the position that when the lender's

credit worthiness is questioned and when it is doubtful about his capacity to lend money, the lender should prove his financial capacity to lend the money. If he did not prove his capacity to lend the money, the case has to be necessarily fail.

14.The learned counsel for the respondent has not produced any authorities in support of his case. In the light of the submissions made in this case and the precedents produced on the side of the petitioner and analysis of the oral and documentary evidence produced in this case, a strong suspicion is created with regard to the loan transaction. Though the respondent filed Ex.P.7 Income Tax statement, it is seen from his evidence that this statement was filed only after filing of this case. Ex.P.7 is only the statement prepared by the Chartered Accountant. The respondent has not produced any evidence to show that this statement was produced before the Income Tax Authorities. There is also no material produced to show that he is an Income Tax Assessee and has been regularly assessed to income tax. He he has not filed any income tax returns prior to assessment year 2015-2016.

15.Reading of his evidence shows that there is no specific mention about the date of lending money to the petitioner in Ex.P.7. Ex.P.7 was prepared on the basis of chits he produced before the auditor and he has not produced those chits in the court. Ex.P.7 has come into existence after the

institution of this case and there is no evidence to show that this statement was filed before the income tax authorities. When there is no material to show that the respondent is a regular income tax assessee and he has been regularly filing income tax returns, this Court is of the considered view that on the basis of Ex.P.7 one cannot come to the conclusion that the respondent has sufficient means to lend a sum of Rs.5,00,000/- to the petitioner, especially when the petitioner said that he had no prior acquaintance with the respondent. When we further read the evidence of the respondent, it shows that he was doing a small scale textile business and also doing real estate. However DW-2, the respondent's son did not say that the respondent was doing real estate business. When PW-1, the respondent was asked as to how did he know the petitioner, he replied that he knew the petitioner through one Rajendran. The said Rajendran is not his relative and he did not know the address of Rajendran. He would further state that the petitioner asked Rs.5,00,000/- 15 days prior to 28.09.2014. He had Rs.5,00,000/- in the form of savings and he gave Rs.5,00,000/- to the petitioner on 28.09.2014 at 4.00 p.m. After receiving the money, the petitioner gave him the cheque. Curiously, he stated that he did not know the reason for borrowal of this amount by the petitioner. He stated that he had mentioned in the notice and in the complaint about the reason for borrowing. However nothing is said about the reason for the

borrowing, except saying that the petitioner borrowed a sum of Rs.5,00,000/-. Though he denied the suggestion that he had no means to pay Rs.5,00,000/- to the petitioner, he did not produce any other acceptable evidence apart from his oral evidence, to show that he had means to lend sum of Rs.5,00,000/- to the petitioner. He stated that he lent a sum of Rs.5,00,000/- to the petitioner only on the basis of the cheque and he did not receive any other documents to evidence the said loan transaction.

16.It is seen from the evidence of PW-1 that he did not know the petitioner prior to lending a huge sum of Rs.5,00,000/-. He came to know about the petitioner through one Rajendran. He did not even know the address of the said Rajendran. He did not get any supporting document like a promissory note to evidence the loan transaction. These aspects strengthens the case of the petitioner that the cheque he gave to Sathyan as a security for chit transaction is misused through the respondent. It is true that the petitioner has not happily worded in the reply that the cheque in question was given as security to Sathyan in chit transaction. But it is stated in the reply that the cheque was not issued to the respondent, the cheque leaf is misused and this case is initiated on behalf of some other person. As seen from the judgment relied on by the learned counsel for the respondent, it is not necessary for the petitioner to prove his case beyond reasonable doubt and it is

enough to prove his case by preponderance of probability. It is accepted fact that the respondent had no prior acquaintance with the petitioner and he had not insisted on the execution of the promissory note or any other document to evidence the loan transaction. There is no denial of the fact that Satyan is the close relative of the respondent. The fact that the respondent had not produced any acceptable evidence to show that he has means to lend a sum of Rs.5,00,000/- to the petitioner, when seen in the backdrop of the case projected by the petitioner that the cheque was given as security in the chit rune by Satyan, probalised the case of the petitioner that the cheque which was given as security in the chit transaction is misused by the respondent.

17.The judgment reported in (2009) 14 SCC 398 (cited supra) is brought to the notice of this court by the Learned Counsel for the Petitioner for the position that when the notice is sent with regard to dishonour of cheque, the service of notice on the accused is sine qua non in terms of Clause (b) of proviso to section 138 of Negotiable Instruments Act. It is seen from this judgment that the notice was served on the wife of the accused. It was held that there was no valid service of notice in terms of clause (b) of proviso to section 138 of Negotiable Instruments Act. In the case on hand, the notice was not served on the petitioner but served on his wife. The ratio of this judgment squarely applies to the facts and circumstances of the case. The

Learned Counsel for the respondent has not produced any authority which has taken contrary decision on this point. Therefore it has to be necessarily held that notice was not served properly on the petitioner in terms of Clause (b) of proviso to Section 138 of Negotiable Instruments Act and the conviction of the petitioner cannot be sustained.

18.Both the Trial court and the Appellate court have not considered these vital aspects while proceeding to dispose the case and heavily placed reliance on the presumption under section 139 of the Negotiable Instruments Act, without minding that this provision merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability. However, this presumption does not extend to the existence of a debt also. Existence of a legally enforceable debt is not a matter of presumption under section 139 of Negotiable Instruments Act. In view of the reasons stated above, it could be gathered that the respondent has miserably failed to prove that he had means to lend a sum of Rs.5,00,000/- to the petitioner, lent that sum and the cheque in question was issued for discharging that debt. Therefore, this court concludes that the judgments of the court below in convicting and sentencing the petitioner under Section 138 of Negotiable Instruments Act is not in consonance with established facts and position of law and has to be necessarily set aside. In this view of the matter,

the judgment of the Learned II Additional Sessions Judge, Erode in C.A.No.133/2016, which confirmed the judgment of Learned Judicial Magistrate Cum Fast Track Court I, Erode in STC No.610/2014 is set aside; the petitioner is found not guilty under Section 138 of Negotiable Instruments Act and acquitted. Fine amount, if paid already, is ordered to be repaid to him and the bail bond to be canceled. The point is answered as above.

19. In the result, this Criminal Revision Petition is allowed. The judgment of the Learned II Additional Sessions Judge, Erode in C.A.No.133/2016, which confirmed the judgment of Learned Judicial Magistrate Cum Fast Track Court I, Erode in STC No.610/2014 is set aside; the petitioner is found not guilty under Section 138 of Negotiable Instruments Act and acquitted. Fine amount, if paid already, is ordered to be repaid to him and the bail bond to be canceled. Consequently, connected Miscellaneous Petitions are closed.

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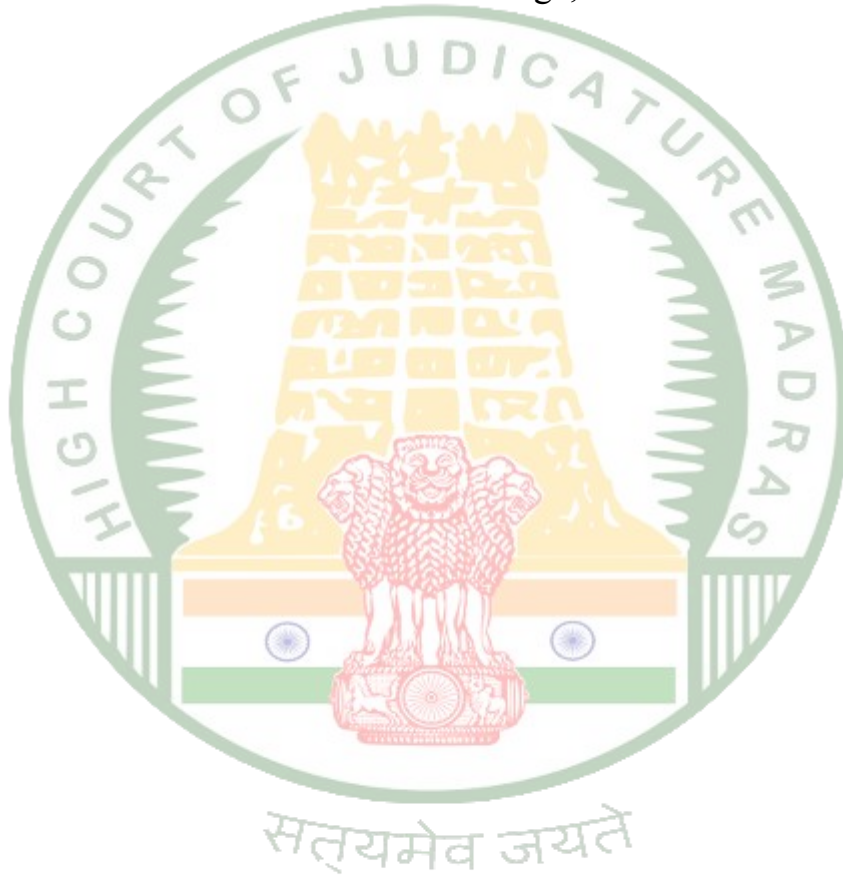
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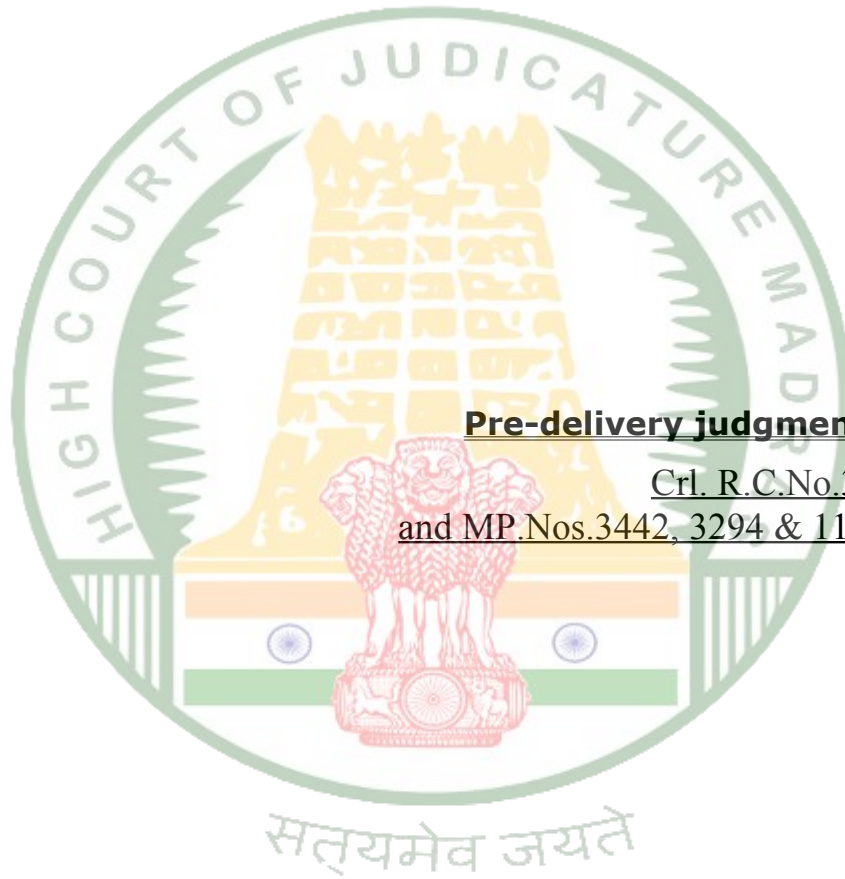
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Pre-delivery judgment made in

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