IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	19.10.2022
Pronounced on	:	06.01.2023

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal Nos.621 to 625 and 627 of 2022

In Crl.A.Nos.621 to 625 of 2022

S.Burushotham Alwyn ... Appellant

Vs.

A. Gunasingh Immanuel .... Respondent

Common Prayer in Crl.A.Nos.621 to 625 of 2022 : Criminal Appeal filed under Sections 378 of Criminal Procedure Code, praying to admit these appeals on file, set aside the Judgment of the trial Court in C.C.Nos.38, 36, 35, 34 and 37 of 2017 dated 09.12.2021 passed by the learned Judicial Magistrate No.II, Udumalpet acquitting the respondent/accused, thereby allow the appeal by convicting the respondents/accused.

In Crl.A.No.627 of 2022

S.Burushotham Alwyn ... Appellant

Vs.

1. Royal Educational Institutions
   rep. by its Executive Director
   A.Gunasingh Immanuel

2. A.Gunasingh Immanuel .... Respondents

Prayer: Criminal Appeal filed under Sections 378 of Criminal Procedure Code, praying to admit these appeals on file, set aside the Judgment of the trial Court in C.C.No.39 of 2017 dated 09.12.2021 passed by the learned Judicial Magistrate No.II, Udumalpet acquitting the respondent/accused, thereby allow the appeal by convicting the respondents/accused.

In all Criminal Appeals

For Appellant : Mr.M.Padmanaban

For Respondent/s : Mr.B.Kumarasamy

JUDGMENT

These Criminal Appeals have been filed challenging the Judgment of acquittal passed by the learned Judicial Magistrate No.II, Udumalpet, in C.C.Nos.38, 36, 35, 34, 37 and 39 of 2017 dated 09.12.2021.

2. In Crl.A.No.627 of 2022, the appellant is the complainant and the 1st respondent is an Educational Institution and the 2nd respondent is the Administrative Director of the said Institution. On 19.02.2010, the 2nd respondent had approached the appellant seeking loan for the purpose of his Institution and since the 2nd respondent is his relative and doing business, the appellant lent a sum of Rs.28,37,500/- for which, the 2nd respondent had issued promissory note to the appellant and thereafter, the 2nd respondent was paying the interest regularly. Thereafter, when the appellant had asked to return the loan amount, the 2nd respondent visited the house of the appellant on 04.02.2013 and towards the repayment of the loan amount of Rs.28,37,500/-, he issued 3 cheques dated 04.02.2013 bearing Nos.289275, 289276 and 289278 each for Rs.10 lakhs, Rs.10 lakhs and Rs.8,37,500/- drawn on Indian Overseas Bank, Tirumalayampalam Branch, Coimbatore, in favour of the appellant and subsequently, taken back the promissory notes executed by him at the time of availing loan. Subsequently, the appellant deposited the said 3 cheques with his banker viz., Central Bank of India, Udumalaipet Branch for collection. But the same were returned with memo as “funds insufficient” on 08.02.2013. Hence, the appellant issued statutory notice to the respondents 1 and 2 and the same were received by them on 05.04.2013. However, they did not repay the amount within the statutory period and not even sent any reply to the statutory notice. Hence, the appellant filed private complaint under Section 200 Cr.P.C. for the offence under Section 138 of the Negotiable Instruments Act and the said complaint was taken cognizance in C.C.No.244 of 2013 by the Judicial Magistrate No.I, Udumalaipet and subsequently, transferred to Judicial Magisterial No.II, Udumalaipet, and re-numbered as C.C.Nos.39 of 2017. Before the trial Court, in order to substantiate the averments in the complaint, the complainant was examined as P.W.1 and on his behalf, 3 other witnesses were examined as P.W.2 to P.W.4 and 51 documents were marked as Ex.P.1 to Ex.P.51. On the side of the respondent, 4 witnesses were examined as DW.1 to DW.4 and 3 documents were marked as Exs.D1 to D.3.

3. In Crl.A.Nos. 621 to 625 of 2022, the appellant is the complainant and the respondent is the accused. The specific case of the appellant is that after availing loan of Rs.28,37,500/- from the appellant on 19.02.2010, the respondent/2nd respondent in Crl.A.No.627 of 2022 again approached the appellant herein on 16.06.2010, 13.10.2010, 16.02.2011, 15.06.2011, 14.12.2011 and availed loan of Rs.25 lakhs, Rs.25 lakhs, Rs.25 lakhs, Rs.20 lakhs and Rs.35 lakhs respectively for his business development by executing promissory notes and agreed to pay interest at the rate of Rs.1 for Rs.100/- and also paid interest by cash regularly. Thereafter, in lieu of repayment of the said amounts, the respondent met the appellant on 22.12.2012 and handed over 5 cheques dated 22.12.2012 bearing Nos.021363, 021364, 021365, 021366, 021367 for Rs.25 lakhs, Rs.25 lakhs, Rs.25 lakhs, Rs.20 lakhs and Rs.35 lakhs respectively, drawn on Indian Overseas Bank, Tirumalayampalayam Branch, Coimbatore, and requested the appellant to present the same on

20.03.2013 and he also got back the promissory notes executed by him at the time of availing the loan. Accordingly, the cheques were presented by the appellant with his Banker namely Tamilnadu Mercantile bank, Udumalaipet Branch, for collection on 20.03.2013. But the same were returned on the same day viz., 20.03.2013 with the memo as "insufficient funds". Hence, the appellant issued statutory notices on 05.04.2013 through registered post and the same were received by the respondent on 08.04.2013. However, the respondent did not repay the amount within the statutory period and also not sent any reply to the statutory notices. Hence, the appellant filed 5 private complaints under Section 200 Cr.P.C. for the offence under Section 138 of the Negotiable Instruments Act and the same were taken on file by the Judicial Magistrate No.I, Udumalaipet in C.C.Nos.149 of 2013, 151 of 2013, 179 of 2013, 150 of 2013 and 180 of 2013 and subsequently, transferred to the Judicial Magistrate No.II, Udumalipet and re-numbered as C.C.Nos.34 of 2017, 36 of 2017, 37 of 2017, 35 of 2017 and 38 of 2017. Before the trial Court, in order to substantiate the averments in the complaint, in each case, the complainant was examined as P.W.1 and on his behalf, 3 other witnesses were examined as P.W.2 to P.W.4. Except in C.C.No.34 of 2017, in other cases viz., C.C.Nos.36 of 2017, 37 of 2017, 35 of 2017 and 38 of 2017, totally, 51 documents were marked as Ex.P.1 to Ex.P.51 and in C.C.No.34 of 2017, 56 documents were marked as Ex.P.1 to Ex.P.56. On the side of the respondent, 4 witnesses were examined as DW.1 to DW.4 and 3 documents were marked as Exs.D1 to D.3.

4. The trial Court, after hearing both sides, dismissed all the complaints by order dated 09.12.2021 and acquitted the accused. Aggrieved over the said Judgment of acquittal, the complainant has filed the present appeals before this Court.

5. For the sake of convenience, the parties are referred to as per their rank in the respective calender cases.

6. The learned counsel appearing for the complainant submitted that the accused had borrowed money from the complainant to the tune of Rs.1,58,37,500/- on various dates by executing separate promissory notes and thereafter, in order to repay the said amounts, he issued 5 cheques dated 22.12.2012 and 3 cheques dated 04.02.2013 in favour of the complainant and got back the promissory notes. Thereafter, when the cheques were presented on 20.03.2013 and 04.02.2013 before his Banker for collection, the same were returned for the reasons "funds insufficient" on 20.03.2013 and 04.02.2013. Hence, the complainant issued statutory notices through his Advocate and even after receipt of the statutory notices, the accused neither replied nor repaid the loan amount. Hence, the complainant filed private complaints before the Court below under Section 200 Cr.P.C. for the offence under Section 138 of the Negotiable Instruments Act. The learned Magistrate, failed to appreciate the entire evidence of the witnesses in proper prospective and instead, had read the evidences in portions and dismissed the complaints. The accused did not rebut the statutory presumption standing against him with proper evidence. But the trial Court erred in holding that the accused rebutted the statutory presumption under Section 139 of the Negotiable Instruments Act merely by raising the question during the cross examination of the accused regarding the source of income of the complainant to advance the money. He would further submit that the accused admitted the signatures found in the cheques. Though the accused taken the defence that the cheques were stolen from his custody, there is no oral or documentary evidence to show that he has initiated action for the misuse of the cheques by the complainant. Further, the accused did not even choose to cross examine P.W.1/complainant by way of suggestion to establish that the contents of the cheques were not filled by the accused. Therefore, such defence becomes improbable. Therefore, the Judgment of acquittal passed by the trial Court is liable to be reversed.

7. The learned counsel for the accused would submit that the complainant had worked as a part time worker in the institute of the accused and the complainant has no financial capacity to lend such a huge amount. Though the complainant had stated that he has business in Dindigul, during cross examination, he admitted that he has no business in Dindigul. As per the complainant, the accused had initially borrowed a sum of Rs.28,37,500/- and subsequently, borrowed a sum of

Rs.1,30,000,00/- on 5 instalments and thereafter, towards the repayment of Rs.1,30,000,00/-, the accused is alleged to have issued 5 cheques dated 22.12.2012 and 3 cheques dated 04.02.2013 towards repayment of Rs.28,37,500/-. If at all the accused was intended to repay the amount in full, he would have issued a single cheque to the complainant as there is no bar for issuance of single cheque and he would not have issued 8 separate cheques as alleged by the complainant. Further, the complainant during cross examination stated that by pledging jewels of his wife and by selling his properties, he got money out of which, he lent money to the accused. But he has not substantiated the same by documentary evidence. He would submit that no prudent man would lend such a huge amount without even obtaining any document for security. Therefore, the trial Court on finding that the complainant failed to prove his case beyond all reasonable doubt and the accused rebutted the presumption by preponderance of probabilities, dismissed the complainants filed by the complainant and acquitted the accused. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard the learned counsel for the complainant and the learned Counsel for the accused and also perused the materials available on record.

9. The case of the complainant is that the accused had borrowed money from him on several occasions and executed promissory notes and subsequently, towards repayment of the principal amount, the accused had issued 5 cheques dated 22.12.2012 to the tune of Rs.1,30,000,00/- and 3 cheques dated 04.02.2013 to the tune of Rs.28,37,500/- in favour of the complainant and got back the promissory notes and thereafter, when the said cheques were presented in by the complainant in his bank for collection on 20.03.2013 and 04.02.2013 respectively, the same were returned as “insufficient funds. However, a perusal of the records shows that the complainant is said to have lent money to the accused on 6 different dates based on the promissory notes executed by the accused. But, the complainant has not produced and marked the said promissory notes before the Court below. Further, as pointed out by the learned counsel for the accused, all the 5 cheques for the sum of Rs.1,30,000,00/-

were issued on the same day i.e. 22.12.2012 and presented in the bank on the same day i.e. on 20.03.2013 and in the same way, all the said 3 cheques issued for Rs.28,37,500/- were given to the complainant on the same day and presented in the bank on the same day i.e. 04.02.2013. When a person is intended settle the amount in full, he would normally issue a single cheque as there is no bar for giving single cheque and he would not issue several cheques that too with same date, which itself creates doubt.

10. Further, the complainant who is alleged to have lent such a huge amount of Rs.1,58,37,500/- to the accused, has admitted that he worked as a part time worker in the institution of the accused. A person who is working as a part time employee, lending such a huge amount to his employer, itself creates doubt. Though the appellant denied the suggestion that he has no money to lend such a huge amount to the accused, he has not proved that he had source in his bank account or in his known source at the time of lending money. Though during cross examination the complainant stated that by pledging the jewels of his wife and selling his properties and also entering into agreement of sale of property, he lent money to the accused, he has not substantiated the same by documentary evidence and the documents which were produced by the complainant are not correlated with the date of lending of amount to the accused. Except some bank statements and also agreement of sale, he has not proved that on the date of lending money, he had source and prior to the date of lending, he had pledged the jewels by producing any receipts corresponding to the amount said to have lent to the accused. Further, the complainant has not specifically stated for how much, he pledged the jewels and out of which, how much he paid to the accused. The first loan was alleged to have given by the complainant on 19.10.2010 and the last loan was alleged to have given on 14.12.2011 and in the meanwhile, for each principal amount, whether the accused paid interest without any delay or not. Even if he was duly paying the interest, why the complainant was keeping on lending money upto Rs.1,58,37,500/- to the accused with an interval of about 4 or 5 months that too by pledging the jewels of his wife and selling his properties without even getting any document or security from the accused, which is also highly improbable.

11. The accused is said to have visited the house of the complainant and obtained a sum of Rs.28,37,500/- on 19.02.2010. But the complainant has not stated anything about the payment of interest for the same. Subsequently, the complainant has paid a sum of Rs.25 lakhs on 16.06.2010 to the accused for which also he has not stated anything about the payment of interest and also not produced any proof for the receipt of interest. Again on 13.10.2010, he has further paid a sum of Rs.25 lakhs to the accused and thereafter, another sum of Rs.25 lakhs on 16.02.2011 and Rs.20 lakhs on 15.06.2011 and finally, he has paid a sum of Rs.35 lakhs on 14.12.2011 to the accused. The first loan amount of Rs.28,37,500/- was paid by the complainant in the month of February 2010 and pending the same, he has again and again paid amount to the tune of Rs.1,30,000,00/- to the accused on 5 instalments. But he has not stated anything about the payment of interest and also not proved the receipt of interest for none of the transactions. No prudent man would lend such a huge amount only based on promissory note, without even obtaining any documents or security. Though the complainant stated that he lent the said amount based on the promissory notes, he did not produce or mark the promissory notes before the Court. Admittedly, without any benefit, he could not have lent the money. If at all, he had lent the money to the accused, he would have received some interest. Even assuming that the accused was duly paying the interest by cash, why the complainant was keeping on lending such a huge amount of Rs.1,58,37,500/- to the accused with an interval of about 4 or 5 months that too by pledging the jewels of his wife and selling his properties and without even obtaining any documents or security from the accused, which is highly improbable.

12. Further, the accused is alleged to have issued 3 cheques dated 04.02.2013 for a sum of Rs.10 lakhs, Rs.10 lakhs and Rs.87,500/- each, towards the principal amount of Rs.28,37,500/- borrowed initially on 19.02.2010. The said 3 cheques were alleged to have been issued after a period of 2 years that too, after the issuance of the 5 cheques on 22.12.2012 for the sum of Rs.1,30,000,00/-. However, the complainant has presented the said 3 cheques first, issued for Rs.28,37,500/- in his bank for collection on 04.02.2013 and the same were returned on 08.02.2013 itself as "insufficient funds". Thereafter, knowing fully well that the 3 cheques presented for Rs.28,37,500/- itself were returned for the reasons "insufficient funds, on 20.03.2013 the complainant also presented the other 5 cheques issued for Rs.1,30,000,00/- which also creates doubt. Though, he has stated that the said 3 cheques issued for Rs.28,37,500/- was given on behalf of the institution of the accused, all the cheques were issued by the same accused. Therefore, the explanation of the complainant is not acceptable.

13. The main defence taken by the accused is that the complainant was working as a part time worker in his institution and at that time, he helped the accused to obtain loan from bank and he was also taking care of the money transaction to the bank. Subsequently, by making use of the closeness with the accused, he got signed blank cheques from him and left the job and thereafter, by misusing the said cheques, lodged the false complaints against him. As stated above, while considering the entire materials, the defence of the accused seems to be probable. Because no prudent man would lend such a huge amount on instalment basis without any document or security and without any benefit of interest.

14. Though the complainant admitted that while the accused was trying for Bank loan from Ramanathapuram and Coimbatore Syndicate Banks for his institution, he helped the accused to avail loan, he denied the suggestion that the accused had deposited amount in his bank account to be paid to the bank towards repayment of loan. Further, when a suggestion was put before the complainant for more than twice as to whether the complainant, by using the cheque of the accused, paid amount to the Syndicate bank or to any other bank, the complainant has stated that he did not understand the question.

15. Further, for one of the cheques viz., bearing No.021366 alleged to have been issued by the accused for Rs.20 lakhs, the complainant has filed a suit for recovery of principal amount of Rs.20 lakhs and interest for the said amount from 21.12.2012 borrowed by the accused on 15.06.2011 and in the suit, he has also got a decree. Even in that case, the complainant has not produced the promissory note said to have been executed by the accused in favour of the complainant and he has filed the suit only based on the xerox copy of the cheque bearing No.021366 and also corresponding notice. Though he has filed some income tax returns in the said suit, that was not corresponding to the money lent to the accused. The complainant has not proved that on the date of lending money to the accused, he had sufficient amount in his hand or in his bank account. Though the complainant has stated that he obtained money by pledging jewels of his wife, the wife of the complainant was not examined. Further, though the complainant produced some receipts of pledged jewels, they are not corresponding to the date of the amount alleged to have been given to the accused.

16. In this case, this Court finds that the complainant has not proved his case except the signatures found in the cheques are that of the accused and there was some transactions between them. Though the signatures of the accused in all the cheques were admitted, mere admission of signatures is not sufficient to convict an accused for the offence under Section 138 of Negotiable Instruments Act. The complainant has to prove that the accused issued the cheque towards discharge of legally enforceable debt. Though it seems that there were some transactions between the complainant and the accused, the complainant has not proved his case as projected by him. The averments made by the complainant in all the complaints are invariably identical wherein, he has stated that the accused approached him on various dates and asked money mentioned in the respective complainants for his business purpose and the accused had executed promissory notes at the time of borrowing money from him agreeing to pay interest at the rate of Rs.1 for Rs.100/- and after availing loan, he was paying the interest amount directly to the complainant by cash and subsequently, in order to repay the principal amount, the accused issued the said cheques and thereafter, when he presented the said cheques before the Bank for collection, the same were returned as "insufficient funs. But, the complainant has not produced the promissory notes and any other document to show that the accused borrowed money from him. Mere admission of signatures found in the cheques, cannot be taken as if, the cheques were issued towards discharge of legally enforceable debt. Even otherwise, the execution of cheques and the signatures found in the cheques would only lead to the presumption under Section 139 of Negotiable Instruments Act. However the said presumption is a rebuttable presumption. The accused can always rebut the presumption by preponderance of probabilities. The onus of proof on the accused is not that much heavy as that of the complainant. The accused can always rebut the presumption by preponderance of probabilities.

17. Though the complainant has specifically stated that the accused lent money for interest on several occasions on promissory notes, he has not produced any promissory note and he has not stated what had happened to that promissory notes. Further, he has also not stated anything about the repayment of interest amount and not proved that from the date of availing of each loan and till the date of presentation of cheques before the bank for collection, the accused as promised by him, had paid interest and only for the principal amount, he issued the subject matter of cheques. Further, the complainant has also not produced any corresponding document to show that on the date of payment of each loan, he had money in his hand or in his bank account and the documents produced by the complainant are not correlated with the date of lending loan amount. Further, he stated that he received the consideration from sale of some properties, but he did not produce proper particulars about the corresponding date on which he received the money from whom either by cash. Though the complainant has stated that he is an Income Tax assessee, he has not produced his income tax receipts or his wife to prove that the said amount has been shown in his Income Tax returns. It is the bounden duty of the complainant to prove the fundamental fact that the accused had borrowed money from him and in order to repay the same, he issued the cheques towards discharge of legally enforceable debt.

18. The complaint under the Negotiable Instruments Act is Civil in nature and the complainant need not prove his case as in the criminal case by the prosecution. The accused also need not rebut the presumption by let in any direct evidence and the accused can always rebut the presumption by preponderance of probabilities.

19. In this case, as discussed above, this Court finds that the complainant has not disclosed the entire facts and not proved his complaints as projected by him.

20. It is settled proposition of law that normally the appellate Court will not interfere with the judgment of acquittal, unless it finds that the appreciation of evidence by the trial Court is so perverse and there is a compelled circumstances to reverse the judgment of acquittal. This Court, being an appellate Court and final Court of fact finding, re-appreciated the entire evidence independently. In this case, the trial Court has not discussed about each and every document and this Court also finds that it is not necessary.

21. Normally, the accused is presumed to be innocent unless, it is proved before the Court. Especially, in the appeal against acquittal, the accused has got double presumption. Therefore, it is for the complainant to prove the fundamental fact and the appreciation of evidence by the trial Court is perverse and that there is a compelled circumstances for the interference of the appellate Court to interfere with the findings of the trial Court.

22. In this case, this Court finds that the complainant has not proved his case in the manner known to law, whereas the accused has rebutted the presumption by preponderance of probabilities. Under these circumstances, this Court does not find any perversity in the appreciation of evidence by the trial Court. Therefore, there is no merit in the appeal and all the appeals are liable to be dismissed.

23. Accordingly, these Criminal Appeals are dismissed.

06.01.2023

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Index:Yes/No

P.VELMURUGAN, J

ksa-2

To

1. The Judicial Magistrate No.II, Udumalpet

2. The Public Prosecutor Officer, High Court, Madras

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

Pre-Deliver Order in
Criminal Appeal No.621 to 625 and 627 of 2022

06.01.2023