



WEB COPY



Crl.A.No.202 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.07.2023

DELIVERED ON : 03.08.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.No.202 of 2022

M/s.Sri Sastha Vasan Builders & Land Promoters
Represented by its Proprietor,
S.M.Shiva,
No.161, VKM Complex,
Veerapathra Street,
Opp. to Hotel Le-Jardin,
Erode - 3.

... Appellant

Vs.

G.Jeganathan

... Respondent

PRAYER: Criminal Appeal filed under Section 378 of Criminal Procedure Code, 1973 to set aside the order of acquittal dated 17.09.2020 made in S.T.C.No.156/2019 on the file of the Judicial Magistrate Court (Fast Track Court -1), Erode.

For Appellant : Mr.M.Guruprasad

For Respondent : Mr.T.S.Arthanareeswaran



Crl.A.No.202 of 2022

J U D G M E N T

WEB COPY This criminal appeal is filed against the Judgment and order of the Judicial Magistrate Court (Fast Track Court -1), Erode, made in S.T.C.No.156/2019, dated 17.09.2020, acquitting the accused of the offence under Section 138 of the Negotiable Instruments Act.

2. The case of the appellant/complainant is that he is doing construction and land promoter business in the name and style of Sri Sastha Vasan Builders & Land Promoters. According to him, he had purchased 2.58 acres of land at Varukurampatti Village in Tiruchengode Taluk and formed into a housing colony with house-sites ready for construction.

2.1. The respondent/accused and his wife entered into a construction agreement on 13.07.2015 for site No.58 ad-measuring 1500 sq.ft. and for constructing a house on the same to the extent of 957 sq.ft. for a total consideration of Rs.21,35,700/-. In order to facilitate the respondent's wife to avail a loan from the bank a sale deed for the house site was registered on 15.11.2015 as Document No.4733/2015 on the file of Sub-Registrar,



Crl.A.No.202 of 2022

Tiruchengode.

WEB COPY

2.2. According to the appellant/complainant, the accused had paid only a sum of Rs.12,47,000/- though the total cost agreed at Rs.21,35,700/- went up by another Rs.1,76,595/- which was acknowledged by the respondent.

2.3. House warming ceremony was conducted on 06.06.2016, at which time the balance amount receivable from the respondent was Rs.10,65,295/- against which the respondent had given a post dated cheque bearing No.000138 for a sum of Rs.4,80,000/- (Ex.P1) dated 14.02.2017 drawn on Karur Vysya Bank, Nathagoundampalayam Branch. The cheque was dishonoured when sent for collection vide a memo dated 05.03.2017 (Ex.P2) and the reason for the return was mentioned as 'Payment Stopped by Drawer'. This prompted the appellant to issue a legal notice on 16.03.2017 (Ex.P3) calling upon the respondent/accused to pay the cheque amount of Rs.4,80,000/- within 15 days from the date of receipt of the said notice. Though the respondent/accused received the said notice on 21.03.2017



Crl.A.No.202 of 2022

(Ex.P4), he failed to make payment within 15 days from the date of receipt of the said notice thereby committing offences under Sections 138, 141 r/w.142 of Negotiable Instruments Act. In the meanwhile, there was also legal notice from the respondent's counsel dated 25.02.2017 (Ex.P6).

2.4. The respondent/accused disputed the balance amount to be given as according to him, he had already remitted Rs.16,52,690/- and immediately after the completion of the work remitted Rs.4,83,690/- for which no receipt was given by the appellant/complainant. His contention is that cheque bearing No.000138 was given as security at the time of entering into the construction agreement (Ex.P5) and instead of returning the cheque he has misused the same keeping in mind the bitterness when he (respondent/accused) had expressed his dissatisfaction regarding the quality of construction. The petitioner/complainant therefore filed the case against the accused under Section 138 of N.I Act.

3. The learned Judicial Magistrate, Fast Track Court-I, Erode, after receipt of the complaint recorded the sworn statement of the complainant



Crl.A.No.202 of 2022

and also on perusal of the documents found that there was a prima facie case against the accused and took cognizance of offence under Section 138 of N.I Act and issued summons to the accused under Section 204(3) Cr.P.C. On appearance of the accused, the copies of the case records were furnished to him under Section 207 Cr.P.C., and when the accused was questioned with regard to the substance of accusation made by the complainant, he pleaded not guilty and therefore, the case was posted for trial.

4. In the trial Court, the appellant/complainant had examined himself as PW1 and marked Ex.P1 to Ex.P13. When the accused was questioned under Section 313(1) Cr.P.C. with regard to incriminating offences appearing in evidence against him he denied of having committed any offence. He examined himself and marked as Ex.R1 & Ex.R2. The trial Court had discussed all the documents in detail and also the contents of the deposition of both the complainant and the accused. Finally, the trial Court concluded that since the subject cheque which was returned for the reason 'payment stopped by the drawer' was taken by the complainant only as a security and therefore, the presumption that the cheque was issued for a



Crl.A.No.202 of 2022

legally enforceable debt does not hold good in the present case and therefore, the alleged offence said to have been committed by the respondent/accused was not proved beyond doubt resulting in acquittal of the accused.

5. The present appeal is against this order of acquittal.

6. Heard, Mr.M.Guruprasad, learned counsel for the appellant and Mr.T.S.Arthanareeswaran, learned counsel for the respondent.

7. Mr.M.Guruprasad, learned counsel for the appellant contended that there is no dispute as regards the construction agreement (Ex.P5). It was also his contention that the sale deed registered in the name of the wife of the respondent/accused was to facilitate sanction of a bank loan which was also sanctioned subsequently. It is further contended that Rs.15,00,000/- loan was sanctioned based on the sale deed. Though the respondent/accused had claimed that the amounts were paid to the appellant/complainant from the loan amount as cash it is not proved by him



by adducing acceptable evidence. In this context, the respondent as RW1 has claimed no receipts were given to him by the appellant/complainant. It has been further argued when there are receipts for all the payments made by the respondent/accused to the appellant/complainant, how no receipts were given for these amounts. According to the learned counsel, it naturally raises a question as to why payments from the loan proceeds were made in cash. Furthermore, it was contended that the trial Court had erred in acquitting the respondent/accused by simply stating that the cheques were given only as security which ought to have been returned to the respondent/accused once the full payment was received.

8. Per contra, the learned counsel for the respondent / accused argued that it is well settled by way of numerous decisions of different High Courts and the Apex Court that the cheques obtained as security should not be presented for collection and if returned the presumption of existing legally enforceable liability does not hold good. Therefore, according to him, the appellant had no case and the acquittal by the trial Court was correct and justified.



Crl.A.No.202 of 2022

9. Before going into the merits of the case let us delve into what

Section 138 of the Negotiable Instruments Act envisages and how it is interpreted. Section 138 of the Negotiable Instruments Act is a penal provision wherein if a person draws a cheque from an account maintained by him and if a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with that bank such person shall be deemed to have committed an offence. However, with regard to payments stopped by the drawer, the Section does not mention anything specifically. The Hon'ble Supreme Court in the case of ***M/s.Electronic Trade & Technology Development Corporation Ltd Vs M/s.Indian Technologies & Engineers (Electronics) Pvt Ltd and Another*** in Appeal (Crl.) 124 of 1996 was explicit in relation to bouncing of cheque due to payments stopped by the drawer. It had expressly held that if on issuance of the notice by the payee or the holder in due course after dishonour, to the



Crl.A.No.202 of 2022

drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied.

10. In the case of *MMTC Ltd & Another Vs Medchi Chemicals and Pharma (P) Ltd & Another* reported in *(2002) 1 SCC 234* the Hon'ble Apex Court had held that if the accused can show that there was sufficient funds in their account to clear the amount of the cheque at the time of presentation and that the stop payment notice was issued for valid reason then the offence under Section 138 would not be made out. In the instant case, the respondent/accused has not adduced any documentary evidence to show that he had sufficient balance in his account and that he had a valid reason for instructing the bank to stop the payment of the cheque. Further, as contended by the learned counsel for the appellant the respondent/accused has not adduced any evidence of payments of 'different amounts' from the loan of Rs.15,00,000/- availed by his wife based on Ex.R1. It is also perplexing as to why the statement of accounts was given only for a short period from 01.04.2015 to 27.05.2015 which shows only



Crl.A.No.202 of 2022

disbursement of Rs.7.72 lakhs out of Rs.15,00,000/- loan amount. The respondent/accused during the course of cross examination has admitted all the receipts issued by the complainant (Ex.P7 to Ex.P12). He also acknowledged that he had signed the sketch showing the area of 957 sq.ft. and also the additional amount of Rs.2,36,000/- which was marked as Ex.P13. He also admitted that he had issued a legal notice on 25.02.2017 in which it was accepted by him that a balance amount of Rs.90,700/- was payable by him to the complainant while in his proof affidavit he has claimed there are no dues payable by him. Another aspect which was touched upon by him in the cross examination was that he had never sent any notice or letter to the complainant listing out the poor quality of construction or deficiencies in the construction though he claimed that it was only because he raised an issue of poor quality construction the complainant had filed this case by misusing the cheque given to him as security. However, in the legal notice dated 25.02.2017 (Ex.P6) issued by the respondent there is a mention about certain deficiencies in the construction and also about the promise by the complainant to rectify the same. Interestingly, this cheque bearing No.000138 for Rs.4,80,000/- was



Crl.A.No.202 of 2022

presented on 16.02.2017 itself being the first occasion and was returned unpaid for the same reason 'payment stopped by the drawer'. Another important aspect to be discussed is whether the presumption legally enforceable debt is applicable in the present case or not. In this context, it is pertinent to refer a judgment of Apex Court in ***Sripati Singh (Since Deceased) vs The State Of Jharkhand*** reported in ***2021 SCC Online SC 1002***, wherein in para 17 it is observed thus :

"17. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same.

*.....
all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the*



borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security."

11. In the decision in ***Sunil Todi vs The State of Gujarat*** in Criminal Appeal No.1446/2021, the Hon'ble Apex Court had observed thus :

"26. The object of the [NI Act](#) is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. In Indus Airways, advance payments were made but since the purchase agreement was cancelled, there was no occasion of incurring any debt. The true purpose of [Section 138](#) would not be



fulfilled, if 'debt or other liability' is interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, Parliament has used the expression 'debt or other liability'. The expression "or other liability' must have a meaning of its own, the legislature having used two distinct phrases. The expression 'or other liability' has a content which is broader than 'a debt' and cannot be equated with the latter. In the present case, the cheque was issued in close proximity with the commencement of power supply. The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealings. The issuance of the cheque was followed close on its heels by the supply of power. To hold that the cheque was not issued in the context of a liability which was being assumed by the company to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings. If the company were to fail to provide a satisfactory LC and yet consume power, the cheques were capable of being presented for the purpose of meeting the outstanding dues."



Crl.A.No.202 of 2022

12. In the instant case, the trial Court had concluded that the dishonoured cheque was only given as a security and that therefore, will not fall under the provisions of Section 138 of Negotiable Instruments Act. This Court opines that the conclusion of the trial Court is totally erroneous. The respondent/accused had given the cheque bearing No.000138 for Rs.4,80,000/- drawn on Karur Vysya Bank, Nathagoundampalayam Branch to liquidate a legally enforceable cheque. The respondent/accused cannot escape this liability by merely stating that the cheque was handed over to the appellant/complainant only as a security. If that is true then they ought to have adduced satisfactory evidence for having remitted the amount due. The respondent/accused instead of adducing a satisfactory evidence of making payment to the appellant, cannot claim that the presumption envisaged in the Section 138 of Negotiable Instruments Act is rebutted. In fact all the payments made by the respondent have been duly acknowledged with receipts.

13. It is also intriguing to find that the accused in his deposition has stated that he had demanded the agreement copy, cheque No.000138 to be



Crl.A.No.202 of 2022

returned and sketch of the building. If it is presumed that the three cheques were given as security, it is incomprehensible as to why only one cheque (the cheque which was returned unpaid) was demanded to be returned back. Moreover, there is no mention in the construction agreement that the three cheques were given only as security to the complainant. Thus the trial Court had committed gross error and grave injustice to the complainant. Therefore, the accused is found guilty of the offence under Section 138 of the Negotiable Instruments Act.

14.In the result,

- i. the Criminal Appeal is allowed.
- ii. The order dated 17.09.2020 passed by the Judicial Magistrate Court (Fast Track Court -1), Erode in S.T.C.No.156/2019, is set aside.
- iii. The respondent/accused is found guilty of the offence under Section 138 of the Negotiable Instruments Act and convicted under Section 255(2) Cr.P.C and sentenced to undergo Simple Imprisonment for a period of 6 months and to pay a compensation of Rs.4,80,000/- under Section 357(3) Cr.P.C., which shall be paid to the



Crl.A.No.202 of 2022

WEB COPY

appellant/complainant within two months from the date of receipt of a copy of this judgment and in default, to undergo Simple Imprisonment for a period of 2 months.

iv. The respondent/accused is directed to surrender before the Judicial Magistrate (Fast Track Court -1), Erode, within 15 days from the date of receipt of a copy of this order, failing which, the trial court shall take steps to secure him for undergoing the sentence imposed upon him by this Court.

03.08.2023

mtl/bga
Index : yes/no
Speaking /Non speaking Order

To

- 1.The Judicial Magistrate Court (Fast Track Court -1), Erode.
- 2.The Section Officer, Criminal Section, High Court, Madras.



WEB COPY



Crl.A.No.202 of 2022

R.HEMALATHA, J.

mtl/bga

Pre-Delivery Judgment in
Crl.A.No.202 of 2022

03.08.2023