THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE **V.SIVAGNANAM**

Crl.O.P.No.32296 of 2022 in
Crl.A.SR 42483 of 2022

C.Gunaseelan (deceased)
1. Kalaimathy
2. C.K.Karthikeyan
3. C.K.Yuvaraj ... Petitioners

Vs.

B.Sivaprakash ... Respondent

**PRAYER in Crl.O.P.No.32296 of 2022:** Criminal Original Petition filed under Section 378(4) of Cr.P.C. to grant leave permitting the petitioners/appellants to prefer Criminal Appeal against the judgment of Acquittal passed in C.C.No.113 of 2014 on the file of the Judicial Magistrate, Rasipuram dated 03.06.2022.

**PRAYER in Crl.A.SR.42483 of 2022:** Criminal Appeal (SR) filed under Section 378 of Cr.P.C. to set aside the judgment of Acquittal passed in C.C.No.113 of 2014 on the file of the Judicial Magistrate, Rasipuram dated 03.06.2022.

For Petitioners/Appellants : Mr. A.Stephen

**ORDER**

This Criminal Original Petition has been filed to grant leave to the petitioners to prefer Criminal Appeal against the judgment of Acquittal passed in C.C.No.113 of 2014 by the Judicial Magistrate, Rasipuram dated 03.06.2022.

2. The petitioner's father namely S.Gunaseelan (deceased), (herein after referred to as complainant) filed a private complaint in C.C.No.113/2014 against the respondent under Section 138 of Negotiable Instruments Act before the Trial Court. Pending case, the complainant died and his legal heirs were impleaded as parties. According to the complainant, the respondent/accused borrowed a sum of Rs.10,00,000/- from him as hand loan, six months before the date of issuing cheques. In order to repay the amount, the respondent issued two cheques, bearing No.170429 and 170430 dated 21.08.2013, each for a sum of Rs.5,00,000/-, drawn on Axis Bank, Rasipuram branch and when the same were presented for collection, returned as “Account Closed”. Hence, after issuing statutory notice to the respondent, the

complainant filed the private complaint seeking compensation towards the dishonoured cheques.

3. Before Trial Court, the complainant and two other witnesses were examined as PW1 to PW3 and 4 documents were marked as Ex.P1 to Ex.P4. On the side of the defence, one witness was examined as DW1 and no documentary evidence was adduced.

4. After demise of the complainant, the petitioners, who are the legal heirs of the complainant, proceeded the case further. The Trial Court, upon perusing the oral and documentary evidence, passed judgment vide order dated 06.06.2018, acquitting the respondent from the offence under Section 138 of Negotiable Instruments Act. Hence this petition has been filed seeking leave to prefer appeal against the judgment of acquittal.

5. The learned counsel for the petitioners submitted that, the father of the petitioners/complainant had come with a clear case that the respondent borrowed a sum of Rs.10,00,000/- from him and to repay the same, the

respondent gave two cheques bearing Nos.170429 and 170430, dated 21.08.2013, drawn on Axis Bank, Rasipuram branch, each for a sum of Rs.5,00,000/- to the complainant and the same were dishonored by the bank on 30.10.2018, with an endorsement " Account closed ". He further submitted that just 6 days before the date of dishonouring cheques, the respondent had closed his bank account on 24.10.2013, however, the Trial Court without appreciating the evidence and the documents adduced by the petitioner in proper perspective, has passed the impugned judgment, acquitting the respondent from the charge under Section 138 of Negotiable Instruments Act. Hence leave may be granted to prefer Appeal.

6. Heard the counsel for the petitioners and I have perused the materials on record.

7. It is seen from the records that the complainant had filed a private complaint in C.C.No.113 of 2014 against the respondent under Section 138 of Negotiable Instruments Act before the Judicial Magistrate, Rasipuram. It is the case of the complainant that the respondent borrowed a sum of

Rs.10,00,000/- from him, six months before the date of issuing cheques; and to repay the same, he had given two cheques bearing Nos.170429 and 170430, dated 21.08.2013, drawn on Axis Bank, Rasipuram branch, for Rs.5,00,000/- each; and when the cheques were presented for collection, the same were returned on 30.10.2013 with an endorsement " Account Closed "; hence, after issuing statutory notice, complaint was filed.

8. A perusal of the judgment passed by the Trial Court reveals that the complainant, in his complaint as well as while deposing evidence as PW1, has simply stated that, six months before the date of issuing the cheques, the respondent borrowed a sum of Rs.10,00,000/- from him. He has not let any satisfactory evidence to prove, on what date, he lent a sum of Rs.10,00,000/- and what is the source for payment of the above amount. Further, the complainant has not filed either bank accounts or any documents to show that he had source for payment of Rs.10,00,000/-, on the date of lending money to the respondent. In such circumstances, the Trial Court found that the presumption under Section 139 of Negotiable Instruments Act, cannot be invoked for payment of Rs.10,00,000/- and only if there is any legal

enforceable debt, presumption can be invoked under Section 139 of Negotiable Instruments Act.

9. Before Trial Court, the respondent raised defence that there was a transaction between him and the son of the complainant, and for the same, he had issued two cheques, each for a sum of Rs.5,00,000/-; and in that transaction, the respondent filed I.P.No.6/2013 against the son of complainant before the Sub Court, Rasipuram; and having grudge over the same, the complainant filed the present complaint against the respondent.

10. In such circumstances, it is to be noted that when the complainant has not stated the exact date of payment of Rs.10,00,000/- made to the respondent, has admitted about the pendency of I.P.No.6/2013 against his son, during examination as PW1. Further, the Trial Court discussed the fact that the complainant had not explained as to how he came to know the respondent and what are all the transactions between the complainant and the respondent and has rightly come to the conclusion that the complainant has not proved the payment of Rs.10,00,000/- to the respondent. Further, the Trial Court has

rightly concluded that the alleged loan transaction between him and the complainant is improbable, inview of the attending circumstances brought on record by the respondent. Further, the Trial Court has rightly concluded that the complainant has not discharged the initial burden of proof of payment of Rs.10,00,000/- to the respondent, when the existence of legal recoverable debt cannot be presumed. Therefore, in the absence of proof for payment of Rs.10,00,000 by the complainant to the respondent, the Trial Court and has rightly dismissed the case and acquitted the respondent from the charge under Section 138 of Negotiable Instruments Act. Hence, this Court do not find any illegality or infirmity in the judgment passed by the Trial Court. Accordingly, this Court find that there is no prima facie case either on facts or on law to grant leave to the petitioners to prefer an appeal against the impugned judgment passed by the Trial Court.

11. Accordingly, the petition to grant leave to prefer the Criminal Appeal is dismissed. Consequently, the Criminal Appeal is also dismissed at the SR stage itself.

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To:

The Judicial Magistrate, Rasipuram.

**V.SIVAGNANAM, J.**

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