



Crl.A.No.836 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 18-03-2025

CORAM :

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Criminal Appeal No. 836 of 2012

M. Senthil Nathan

.. Appellant

Versus

K. Saravanan

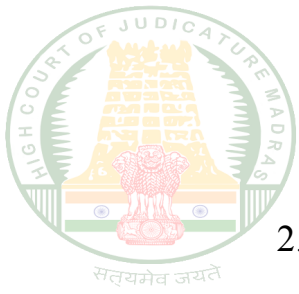
.. Respondent

Criminal Appeal is filed under Section 378 of Cr.P.C to set aside the order of acquittal dated 05.10.2012 passed in C.C.No.797 of 2010, on the file of the learned VIII Metropolitan Magistrate, George Town, Chennai.

For Appellant	:	Mr. V.M. Ravishankar
For Respondent	:	Mr. R. Muthukumar

J U D G M E N T

This Criminal Appeal is filed to set aside the order of acquittal dated 05.10.2012 passed by the learned VIII Metropolitan Magistrate, George Town, Chennai in C.C.No.797 of 2010 and consequently convict the respondent/accused for having committed the offence under Section 138 of the Negotiable Instruments Act.

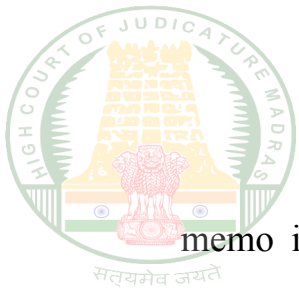


Crl.A.No.836 of 2018

2. The brief facts, which are necessary for disposal of this Criminal

Appeal, are as follows:

2.1. As per the complaint in C.C. No. 797 of 2010 filed by the complainant, the Accused borrowed a sum of Rs.1,50,000/- as loan from the Complainant on 18.12.2008 and agreed to repay the same along with interest at 18% per annum. For securing the prompt repayment of the loan amount, the accused mortgage his property – wet land comprised in Survey No. 95/6 situated in Aameethanallur Village, Oothukottai Taluk, Tiruvallur District within the Sub-Registration of Aarani and Registration District of Chennai North. The mortgage deed was registered as Document No.5846 of 2008 on the file of the Sub-Registrar Aarani in favour of the Complainant. The Accused had also deposited the title deeds relating to the above said property to create collateral security for the said repayment of the loan. Subsequently, for the repayment of the loan, the Accused issued a cheque bearing No.740401 dated 20.10.2009 drawn on State Bank of India, Janapanchatram Branch, G.N.Y. Road, Sholavaram Post, Ponneri Taluk, Pin Code - 600067 for Rs.1,50,000/- and assured that there are sufficient funds in his Bank account and cheque would be honoured on presentation. However, when the Complainant presented the cheque through his Bank, ICICI Bank, Nungambakkam Branch, Chennai for realisation, the said cheque was returned unpaid for the reason '*insufficient funds*' on 23.10.2009. On receipt of the returned cheque along with

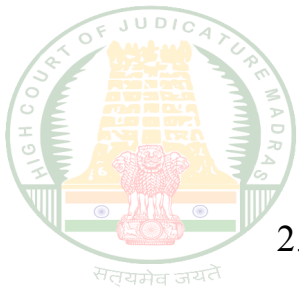


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memo issued by the ICICI Bank, Nungambakkam Branch the Complainant issued a statutory notice through his Counsel to the Accused calling upon him to pay the cheque amount. The Accused received the statutory notice, but failed to pay the cheque amount. Therefore, the complainant, after waiting for a period of 15 years had preferred the complaint in C.C. No. 797 of 2010 against the Accused.

2.2. After recording the sworn statement of the Complainant, the learned VIII Metropolitan Magistrate had taken the complaint under 138 of the Negotiable Instruments Act on file and issued summons to the Accused. The Accused appeared and he was questioned regarding the dishonour of the cheque and commission of the offence under 138 Negotiable Instruments Act. The Accused denied the charge against him and claimed to be tried. Therefore, trial was ordered.

2.3. During trial, the Complainant examined his Power of Attorney Agent as P.W-1 and marked 6 documents. Ex.P-1 is the Power of Attorney deed. Ex.P-2 is the dishonoured cheque. Ex.P-3 is the return memo issued by the Bank. Ex.P-4 is the debit advice issued by the Bank. Ex.P-5 is the legal notice issued to the accused. Ex.P-6 is the acknowledgement card.



2.4. The incriminating evidence against the Accused was put to him under 313 Cr.P.C. The Accused denied the incriminating evidence against him. To prove the case, the Accused adduced evidence in an attempt to rebut the initial presumption raised by the Complainant. The Accused examined himself as D.W-1 and the brother in law of the Accused was examined as D.W-2. The accused also marked Ex.D-1, mortgage deed executed in favour of the Complainant and contended that the Accused was forced to part with two cheques at the time of execution of the mortgage which were filled up by the complainant and presented before the Bank.

2.5. On assessment of the oral and documentary evidence, the learned VIII Metropolitan Magistrate by judgment dated 05.12.2012 dismissed the complaint and acquitted the Accused.

2.6. Aggrieved by the judgment of acquittal, the Complainant had filed this Appeal.

3. Thiru V.M. Ravishankar, for Mr.B.Jayaraman Learned Counsel for the Appellant submitted that the learned Trial Judge concluded that when already mortgage deed was executed, then, there is no necessity for the accused to issue the cheque. This conclusion is erroneous inasmuch as the cheques



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were issued for repayment of the loan amount for which mortgage deed was executed. Further, the respondent-accused admitted his signature in the cheque and it is not his case that he has not signed the cheque. While so, the initial presumption raised by the complainant under Section 139 of The Negotiable Instruments Act is clearly attracted in this case. Even Ex.D1 marked on the side of the respondent-accused would only prove that the accused had incurred debt, for which the cheque in question was issued by him. The observations made by the learned Trial Judge that the rights of the complainant is secured as the mortgage deed is in subsistence. However, the learned Trial Judge failed to consider that a cheque is a negotiable instrument and on it's dishonour, a case under Section 138 of The Negotiable Instruments Act is made out. When there is insufficient funds available in the Bank account, the accused ought not to have issued the cheque in question and thereby the provisions of Section 138 of The Negotiable Instruments Act are attracted.

4. The learned Counsel invited the attention of this Court to the presumption available in cases under Negotiable Instruments Act in favour of the Complainant under Section 118 and 139 of the Negotiable Instruments Act. When the signature on the cheque is not denied when the issuance of the Cheque is not denied, then as per Section 118 and 139 of the Negotiable Instruments Act, the Court can presume when the cheque was issued by the

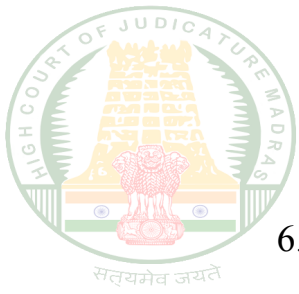


Accused for prior enforceable liability.

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5. The learned Counsel for the Appellant also submitted that even though the Accused received the statutory notice he did not respond. It was an earliest opportunity for the accused to deny the claim made by the complainant regarding the dishonour of the cheque and the liability of the accused. When the accused failed to issue any reply notice, the presumption is that the cheque was issued for a legally enforceable debt and liability, but this was not properly considered by the learned Trial Judge. Thus, the burden is on the Accused to rebut the evidence adduced on behalf of the Complainant. Till such time, the presumption is always in favour of the Complainant under Section 118 and 139 of the Negotiable instruments Act. The learned XVIII Metropolitan Magistrate failed to appreciate the evidence properly while acquitting the Accused. The learned Counsel for the Appellant/Complainant invited the attention of this Court to the reported decisions listed below:-

- i) In ***Rajesh Jain v. Ajay Singh*** reported in ***CDJ 2023 SC 922***;
- ii) In ***L.Sashikala v. Integrated Finance Company Limited*** reported in ***CDJ 1993 MHC 131***;
- iii) In the case of ***Sripati Singh (Since Deceased) through his son Gaurav Singh v. The State of Jharkhand and another***;



Crl.A.No.836 of 2018

6. By pointing out the aforesaid decisions, the learned counsel for the appellant-complainant sought to set aside the judgment of acquittal recorded by the learned VIII Metropolitan Magistrate in C.C.No.797 of 2010 dated 05.10.2012 and for allowing this appeal.

7. Per contra, the learned counsel for the respondent-accused submits that the cheque issued to the Complainant, at the time of registration of the mortgage deed, was misused by the Complainant. Therefore, the Complaint filed under 138 of Negotiable Instruments Act does not attract the rigor of Section 138 of Negotiable Instruments Act. When the mortgage created by the Accused under Ex.D-1 is in subsistence, there is no necessity for the Accused to issue cheque for the alleged total loan amount of Rs.1,50,000/- in favour of the Complainant. D.W-2 was cross examined by the learned Counsel for the Complainant. In the cross examination, no useful answer could be elicited from DW2 regarding the cheque issued by the Accused. The learned Counsel for the Respondent contended that under Ex.D1, Mortgage executed by the Accused is subsisting. The Complainant can very well initiate action based on the mortgage to recover the dues from the Accused. Instead, the cheque issued by the Accused to the Complainant towards security was misused by the Complainant to file the instant complaint.

Also the Complainant had instituted the private complainant under 138 of the



Crl.A.No.836 of 2018

Negotiable Instruments Act. In a proceeding of this nature, his Power of Attorney agent can only conduct the day to day proceedings before the trial Court. Here the Power of Attorney examined himself as P.W-1 instead of the original complaint. The evidence of P.W-1 has to be rejected as he is incompetent to speak about the transaction between the complainant and the accused. The learned VIII Metropolitan Magistrate on proper assessment of evidence had recorded the judgment of acquittal which is well reasoned and does not warrant any interference by this Court. The Appeal is to be dismissed as having no merits.

Point for consideration:

Whether the judgment of acquittal recorded by the learned VIII Metropolitan Magistrate George town in C.C.No.797 of 2010 dated 05.10.2012 is to be set aside and the Accused to be convicted?

8. Heard the learned Counsel for the Appellant and the learned Counsel for the Respondent. Perused the deposition of P.W-1 as well as Ex.P-1 to Ex.P-6. Also perused the evidence of the Accused as D.W-1 and another witness in favour of the Accused as D.W-2. Perused the judgment of the learned VIII Metropolitan Magistrate in C.C.No.797 of 2010 dated 05.10.2012.

9. The submission of the learned Counsel for the Appellant is that



Crl.A.No.836 of 2018

the case against the Accused had been proved through cogent evidence under

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Ex.P-1 to Ex.P-6 and inspite of the same, the complaint filed by him has been dismissed. On perusal of the documents, the complaint was instituted by the Power of Attorney agent of the Complainant. He himself had let in evidence as P.W-1. As per the settled position of law, Power of Attorney Agent can institute a suit or private complaint. But the Power of Attorney agent is not a competent witness to speak about the transaction that had taken place between the complainant and Accused. The Power of Attorney agent may not be a competent witness as he was not a party to the transaction. Therefore, he cannot speak about the facts which are in dispute between the Complainant and the Accused. Other than the Power of Attorney agent, no other witness had been examined by the complainant. The transactions are borne out of records in the cross examination. The Power of Attorney Agent of the Complainant as P.W-1 was unable to deny the suggestion of the learned Counsel for the Accused. For the question when there is mortgage for the same loan, what is the necessity for issuing the cheque by the Accused he was unable to answer. For the loan of Rs.1,50,000/-, the Accused had executed mortgage deed and created collateral security by furnishing title deeds of the property to the Complainant. When there is already a security loan, what is the necessity for the Accused to give cheque towards the same loan is to be explained by the Complainant. The presumption available under the Negotiable Instruments Act



Crl.A.No.836 of 2018

regarding cheque duly signed by the Accused is not in favour of the complainant. Therefore, the judgment of the learned VIII Metropolitan Magistrate dismissing the complaint and acquitting the Accused is found proper.

10. Usually when loan is extended, towards repayment, cheques are accepted. Here, towards repayment of the loan, the Accused created mortgage by deposit of title deeds and execute the mortgage deed. The complainant had very well acted on the mortgage deed for recovery of the money. Instead complainant is alleged to have filled up the cheque issued by the Accused at the time of registration of the mortgage and presented before Bank. When the Accused had created mortgage as security for the loan availed by him, there is no necessity for him to issue cheque. The person who is competent to speak about it, is the Complainant Senthilnathan. He had not entered the witness box.

11. This is a peculiar case where the Complainant had adopted a method whereby the Complainant was not able to prove the claim that the Accused had issued the cheque towards security along with mortgage deed executed by him. Therefore, the learned VIII Metropolitan Magistrate rejected the claim made by the Complainant and dismissed the Complaint. The dismissal of the complaint is found proper when the person who had availed

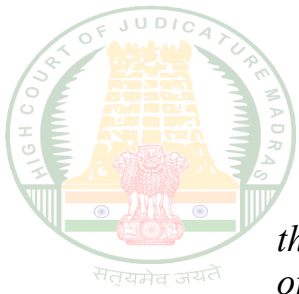


loan had executed mortgage deed along with deposit of title deed, while so, what is the necessity to issue a blank cheque to the Complainant is to be explained by the Complainant. He had avoided the witness box. That gives the presumption that the Complainant is aware of the risk involved in the cross examination by which his case may be weakened. Under those circumstances, the learned VIII Metropolitan Magistrate dismissed the complaint and acquitted the Accused.

12. The decisions cited by the learned Counsel for the Complainant is not helpful to the facts of this case. In all the reported decisions, the rebuttal burden on the Accused alone is reiterated. Here, the facts are different. The Accused had created mortgage, registered it as mortgage deed and along with title deed to the Complainant. The Complainant acted with caution and taken two cheques from the Accused and filled it up and presented it to Bank. The said conduct of the Complainant is found not proper. When the Accused had executed mortgage deed, the complainant attempted to recover the loan amount through the cheques by filing the present complaint under Section 138 of the Negotiable Instruments Act.

13. In the case of ***Janki Vashdeo Bhojwani v. Indusind Bank Ltd*** reported in ***(2005) 2 SCC 217***, it was held,

“that a Power of Attorney holder, who has acted in pursuance of



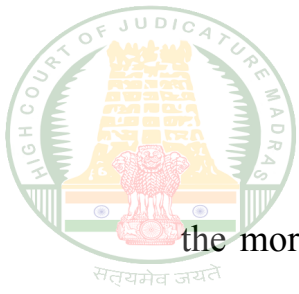
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the said power, may depose on behalf of the Principal in respect of such acts but cannot depose for the Principal for the acts done by the Principal and not by the Power of Attorney holder. Likewise, the Power of Attorney holder cannot depose for the Principal in respect of matters of which the Principal alone can have personal knowledge and in respect of which the Principal is entitled to be cross-examined. In our opinion, the failure of the Respondent to appear in the witness box can be considered to raise an adverse presumption against him as further observed therein as follows:

*15. Apart from what has been stated , this Court in **Vidhyadhar v. Manikrao** observed at SCC pp.583-84, para 17 that:*

17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....”

14. In this case, to avoid the witness box the complainant executed the Power of Attorney deed. The Power of Attorney agent was unable to answer the questions put to him in cross examination. Under those circumstances, the Court has taken adverse interference against the conduct of the Complainant in avoiding the witness box. When there is mortgage executed by the Accused what is the necessity for presenting the duly signed blank cheque has not been explained. When security had been provided by the Accused by executing registered mortgage deed and depositing title deeds of the property the Complainant can very well seek recovery of money through civil proceedings. Instead, he had taken a short cut method by filing this complaint. Merely filling up the cheque obtained from the Accused at the time of registration of



the mortgage will not help the Complainant to invoke the presumption under Section 139 of the Act.

15. The contention of the learned Counsel for the Appellant/Complainant that the Accused did not respond to the notice under Ex.P-5 will not help the Complainant in any manner. When the Accused had executed the mortgage deed and deposited title deeds as security for the loan obtained from the Complainant, the non-issuance of reply notice cannot be put against the accused in this case. The attempt of the complainant in converting a civil dispute into a criminal case invoking Section 138 of Negotiable Instruments Act, 1881 where the citizen of this country had to undergo sentence of imprisonment affecting his freedom cannot be treated lightly. The Complainant instead of resorting to civil remedy against the mortgage had sought criminal action without resorting to civil remedy. Therefore, the finding of the trial Court need not be interfered with particularly as against an order of acquittal. The Appeal Court will be slow in reversing the finding of the trial Court rendering an order of acquittal.

16. In the light of the above discussion, the point for consideration is answered in favour of the Respondent/Accused and against the Complainant/Appellant. The judgment of acquittal recorded by the learned

VIII Metropolitan Magistrate, George Town in C.C.No.797 of 2010 dated



Crl.A.No.836 of 2018

05.10.2012 is found proper which does not warrant interference by this Court.

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In the result, **this Criminal Appeal is dismissed.** The judgment of acquittal recorded by the learned VIII Metropolitan Magistrate, George Town in C.C.No.797 of 2010 dated 05.10.2012 is confirmed.

18.03.2025

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Internet : Yes/No

Index : Yes/No

Speaking/Non-speaking order

Neutral Citation : Yes/No

To

1. The VIII Metropolitan Magistrate,
George Town, Chennai
2. The Public Prosecutor,
High Court, Madras.
3. The Section Officer
Criminal Section.
High Court of Madras.



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Crl.A.No.836 of 2018

SATHI KUMAR SUKUMARA KURUP, J

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Crl.A.No.836 of 2018

Judgment made in
Crl.A.No.836 of 2012

18.03.2025