



Criminal Appeal No.808 of 2019

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.11.2024

Pronounced on : 07.01.2025

CORAM : JUSTICE N.SESHASAYEE

Criminal Appeal No.808 of 2019

S.Karthikeyan

.... Appellant /Complainant

Vs

M.Ramesh

.... Respondent / Respondent

Prayer : Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, 1973, praying to set aside the order of acquittal dated 29.03.2019 passed in C.A.No.98 of 2017 on the file of the learned II Additional District and Sessions Judge, Salem, reversing the judgment dated 26.07.2017 passed in S.T.C.No.237 of 2016 on the file of the learned Judicial Magistrate No.III, Salem, convicting and sentencing the respondent to undergo simple imprisonment for six months and to pay a fine amount of Rs.5,000/- for the offence under Section 138 of the Negotiable Instruments Act, 1881, by allowing this criminal appeal and to grant such further or other orders as may deem fit and proper in the circumstances of the case.



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For Appellant : Mr.J.Hariharan
for M/s.K.V.Law Firm

For Respondent : Mr.S.Saravana Kumar
Legal Aid Counsel

JUDGMENT

The appellant/complainant aggrieved by the judgment of the II Additional Sessions Court in C.A.No.98 of 2017, acquitting the respondent of charges under Section 138 of Negotiable Instruments Act, has come forward with this appeal.

2. The case of the appellant/complainant is that on 28.01.2013, the appellant had advanced a sum of Rs.10.0 lakhs to the respondent under Ext.P1 promissory note dated 28.01.2013, and that the respondent had issued a duly filled up post-dated cheque dated 25.05.2013 drawn on M/s.United Bank of India, Salem Branch for a sum of Rs.10.0 lakhs (Ext.P2). When the cheque was presented by the appellant/complainant on 25.05.2013 into his bank viz., IDBI Bank Ltd., Salem Branch, it came to be dishonoured by Ext.P3 dishonour memo dated 27.05.2013, issued by the bank, on the grounds of insufficiency of funds in the



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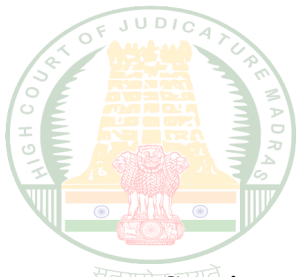
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account of the respondent. Promptly, the appellant issued Ext.P4 statutory notice under Sec.138 of N.I. Act, but it evoked no reply. It is in this circumstances, the appellant has preferred a complaint before the trial Court which was taken cognizance of by the learned Magistrate in STC.No.237 of 2016.

3.1 During trial, the appellant examined himself as P.W.1, and for the respondent, he examined D.W.1 to D.W.3, of whom, D.W.1 and D.W.2 are bank officials, and D.W.2 is one of the attesting witnesses to Ext.P1 promissory note. He had also produced Ext.D1 to D24 most of which are produced to establish appellant's acquaintance with criminality.

3.2 On evaluating the evidence before it, the learned Magistrate convicted the respondent and imposed a sentence of six months S.I., and a fine of Rs.5,000/-.

3.3 Aggrieved by the same, the respondent has preferred C.A.No.98/2017, and the defacto complainant on his part would prefer CrI.R.C.No.34/2017 for enhancing the sentence. Vide separate orders dated 29.03.2019, the learned



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Sessions Judge allowed C.A.No.98/2017 and dismissed Crl.R.C.No.34/2017.

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In effect, the respondent was set free by the appellate Court. The line of reasoning of the learned appellate Judge was that the complainant/appellant herein has not established that he possessed Rs.10.0 lakhs on the date on which he claimed to have advanced the loan to the respondent. This is now under challenge.

4. The learned counsel for the appellant made the following submissions:

- a) that the respondent disclosed his line of defence only during the cross-examination of P.W.1, where he did not pointedly choose to dispute his signatures either in Ext.P1 promissory note or Ext.P2 cheque, instead he would say that both Ext.P1 and Ext.P2 were issued by him to someone else, who he chooses not to name, and that these documents had come into the hands of the appellant. This has to be considered in the backdrop of the fact that the respondent, though had received the copy of statutory notice (Ext.P4), had chosen not to respond to the same.
- b) So far as possessing requisite funds are concerned, even the appellant



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as P.W.1 concedes that he did not possess adequate funds in his bank account but he possessed them as liquid cash in his hands. He even concedes that the loan advanced to the respondent did not reflect in his income tax returns, but the respondent did not question the appellant's financial capacity to possess substantial funds with him. If a certain sum possessed by the appellant does not reflect in his income tax returns, then it is the matter which the Income Tax Department needs to take note of. In other words, unless the respondent takes a pointed plea right at the time he had an opportunity to take a plea about lack of financial capacity of the complainant to advance the sum vide his reply, then he is not entitled to take that plea. Reliance was placed on the authority in ***Tedhi Singh Vs Narayan Dass Mahant*** [(2022) 6 SCC 735].

- c) Thirdly, nowhere the respondent had disclosed to whom he had handed over Ext.P1 and Ext.P2 nor he has chosen to examine the one to whom he claims to have issued Ext.P1 and Ext.P2. In this regard, he tried to establish certain facts against the genuineness of Ext.P1 and Ext.P2 through D.W.3 one of the attesting witnesses to Ext.P1. But



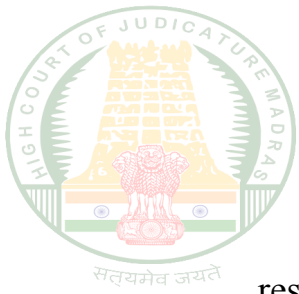
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very surprisingly instead of chief examining him, the respondent has chosen to cross-examine him even in his chief examination without declaring him as hostile witness. And this D.W.3 has supported the case of the appellant.

Summing up the arguments, the learned counsel submitted that the learned Sessions Judge has not considered any one of the submissions herein made and appears to have found a easy route to his case.

5. Per contra, the learned counsel for the respondent has submitted that :

- a) The claim of the appellant has been that he had advanced Rs.10.0 lakhs to the respondent under Ext.P1 promissory note, and to repay the same, the respondent had issued Ext.P2 cheque. And, the appellant claims that he had paid the said sum in unaccounted cash. The respondent denies that he ever had borrowed the said sum of money. Necessarily the burden is on the appellant to establish the payment of the loan that he claims. Unless the appellant is able to establish that he possessed the requisite funds to pay the money, even the presumption under Sec.118(a) of N.I. Act cannot be invoked. It may be that the respondent might not have



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responded to notice issued under Sec.138 of N.I. Act but that does not relieve the burden on the appellant to prove that he possessed the cash to pay the respondent.

- b) The appellant is a usurious money lender against whom cases have been filed, which Ext.D1 and Ext.D2 establish, and about the pendency of which, he himself had admitted. Ext.D3 the FIR in Crime No.473/2012 alleging the appellant of committing an offence under the Tamilnadu Exorbitant Interest Act, 2003. After investigation, the investigating agency has laid Ext.D4 final report therein.

6.1 Rival submissions are carefully weighed. The foundation for the appellant case is the execution of Ext.P1 promissory note by the respondent, and to repay this amount, the respondent had issued Ext.P2 cheque. The argument which the respondent has raised in aid of his defence is that the appellant did not possess Rs.10.0 lakhs for him to advance under Ext.P1. In other words, his contention is that Ext.P1 is not backed by consideration.

6.2 Under Section 118(a) of N.I. Act, there is a presumption that negotiable



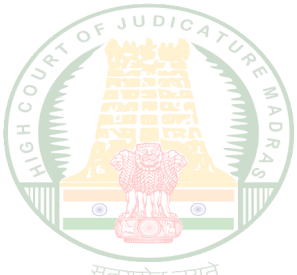
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instruments is backed by the consideration. Therefore, the statutory presumption is that the sum specified in Ext.P1, promissory note had been paid under it. And the burden of rebutting the presumption necessarily is cast on the respondent.

6.3 The appellant had issued Ext.P3 statutory notice which had been received by the respondent as evidenced by Ext.P5 acknowledgement card. In this legal notice, the appellant had specifically alleged about the execution of promissory note by the respondent. The respondent however, chose not to react or respond to Ext.P3, statutory notice, when anyone, in the ordinary course of human conduct, anyone who faces a false allegation will react to it.

6.4 And to disprove execution of Ext.P1, the respondent examined D.W.3, one of the attesting witnesses but he spoke against the respondent. Indeed, in his testimony, he had stated that he met the appellant on the date on which Ext.P1 was executed. The respondent has attempted to discredit the statement of D.W.3, that he had no previous acquaintance with the appellant but that is reduced to trivia since the issue is about whether the respondent had executed Ext.P1, promissory note. Since the respondent has not been able to rebut the



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statutory presumption under Sec.118 (a) then it may be held that Ext.P1, promissory not was backed by consideration.

6.5. If this is kept aside, the respondent himself has produced several documents to show that the appellant was a money lender and that he had instituted quite a few complaints under Sec.138 of N.I. Act and that those cases too have been registered under the Tamil Nadu Exorbitant Interest Act, 2003. This would imply that the appellant did possess the funds for advancing the loans.

7. If facts as found by this Court in paragraph Nos.5.4 & 5.5 are taken together, it necessarily goes against the respondent. So far as the issuance of Ext.P2 cheque is concerned, during the course of cross-examination of P.W.1, respondent makes a sweeping suggestion that Ext.P2 was issued to somebody and thus has been misused in this case. This implies that he had not disputed his signature in Ext.P2, cheque. And when this cheque was dishonoured, automatically the presumption under Sec.139 of N.I. Act gets kickstarted. Again the burden is on the respondent to rebut the presumption. Here again the respondent fails.



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8. This Court now has little hesitation in holding that the appellate Court has not examined the evidence properly which warrants interference by this Court.

9. In conclusion, this appeal is allowed and the order of the learned II Additional District and Sessions Judge, Salem, dated 29.03.2019 passed in C.A.No.98 of 2017, reversing the judgment dated 26.07.2017 passed in S.T.C.No.237 of 2016 on the file of the learned Judicial Magistrate No.III, Salem, is set aside.

07.01.2025

Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No
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To:

1. The II Additional District and Sessions Judge
Salem.
- 2.The Judicial Magistrate No.III
Salem.



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N.SESHASAYEE.J

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Pre-delivery Judgement in
Crl.A.No.808 of 2019

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