

K.Srinivasan vs T.Ranganathan on 28 November, 2022

Author: P.Velmurugan

Bench: P.Velmurugan

CRL A

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.11.2022
Pronounced on : 28.11.2022

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.906 of 2022

K.Srinivasan

Vs.

T.Ranganathan

... Appella

... Respond

Prayer : Criminal Appeal filed under Section 397 and 401 of Criminal Procedure Code, praying to call for the records and set aside the order passed in C.C.No.2456 of 2016 dated 08.03.2018 on the file of the learned Metropolitan Magistrate, Fast Track court-III at Saidapet.

For Appellant : Mr.R.Singaravelan, Senior Advocate
for M/s.S.Saravanan

For Respondent : Mr.V.Nandhakumar

JUDGMENT

This Criminal Appeal has been filed seeking to set aside the order passed in C.C.No.2456 of 2016 dated 08.03.2018 on the file of the <https://www.mhc.tn.gov.in/judis> Metropolitan Magistrate, Fast Track Court-III, Saidapet, Chennai.

2. The appellant is the complainant in C.C.No.2456 of 2016 in which, the respondent is the accused. The complainant had filed the private complaint under Section 200 Cr.P.C. for the offence under Section 138 and 148 of the Amended Negotiable Instruments Act 1881, before the Metropolitan Magistrate, Fast Track Court-III, Saidapet, Chennai, and the learned Magistrate dismissed the same and acquitted the accused by order dated 08.03.2018.

3. Challenging the same, the complainant filed appeal before the learned Principal Sessions Judge, City Civil Court, Chennai, in Crl.A.No.178 of 2018 and the same was made over to the learned VI Additional Sessions Judge, City Civil Court, Chennai, and the appeal was allowed and the accused was convicted. Challenging the same, the accused filed revision before this Court in Crl.RC.No.829 of 2019. As per the outcome of the decision of the Full Bench of this Court in the case of K.Rajalingam Vs.Suganthalakshmi, the appeal against the <https://www.mhc.tn.gov.in/judis> acquittal will not lie before the Session Court and it will lie only before this Court and therefore, the Judgment of the lower appellate Court/VI Additional Sessions Judge, City Civil Court, Chennai, passed in Crl.A.No.178 of 2018 dated 20.08.2019 is not valid. However, the revision can be transmitted into to appeal. Accordingly, the revision was suitably converted into appeal against acquittal as per the order of this Court dated 27.07.2022.

4. The specific case of the appellant is that there was an agreement of sale between the appellant and the respondent. The property belongs to the respondent and his son and as a owner and power of attorney to his son, there was an agreement between the appellant and the respondent dated 06.02.2013 to sell the property and the total sale consideration was fixed as Rs.6 Crore. On the date of agreement of sale, the appellant paid a sum of Rs.5 Crore to the respondent as advance and subsequently due to financial constraint, the sale was not materialised. Subsequently, the respondent and his son came forward to refund the advance amount of Rs.5 Crore which was paid by the appellant towards part of sale <https://www.mhc.tn.gov.in/judis> consideration. Further, the respondent had intended to sell the property to a 3rd party and in order to get clearance from the appellant, there was a Memorandum of Understanding between the appellant and the respondent and his son dated 20.11.2015 since unless the appellant gives clearance to the respondent, he could not sell the property to 3rd party. On the date of entering into the Memorandum of Understanding, the respondent repaid a sum of Rs.1 Crore through RTGS towards the refund of the advance amount and for the balance amount, the respondent issued two cheques out of which, one cheque for Rs.50 lakhs bearing No.000107 dated 12.01.2016 drawn on Kotak Mahindra Bank, Thyagaraya Nagar Branch and another cheque for Rs.3,50,00,000/- bearing No.000124 dated 20.11.2015 drawn on HDFC Bank, Kotturpuram Branch. Further, the respondent instructed the appellant to present the said cheques after 45 days from the date of Memorandum of Understanding. After 45 days, when the appellant approached the respondent for presenting the cheques, the respondent instructed him to deposit the cheque of Rs.50,00,000/- on 04.02.2016 and the another cheque for Rs.3,50,00,000/- on 08.02.2016. Accordingly, the appellant <https://www.mhc.tn.gov.in/judis> presented the same for collection through his bank on 04.02.2016 and 08.02.2016. But the same were returned with endorsements "funds insufficient" on 05.02.2016 and 09.02.2016 respectively. Thereafter, on repeated requests made by the appellant, the respondent did not give any response and therefore, the appellant issued statutory notices dated 29.09.2016 through his Advocate calling upon the respondent to pay the amount of the disputed cheques viz., Rs.50 lakhs and Rs.3,50,00,000/- respectively within 15 days. The said notices were received by the respondent. However, he failed to re-pay the said amount and sent a false reply. Therefore, the appellant was constrained to file two private complaints out of which, one complaint was filed for the cheque amount of Rs.3,50,00,000/- which is the subject matter of the present appeal against the Judgment in C.C.No.2456 of 2016 on the file of the Metropolitan Magistrate, Fast Track Court-III, Saidapet, Chennai. Another complaint was filed for the cheque amount of Rs.50 lakhs which is the subject

matter of the appeal in Crl.A.No.905 of 2022 filed before this Court against the Judgement in C.C.No.2457 of 2016 on the file of the Metropolitan Magistrate, Fast Track Court-III, Saidapet, Chennai. <https://www.mhc.tn.gov.in/judis>

5. Before the trial Court, in order to prove the case of the complainant, on the side of the complainant, the complainant was examined as P.W.1 and 6 documents were marked as Ex.P.1 to Ex.P.6. On the side of the respondent, no oral evidence was let in however, 3 documents were marked as Exs.D1 to D.3 during the cross examination of the complainant. The trial Court, after hearing both sides, dismissed the complaint and acquitted the respondent. Therefore, the present appeal has been filed before this Court.

6. The learned Senior Counsel appearing for the appellant would submit that the agreement of sale/Ex.D1 was admitted, the Memorandum of Understanding/Ex.P.1 was admitted and the execution and issuance of the cheques were also admitted. Further, the respondent admitted that there was a payment of advance made by the appellant for purchasing the property. Thereafter, since the sale was not materialised, the respondent proposed to sell the property to a 3rd party for which, the respondent has to necessarily refund the advance amount paid by the appellant and then only the appellant would give clearance to cancel the <https://www.mhc.tn.gov.in/judis> agreement of sale. Until the appellant gives clearance, the 3rd party would not purchase the property of the respondent. Therefore, in order to give a quietus to the issue, on 20.11.2015 both the parties agreed to enter into a Memorandum of Understanding. The proposed purchaser paid a sum of Rs.1 Crore and the said amount was paid by the respondent to the appellant through RTGS. Subsequently they entered into a Memorandum of Understanding/Ex.P1 and the appellant gave cancellation of agreement/Ex.D2 and for the balance amount of Rs.4 Crore, the respondent issued two cheques to the appellant out of which, one for Rs.3,50,00,000/- and another cheque for Rs.50 lakhs. Though in the cancellation of agreement/Ex.D2, it is sated that the appellant received the entire advance amount paid by him as full and final settlement, unless it is not mentioned, the respondent could not sell the property to the 3rd party. Therefore, such recital appears in the cancellation of agreement/Ex.D2. Subsequently, the respondent executed a sale deed infavour of 3rd party. Therefore, the Memorandum of Understanding/ Ex.P1 and the cancellation of agreement/Ex.D2 were executed on the same day and that the cheques were also issued on the same day. Though <https://www.mhc.tn.gov.in/judis> in the cancellation of agreement/Ex.D2, it is mentioned as full and final settlement, on the same day, Memorandum of Understanding/Ex.P.1 was also existing between the parties in which, it is stated that the balance amount would be paid within 45 days from date of Memorandum of Understanding/Ex.P.1 and further it is also mentioned that the cheque for Rs.3,50,00,000/- dated 20.11.2015 was handed over to the appellant. Accordingly, after the said 45 days, the appellant consulted with the respondent regarding presentation of the cheques and at the instruction of the respondent, the appellant presented the cheques on 04.02.2016 and 08.02.2016. But the cheques were returned as unpaid on 05.02.2016 and 09.02.2016 respectively with the endorsements "funds insufficient. Even thereafter, the respondent did not pay the cheque amount. Therefore, the appellant sent statutory notices to the respondent. Though the respondent sent reply admitting the payment of advance amount made by the appellant and the issuance of cheques, he had falsely stated that he had repaid the entire amount and paid Rs.1 Crore over and above to the appellant and therefore, there was no legally enforceable debt on the date of presentation of the

cheques. Since, the respondent denied the liability <https://www.mhc.tn.gov.in/judis> and sent a false reply, the appellant was constrained to file the complaint. Once the execution of cheque and signatures found in the cheques are admitted, the complainant proved the foundational fact that the respondent issued the cheques towards the discharge of legally enforceable debt and there is a presumption under Section 139 of Negotiable Instruments Act. Therefore, under Section 138 of Negotiable Instruments Act, the appellant has proved that the cheques were issued towards the discharge of legally enforceable liability. Therefore, the onus of proof has been shifted to the respondent. No doubt the said presumption is a rebuttable presumption. It is for the respondent to rebut the presumption in the manner known to law. But the respondent had not rebutted the presumption in the manner known to law. However, the learned Magistrate erroneously dismissed the complaint and therefore, the present appeal has been filed against the acquittal of the respondent. Further the trial Court has not given any reason to reject the Memorandum of Understanding/Ex.P.1. Further though the Magistrate taken note of Ex.P.7 which is the bank statement of the appellant showing the payment of Rs.1 Crore through RTGS, the learned <https://www.mhc.tn.gov.in/judis> Magistrate never discussed about Ex.P.7/Bank Statement and erroneously dismissed the complaint as if, the appellant not proved his case.

7. The learned counsel for the respondent would submit that on the date of agreement of sale/Ex.D1, the appellant had not paid Rs.5 Crore as stated by him and he had only paid Rs.4 Crore as advance. Thereafter, since the sale was not materialised, in order to quietus the issue, the respondent repaid the entire advance amount paid by the appellant and they cancelled the agreement of sale and subsequently, the respondent sold the property to 3rd party. Even in the cancellation of the sale agreement/Ex.D2 dated 20.11.2015, it is clearly stated that the entire amount was settled to the complainant. He would submit that Memorandum of Understanding/Ex.P.1 was entered into between the appellant and the respondent in the morning on 20.11.2015 and the cheques were issued and subsequently in the afternoon after selling the property to 3rd party, he repaid the entire advance amount to the appellant and thereafter, on the same day in the evening, the cancellation of the sale agreement/Ex.D2 was executed. Therefore, the respondent repaid the entire advance amount to the appellant and there is no balance amount to <https://www.mhc.tn.gov.in/judis> be paid to the appellant. However, the appellant did not return the cheques and since the appellant and the respondent are known persons, taking advantage of the possession of cheques, the appellant demanded Rs.1 Crore extra and subsequently, the respondent also paid a further amount of Rs.1 Crore through RTGS by way of two payments viz., Rs.50 lakhs each on 24.11.2015 and on 16.12.2015 and the said amount of Rs.1 Crore was paid over and above the advance amount paid by the appellant. Even after paying Rs.1 Crore over and above, the appellant did not return the cheques and taking advantage of the cheques, the appellant for enrichment, presented the cheques in his bank and subsequently, sent the legal notices. The respondent also sent reply notice denying the liability. He would further submit that the appellant suppressed the documents Ex.D1 to Ex.D3 in his complaint. Therefore, the respondent in order to bring the truth before the Court, marked Ex.D1 to Ex.D3 during cross examination of the appellant/complainant/P.W.1 which would clearly show that the appellant has not come to the Court with clean hands. On the date of presentation of the cheques, there was no legally enforceable debt or liability. Therefore, there was no cause of <https://www.mhc.tn.gov.in/judis> action for filing the complaint and the learned Magistrate rightly appreciated the evidence and given effect to the document Ex.D2/cancellation of agreement and

also Ex.P.7/Bank Statement of the appellant which reflects the payment of Rs.1 Crore through RTGS made by the respondent and dismissed the complaint. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard the learned Senior counsel for the appellant and the learned counsel for the respondent and perused the materials on record.

9. Admittedly there was an agreement of sale between the appellant and the respondent. Though the agreement of sale was marked as Ex.D1 during cross examination of the appellant/complainant/P.W.1 on the side of the defence, in the said agreement of sale dated 06.02.2013, it is not clearly stated that on the date of agreement of sale, as to whether the appellant had paid a sum of Rs.5 Crore as advance amount or not. However, in the Memorandum of Understanding/Ex.P.1 dated 20.11.2015 entered into between the parties, it is admitted that a sum of Rs.5 Crore was paid to the respondent towards part of sale consideration and it is also admitted that on the date of Memorandum of <https://www.mhc.tn.gov.in/judis> Understanding, the respondent had refunded part of the advance amount to the appellant and the balance amount of Rs.3,50,00,000/- would be refunded within 45 days from the date of execution of the Memorandum of Understanding/Ex.P.1 dated 20.11.2015 and it is also mentioned that the post dated cheque bearing No.000124 for a sum of Rs.3,50,00,000/- drawn at HDFC Bank, Kotturpuram Branch, Chennai, was handed over to the appellant and in case of non payment of the said amount, the appellant is at liberty to proceed against the respondent. Therefore, the payment of advance amount of Rs.5 Crore is admitted and the issuance of the subject matter of cheque bearing No.000124 for a sum of Rs.3,50,00,000/- on the date of Memorandum of Understanding/Ex.P.1, is also admitted by both the parties in the Ex.P.1/Memorandum of Understanding dated 20.11.2015.

10. Per contra, in Ex.D.2/cancellation of agreement of sale which is also said to have been executed on the same day i.e. 20.11.2015, it is stated that the appellant had paid a sum of Rs.4,01,60,000/- to the respondent and the respondent refunded the said amount of Rs.4,01,60,000/- to the appellant and thereby, according to the <https://www.mhc.tn.gov.in/judis> respondent the parties cancelled the said sale agreement dated 06.02.2013 and all the accounts between them in respect of the agreement of sale dated 06.02.2013 have been settled in full.

11. Though Ex.P.1/Memorandum of Understanding and Ex.D2/Cancellation of sale Agreement are said to have been executed on the same day i.e. 20.11.2015, they are mutually contrary to each other. But the fact remains that a sum of Rs.1 Crore was paid to the appellant through RTGS by the respondent which is not disputed.

12. According to the appellant, he paid a sum of Rs.5 Crores towards the part of sale consideration to the respondent. Thereafter, since the sale was not materialised, the respondent repaid a sum of Rs.1 Crore and for the balance amount, the respondent issued two cheques out of which, one cheque was issued for Rs.3,50,00,000/- and the another cheque was issued for Rs.50 lakhs on the date of Memorandum of Understanding and the appellant was asked to present the cheques after 45 days from the date of Memorandum of Understanding. Thereafter, as <https://www.mhc.tn.gov.in/judis> per the instruction of the respondent, when the appellant presented the cheques in his bank, the

same were dishonoured. The subject matter of this appeal is in respect of the cheque issued for Rs.3,50,00,000/-.

13. According to the respondent, the appellant had paid Rs.4,01,60,000/- as advance at the time of agreement of sale and the respondent repaid the entire advance amount to the appellant. They executed a Memorandum of Understanding in the morning on 20.11.2015 and the cheques were issued, subsequently in the afternoon soon after selling the property to 3rd party, he repaid the entire amount to the appellant and thereafter, on the same day evening, the cancellation of sale agreement was executed. Even thereafter, the appellant did not return the cheques. Thereafter, taking advantage of the cheques, the appellant demanded Rs.1 Crore extra and subsequently, the respondent also paid the further amount of Rs.1 Crore through RTGS by way of two payments viz., Rs.50 lakhs each on 24.11.2015 and 16.12.2015 respectively under Ex.P.7/Bank statement of the appellant which was over and above the amount of advance paid by the appellant and therefore, he has no liability <https://www.mhc.tn.gov.in/judis> to pay the appellant on or after 20.11.2015 and therefore, there is no cause of action for filing the complaint.

14. It is seen that in Ex.P.1/ Memorandum of Understanding both the appellant and respondent have signed in the presence of witnesses and both the parties have admitted the existence of Ex.P.1/Memorandum of Understanding in which it is clearly stated that a sum of Rs.5 Crores was paid as advance towards the Sale Agreement. Further it is stated that part of the amount has been refunded by the respondent and for the balance amount of Rs.3,50,00,000/- Crore, the subject matter of cheque has been issued which is not disputed. On the very same day, Ex.D2/Cancellation of Agreement of sale has also been executed in which, it is stated the respondent repaid the entire amount of Rs.4,01,60,000/- paid by the appellant. Admittedly, in the complaint, the appellant had not disclosed about Ex.D2/Cancellation of agreement of sale. However he has mentioned in the list of documents to the complaint and as per Ex.D2/Cancellation of sale Agreement, there is no liability. <https://www.mhc.tn.gov.in/judis>

15. The learned Senior Counsel gives explanation that since the proposed purchaser had intended the documents for NIL liability, the appellant executed Ex.D2/cancellation of agreement for record purpose otherwise, the respondent could not sell the property and pay the balance amount to the appellant. He would further submit that if at all, the respondent had repaid the entire amount, there was no need for execution of Ex.P.1/ Memorandum of Understanding and issuance of cheques on the same day. The fact is that Ex.P.1/Memorandum of Understanding, Ex.D2/Cancellation of sale Agreement and Ex.P.2/cheque all were executed on the same day. If at all the entire advance amount was repaid, there is no need for Ex.P.1/ Memorandum of Understanding and Ex.P.2/Cheque come into existence. Only in order to satisfy the proposed purchaser, they entered into Ex.D2/Cancellation of Agreement of sale. Unless the agreement which was executed between the appellant and the respondent was duly cancelled, the 3rd party would not purchase the property. Therefore, Ex.D2/Cancellation of sale Agreement was executed and it is not given effect and it is only a nominal document. <https://www.mhc.tn.gov.in/judis>

16. A careful perusal of the entire materials and the submissions made by both the counsel, this Court finds that the agreement of sale/Ex.D1 is admitted; the advance amount is also not in dispute;

the Memorandum of Understanding/Ex.P.1 is not in dispute and it has been signed by both the parties and the parties cannot go against the terms and conditions of the agreement. As per Ex.P.1/Memorandum of Understanding there was a liability of Rs.5 Crores and part payment has been repaid by the respondent and for the balance amount, the respondent has issued the subject matter of cheque for Rs.3,50,00,000/- and given undertaking to pay the amount mentioned in the cheque within 45 days from the date of Ex.P.1/Memorandum of Understanding. Though the respondent taken a defence that even after the repayment of the entire amount, the cheque was not returned by the appellant. However there is no evidence to show that as per Ex.P.1/Memorandum of Understanding, the cheque amount of Rs.3,50,00,000/- was paid by the respondent. Once Ex.P.1/Memorandum of Understanding is admitted, the presumption under Section 139 of Negotiable Instruments Act would come into play <https://www.mhc.tn.gov.in/judis> that the cheque was issued to discharge the legally enforceable debt. Then it is for the respondent to rebut the presumption in the manner known to law.

17. The learned counsel for the respondent relied on Ex.D2/ cancellation of agreement of sale and submitted that Ex.D2/Cancellation of agreement of sale was marked through the respondent during cross examination of the appellant/complainant/P.W.1 and the said cancellation of agreement of sale was admitted by the appellant in which, it is mentioned that the respondent repaid the entire amount as full and final. Once it is admitted by the appellant that he received the amount as full and final, he has no right to claim. It is seen that the respondent admitted Ex.P.1/ Memorandum of Understanding and Ex.P2/Cheque and the only defence taken by the respondent is that plea of discharge. As per Ex.D2/Cancellation of Agreement of sale, there is no liability on 20.11.2015 and the respondent discharged the liability on the same day and as per Ex.P.7/Bank statement, he has paid Rs.1 Crore over and above through RTGS. Therefore, on the date of presenting the cheque, there <https://www.mhc.tn.gov.in/judis> was no debt or liability and therefore, the respondent need not pay any money to the appellant.

18. Admittedly the sale deed was executed between the respondent and 3rd party. As per Ex.D2/Cancellation of Agreement of sale, if at all the respondent had repaid the entire advance amount paid by the appellant and subsequently the parties cancelled the sale agreement, on the same day, Ex.P.1/Memorandum of Understanding and Ex.P2/Cheque could not have come into existence. The learned Senior Counsel for the appellant submitted that unless they execute Ex.D2/cancellation of sale agreement, the respondent could not sell the property to 3rd party and therefore, they executed Ex.D2/cancellation of the sale agreement only as a nominal document and since the respondent did not repay the balance amount, Ex.P.1/Memorandum of Understanding and Ex.P2/cheque came into existence. Admittedly, Ex.P1/Memorandum of Understanding, Ex.P2/Cheque, Ex.D2/ Cancellation of agreement and sale deed were all on the same day and therefore, the case of the appellant is probable. If at all the respondent had repaid the entire amount, then Ex.P.1/ <https://www.mhc.tn.gov.in/judis> Memorandum of Understanding and Ex.P.2/Cheque would not have come into existence. Therefore, this Court is of the opinion that unless the agreement of sale/Ex.D1 is cancelled, the sale to the 3rd party could not have taken place between the respondent and the 3rd party and therefore, to enable the respondent to sell the property, Ex.D2/cancellation of agreement of sale could have come into existence. Therefore, from Ex.P.1/Memorandum of Understanding and Ex.P.2/Cheque, this Court can infer that

Ex.D2/cancellation of agreement is a nominal document and it is not a valid one. A combined reading of the complaint and the oral and documentary evidence viz., Ex.P.1/Memorandum of Understanding, Ex.P.2/Cheque, Ex.D2/cancellation of the sale agreement dated 20.11.2015 and sale deed, this Court finds that there was a liability of payment of Rs.3,50,00,000/- as per Ex.P.1/Memorandum of Understanding for which Ex.P2/Cheque has come into existence. Therefore, the case of the appellant is probable.

19. Though the case under Section 138 of Negotiable Instrument Act is civil in nature, the burden of proof on the complainant is not as <https://www.mhc.tn.gov.in/judis> heavy as that of the prosecution in the criminal case. If the complainant is able to prove his complaint with preponderance of probability like civil case about the existence of liability and the cheque was issued to discharge the existing liability which is a legally enforceable liability, the onus of proof is shifted to the accused then, it is for the accused to rebut the presumption in the manner known to law.

20. In this case, Ex.P.1/Memorandum of Understanding is admitted and Ex.P2/Cheque is also admitted. Once execution of cheque is admitted, then there is a statutory presumption that the cheque was issued only to discharge the legally enforceable debt. Then it is for the accused to rebut the presumption. No doubt, the accused need not rebut the presumption by let in direct evidence and it can be rebutted by preponderance of probability. Though the respondent made attempts to rebut the presumption by marking Ex.D2/cancellation of agreement of sale in which it is stated that the respondent repaid the entire amount as full and final, but on the very same day, Ex.P.1/Memorandum of Understanding and Ex.P.2/cheque were also executed. Therefore, this <https://www.mhc.tn.gov.in/judis> Court finds that Ex.D2/Cancellation of agreement of sale cannot be taken as discharge of Ex.P.1/Memorandum of Understanding. If Ex.D2 is discharge of Ex.P1/Memorandum of Understanding then Ex.P.1/ Memorandum of Understanding and Ex.D2/Cancellation of sale agreement cannot be on the same day.

21. Therefore, under these circumstances, this Court finds that the disputed cheque/Ex.P.2 was issued towards the discharge of legally enforceable debt and the appellant has proved his case. But the respondent has not rebutted the presumption in the manner known to law. Though the respondent contended that as per Ex.P.7/Bank Statement, he paid Rs.1 Crore subsequently over and above the amount paid by the appellant, but the respondent has not stated that the said sum of Rs.1 Crore was paid as part payment towards Ex.P.2/Cheque and he has only stated that Ex.P.2/cheque was not issued towards the legally enforceable debt. Further, he has stated that due to the threat made by the appellant, he paid the said sum of Rs.1 Crore extra to the appellant and therefore, Ex.P.7/bank statement, came into existence.

<https://www.mhc.tn.gov.in/judis>

22. According to the respondent, the payment of Rs.1 Crore made under Ex.P7 is over and above the amount paid by the appellant. If that be the case, then the respondent would have issued a notice to the appellant. Even though he has stated that he paid Rs.1 Crore over and above without any liability and still he has sent reply notice expressing to take criminal action against the appellant, he has not filed any criminal complaint or taken any action against the appellant and even he has not sent any

notice for return of the discharged cheque. The conduct of the respondent is not in normal course of a prudent man. Though Ex.P.1/ Memorandum of Understanding and Ex.P.2/Cheque were executed as early as on 20.11.2015 and subsequently, the respondent repaid the amount mentioned in Ex.P.1/ Memorandum of Understanding and Ex.P.2/cheque and Ex.D2/Cancellation of Agreement came into existence on the same day, whereas, the respondent has not mentioned about the existence of Ex.P.1/Memorandum of Understanding and Ex.P2/cheque in Ex.D2/cancellation of agreement. If Ex.D2/cancellation of agreement is subsequent to Ex.P.1/Memorandum of Understanding and Ex.P.2/cheque, he should have collected the same on the same day at the time of <https://www.mhc.tn.gov.in/judis> execution of Ex.D2. No prudent man after executing Ex.D2/cancellation of agreement and settling the payment, would leave Ex.P.1/Memorandum of Understanding and Ex.P.2/cheque with the opposite party. Even after the alleged demand of further sum of Rs.1 Crore and after payment of Rs.1 Crore as per Ex.P.7/Bank Statement without any liability, the respondent had not taken any steps or sent notice to get back Ex.P.1/Memorandum of Understanding and Ex.P.2/cheque. Even after the issuance of the statutory notice/Ex.P.4, the respondent has not taken any steps to get back those documents or not taken any legal action against the appellant which clearly shows that Ex.P.2/cheque issued by the respondent is to discharge the legally enforceable debt and the case of the appellant is probable. Therefore, the appellant proved his complaint. Unfortunately the trial Court has not given effect to Ex.P.1/ Memorandum of Understanding and Ex.P.2/cheque which were existing on the same day. When Ex.D2/cancellation of agreement of sale, Ex.P.1/Memorandum of Understanding and Ex.P2/cheque came into existence on the same day and if at all the respondent discharged all the liability, then why the respondent had not taken any action against the <https://www.mhc.tn.gov.in/judis> appellant even after the appellant filing the complaint against him.

23. Under these circumstances, this Court finds that the appellant has proved his complaint that the cheque/Ex.P.2 issued by the respondent was only to discharge the legally enforceable liability. The respondent has not rebutted the presumption in the manner known to law. Except the plea of discharge taken by the respondent, this Court finds that the respondent has not rebutted the statutory presumption in the manner known to law. Therefore, the Judgment of the trial Court is perverse. The trial Court has not appreciated the evidence in proper perspective.

24. The learned counsel for the respondent placed reliance on the decisions of the Hon'ble Supreme Court in the case of Tamil Nadu Electricity Board and Ors Vs. N.Raju Reddiar and Ors. Reported in MANU/SC/0501/1996 and the relevant portion is extracted hereunder;

7. At the outset it must be borne in mind that the agreement between the parties was written agreement and therefore the parties are bound by <https://www.mhc.tn.gov.in/judis> the terms and conditions of the agreement. Once a contract is reduced to writing, by operation of Section 91 of the Evidence Act it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. Under Section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove the other conditions which also must not be inconsistent with the written

contract.

As far as the above decision is concerned, there is no quarrel with the proposition of law as held by of the Hon'ble Supreme Court. However, the very same principal is applicable for Ex.P.1/ Memorandum of Understanding also. The respondent admitted the existence of Ex.P.1/Memorandum of Understanding. Therefore, the respondent cannot go against the recitals mentioned in Ex.P.1/Memorandum of <https://www.mhc.tn.gov.in/judis> Understanding. Since it is admitted that Ex.P.1/ Memorandum of Understanding and Ex.D2/Cancellation of agreement were on the same day, Section 92 of the Indian Evidence Act, itself would not attract. Therefore, the said decision is not applicable to the present case on hand when both Ex.P.1/ Memorandum of Understanding and Ex.D2/Cancellation of agreement, are admitted documents and both were existing on the same day. Therefore, the case of the respondent could not be acceptable.

25. The learned counsel for the respondent further placed reliance of the decisions of the Hon'ble Supreme Court in the case of Malladi Projects Management Centre Pvt. Ltd and Ors Vs. D.C.M.Financial Services Ltd. reported in MANU/TN/0006/2004 and the relevant portion is extracted as follows;

15 The petitioner/accused have proved that they have discharged the liability by documentary evidence. All the letters between the parties are admitted. Payments are admitted in all the letters produced by the parties. No oral evidence contrary to the letters is admissible under Sections 91 and 92 of the evidence Act. When the admitted evidence proves that there is no liability <https://www.mhc.tn.gov.in/judis> on the accused towards the complainant, the requirement of the complainant before the Magistrate to record evidence and giving a finding after appreciating the evidence and then accept the same is beyond the scope of Section 138 of the Negotiable Installments Act and the request to the Magistrate to do so is only a waste of the precious time of Court.

16.

There is no quarrel with the above legal proposition that when there is no compelled circumstances, the appellate Court cannot interfere with the judgment of acquittal made by the trial Court. In the present case, the complainant proved his case that Ex.P.2/cheque was issued towards discharge of legally enforceable liability and the defence taken by the respondent is only plea of discharge and to prove the same he relied on Ex.D2/cancellation of agreement of sale, which is only a nominal document and the respondent has not proved the plea of discharge in the manner known to law and Ex.P1 is not a valid document. This Court finds that there is compelled circumstances to reverse the judgement of acquittal passed by the trial Court.

26. Further, there is no quarrel with the legal proposition of law <https://www.mhc.tn.gov.in/judis> laid down by the Hon'ble Supreme Court in the case in Ravi Sharma Vs. State (Government of N.C.T. Of Delhi) & Anr. Reported in 2022 Live Law (SC) 615, however, it is not applicable to the present case on hand.

27. Further, the learned counsel for the respondent relied upon the Judgment of the Hon'ble Supreme Court in the case of Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel & Anr. Reported in 2022 LiveLaw (SC) 830, in which it is held that when a part -payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The Cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on the presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment. But in the present case, it is not the case of the respondent that he paid the sum of Rs.1 Crore under Ex.P.7/Bank Statement of the appellant towards the part payment of Ex.P.2/cheque. According to the respondent, he has already discharged Ex.P.2/cheque <https://www.mhc.tn.gov.in/judis> and to prove the same he relied on Ex.D2/cancellation of agreement. Once, it is stated by the respondent that the amount of Rs.1 Crore paid through RTGS under Ex.P.7/bank statement is not towards the part payment of Ex.P.2/cheque, the above decision will not be applicable to the present case.

28. This Court as appellate Court as final Court of fact finding, it has to re-appreciate the entire evidence and to give its findings independently. This Court carefully gone through the entire materials and while re-appreciating the entire materials, finds that the trial Court failed to note that when Ex.P.1/Memorandum of Understanding and Ex.P.2/Cheque were existing, how Ex.D2/Cancellation of agreement came in to existence on the same day and the recitals found in Ex.P1/ Memorandum of Understanding and Ex.D2/cancellation of agreement are mutually contrary each other.

29. In Ex.P.1/Memorandum of Understanding executed between the same parties, it is stated that a sum of Rs.3,50,00,000/- is due to the <https://www.mhc.tn.gov.in/judis> appellant as on 20.11.2015 and in Ex.D2/cancellation of agreement which was also executed on the same day between the same parties, it is mentioned as if, the entire amount was discharged. If that being the case, then Ex.P.2/cheque ought to have been got back by the respondent and the respondent would not have left Ex.P.2/cheque with the appellant if the cancellation of agreement/Ex.D2 is really acted upon. Therefore, under these circumstances this Court finds that there is perversity in the appreciation of evidence and the findings of the trial Court.

30. Normally the appellate Court will not interfere with the judgment of acquittal automatically. However, the appellate Court has to slowly interfere with the judgment of acquittal carefully if there is compelled circumstances to interfere. This Court finds that there is perversity in the judgment of the trial Court and there is compelled circumstances to interfere with the judgement of the trial Court. The Judgement passed in C.C.No.2456 of 2016 dated 08.03.2018 on the file of the learned Metropolitan Magistrate, Fast Track court-III, Saidapet, Chennai, in respect of the cheque issued for Rs.3,50,00,000/- is set aside. <https://www.mhc.tn.gov.in/judis>

31. Accordingly, this Criminal Appeal is allowed. Since, it is a case of reversal judgment, before imposing sentence, the accused has to be heard. Therefore, the respondent is directed to appear before this Court on 30.11.2022 "for hearing on question of sentence".

32. Post the matter on 30.11.2022 “for hearing on the question of sentence.” 28.11.2022 (1/2) ksa-2 Index:Yes/No <https://www.mhc.tn.gov.in/judis> P.VELMURUGAN, J ksa-2 To

1. The Metropolitan Magistrate, Fast Track Court-III Saidapet
2. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

Pre-Deliver Order in Criminal Appeal No.906 of 2022 28.11.2022 (1/2) <https://www.mhc.tn.gov.in/judis> P.VELMURUGAN, J.

This Court by judgment dated 28.11.2022 convicted the respondent/accused and the matter was directed to posted on 30.11.2022 “for question of sentence”.

2 Accordingly, today i.e. 30.11.2022 the matter was listed under the caption “for question of sentence” and when it was called in the morning at 10.30 a.m., the learned representing counsel has stated that they have filed change of vakalat and he would produce the respondent/accused at 4.00 p.m.. Recording the said statement, this Court waited till 4.00 p.m. On verification, it came to know that the said representing counsel has not filed any vakalat on behalf of the respondent/accused before the Registry and however again when the matter was called at 4.00 p.m. the learned representing counsel and also Mr.C.V.Kumar learned counsel on record for the respondent/accused have appeared and stated that they would produce the respondent/accused by tomorrow morning at 10.30 a.m. <https://www.mhc.tn.gov.in/judis> P.VELMURUGAN, J.

cg 3 Hence, Registry is directed to issue NBW and the Inspector of Police, Kotturpuram Police Station, Kotturpuram, is directed to secure the respondent/accused and produce him before this Court on or before 02.12.2022.

List on 02.12.2022.

30.11.2022 Note: Issue order copy on 30.11.2022 30.11.2022 <https://www.mhc.tn.gov.in/judis> P.VELMURUGAN, J.

This Court by judgment dated 28.11.2022 convicted the respondent/accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 and the matter was directed to be posted on 30.11.2022 “for questioning of sentence”.

2. When the matter was taken up for hearing on 30.11.2022 since the respondent/accused did not appear before this Court, Non Bailable Warrant was issued and the Inspector of Police, Kotturpuram Police Station, Kotturpuram was directed to secure the respondent/accused and produce him before this Court on or before 02.12.2022.

3. However, even though the matter is not listed today i.e 01.12.2022, the Inspector of Police, Kotturpuram Police Station, Kotturpuram, secured and produced the respondent/accused before this Court and hence, the matter was taken up for hearing by today itself.
<https://www.mhc.tn.gov.in/judis>

4. When this Court questioned the respondent/accused about the sentence, he stated that he already paid the entire amount and also Rs.1.00 Crore over and above and has filed an affidavit, wherein, he narrated the entire history of the case as stated in the 138 proceedings in C.C.No.2456 of 2016 on the file of the Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai. This Court already extensively heard the arguments of learned counsel on either side and allowed the appeal by reversing the judgment of acquittal made by the Court below.

5. In the affidavit filed by the respondent/accused in paragraph Nos.14 to 16, he avered loss towards the sale of the property. As far as the payment and discharge of the amount is concerned this Court already given detailed reasons in the judgment itself. Today, the matter is posted only for awarding sentence as against the accused.

6. Considering the mitigating circumstances mentioned in the <https://www.mhc.tn.gov.in/judis> affidavit in paragraph Nos.14 to 16 and the respondent/accused has committed the offence under Section 138 of N.I.Act, the respondent/accused is convicted and sentenced to pay a sum of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lakhs only) as fine before the learned Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai within a period of one month from today i.e. 01.12.2022, in default, to undergo simple imprisonment for a period of six months. On receipt of the fine amount, the learned Magistrate is directed to convert into compensation and disburse the same to the appellant/complainant without any formal application.

01.12.2022 ms Note : Registry is directed to issue copy of the judgment by today itself (i.e, on 01.12.2022).

Copy to: The Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai
<https://www.mhc.tn.gov.in/judis> P.VELMURUGAN, J.

ms 01.12.2022 <https://www.mhc.tn.gov.in/judis>