

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2017

CORAM

THE HONOURABLE MR. JUSTICE N.AUTHINATHAN

Crl.A.No.450 of 2017

S.Shanmugavel ... Appellant/Complainant

.. Vs ..

N.Jayashree ... Respondent/Accused

Prayer:- Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, against the order of acquittal dated 07.12.2015 made in C.A.No.46 of 2015 on the file of the II Additional District Sessions Court, Erode, reversing the order dated 20.04.2015 made in S.T.C.No.247 of 2012 on the file of the learned Judicial Magistrate, Fast Track Court No.2, Erode.

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For Appellant : Mr.M.Guruprasad

For Respondent : Mr.I.C.Vasudevan

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JUDGMENT

The complainant in S.T.C.No.247 of 2012 on the file of the learned Judicial Magistrate, Fast Track Court No.2, Erode, is the appellant. He filed the complaint for the offence under Section 138 of the Negotiable Instruments Act on the allegations that the respondent herein/accused had borrowed a sum of Rs.2,00,000/- from him on 02.01.2011 that for the discharge of the said liability, the accused had issued the cheque in question and that when the cheque was presented for collection, it was dishonoured. Therefore, the complainant had issued a notice calling upon the accused to make payment. In spite of receipt of the said notice, the accused has failed to repay the amount.

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2. In support of the complaint, the complainant examined himself as P.W.1 and marked documents Exs.P.1 to P.5. The accused pleaded not guilty. She did not adduce any evidence on her behalf.

3. The trial Court accepted the case of the complainant and convicted the accused of the offence under Section 138 of the Negotiable Instruments Act and sentenced her to undergo simple imprisonment for one year and to pay a fine of Rs.5,000/- and in default, to undergo simple imprisonment for one month. Aggrieved by the said order of conviction and sentence, the accused had preferred an appeal before the Sessions Court in Crl.A.No.46 of 2015 and the learned Second Additional District Sessions Judge, Erode, set aside the said conviction and sentence passed by the trial Court and acquitted the accused. Assailing the said order of acquittal, the present appeal has been preferred by the appellant/complainant.

4. Learned counsel appearing for the appellant/complainant has contended that the Lower Appellate Court has failed to note that the accused admitted the execution of the cheque and therefore, the burden is on the accused to rebut the presumption arises under Sections 118 and 139 of the Negotiable Instruments Act and that the Lower Appellate Court has acquitted the accused by not properly

appreciating the facts.

5. Learned counsel appearing for the respondent/accused has advanced his argument in support of the order of acquittal. According to him, the presumption drawn against the respondent has been rebutted by the respondent and that the complainant has not proved his case beyond reasonable doubt.

6. The cheque in question has been marked as Ex.P.1 and it is dated 01.03.2012. The cheque was dishonoured by the Bank with remarks "funds insufficient" as could be seen from Ex.P.2-return memo. Thereafter, the complainant sent Ex.P.3-notice and the receipt of the notice was acknowledged by the accused as per Ex.P.5. It is not in dispute that the cheque belongs to the respondent/accused and it bears her signature. Therefore, in terms of Section 139 of the Negotiable Instruments Act, it is to be presumed that the cheque was issued for the discharge of her legally enforceable debt. The presumption is rebuttable. Therefore, it is for the respondent/accused to rebut the presumption.

7. It is to be seen that whether the respondent/accused has rebutted the presumption. Admittedly, the respondent/accused has not examined herself as a witness and she has not produced any witness on her behalf. She relied on the answers elicited from the evidence of the complainant.

8. It has been made clear by the Hon'ble Supreme Court in **M.S.NARAYANA MENON ALIAS MANI VS. STATE OF KERALA AND ANOTHER [(2006) 6 SCC 39]** that the accused can discharge his burden on the basis of principles of preponderance of probabilities through direct evidence or circumstantial evidence and for the said purpose, he can rely upon the evidence adduced by the complainant. Therefore, the defence of the accused cannot be brushed aside on the ground that she was not examined as a witness. Bearing the dictum laid down by the Hon'ble Supreme Court, I have carefully analysed the evidence of the complainant.

9. The complainant, in his evidence, has admitted that the husband and daughter of the respondent/accused accompanied the

respondent when she borrowed money from him. The case of the respondent/accused is that her husband borrowed money from the complainant and at the time of taking the loan from the complainant by her husband, the complainant obtained unfilled signed cheques from her (the respondent/accused) and from her daughter and as her husband suffered loss in his business, the complainant misused the unfilled cheques obtained by him and has filed the present complaint against the respondent/accused and another complaint against her daughter. The complainant, in his evidence, has accepted that he has lodged a complaint under Section 138 of the Negotiable Instruments Act against the husband of the respondent/accused. The complainant also filed a case against the daughter of the respondent.

10. The definite case of the complainant is that the respondent/accused had borrowed a sum of Rs.2,00,000/- on 02.01.2011 for her urgent family expenses and issued a post dated cheque viz., cheque dated 01.03.2012. It is significant that the complainant did not charge any interest.

11. It is pertinent to note that the Hon'ble Supreme Court in

Krishna Janardhan Bhat Vs. Dattatraya G.Hedge [(2008) 4 SCC 54], has held as follows:-

"Courts have to take notice that ordinarily in terms of Section 269-SS. Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- had to be made by an account payee cheque only".

12. The complainant, in his evidence, has admitted that he is an income tax assessee during the relevant period. He would further admit that the loan in question was not shown in his income tax accounts.

13. The circumstances noticed above, in my considered view are sufficient to conclude that the respondent/accused has rebutted the presumption drawn against her in terms of Sections 130, 118 and 139 of the Negotiable Instruments Act.

14. Once the presumptions had been rebutted, it is for the complainant to prove that he has in fact lent Rs.2,00,000/- to the respondent/accused. Except the disputed cheque and the interested oral testimony of the complainant, there is no other dependable

evidence to show that the complainant has actually lent money to the respondent/accused. Admittedly, there is no contemporaneous document to show that the complainant lent money as claimed by him. Therefore, I have no hesitation to hold that the complainant has failed to prove his case. The Lower Appellate Court has taken a reasonable view on the basis of the materials available on record. I do not find any good ground to hold a different view. The appeal is liable to be dismissed.

15. In the result, this Criminal Appeal is dismissed and the order of acquittal dated 07.12.2015 passed by the learned II Additional District Sessions Court, Erode, in C.A.No.46 of 2015 is confirmed.

Internet : Yes
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To

1. II Additional District Sessions Court,
Erode.
2. The Judicial Magistrate,
Fast Track Court No.2, Erode.



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N.AUTHINATHAN, J.

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