

Bail Slip

Shanthini, W/O.Kanthappan, Female Aged about 47 Years/2017 is released on bail vide the order of this court, dated 15.06.2017 made in CrI.Mp(md) No.4994/2017 in CrI.R.C(md) No.469/2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.09.2018

DELIVERED ON : 09.10.2018

CORAM:**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN****CrI.R.C(MD)No.469 of 2017**

Mrs.Shanthini : Petitioner/
Accused

Vs.

A.Nagarajan : Respondent/
Complainant

PRAYER: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, against the Judgment of conviction passed by the learned Sessions Judge, Mahila Fast Track Court, Nagercoil in C.A.No.34 of 2011, dated 31.08.2015, confirming the Judgment passed by the learned Second Additional District Munsif, Nagercoil in S.T.C.No.115 of 2009, dated 24.02.2011.

For Petitioner : Mr.Niranjana S.Kumar

For Respondent : Mr.S.Balamurugan

ORDER

The revision petitioner is the accused in S.T.C.No.115 of 2009 on the file of the learned Second Additional District Munsif, Nagercoil. The cheque dated 20.02.2008 drawn at Dena Bank, Nagercoil Branch issued by her in favour of Nagarajan for Rs.2,80,000/-, on presentation for collection, returned unpaid. Nagarajan issued statutory notice dated 26.02.2008 calling upon the revision petitioner to pay the cheque amount within 15 days from the date of receipt of the notice. The revision petitioner, though received the notice on 28.02.2008, neither replied nor paid the cheque amount.

2.Nagarajan filed complaint before the Court, which was taken up on file. The complainant examined himself as PW-1. The cheque, memo, debit advice challan, statutory notice, postal receipt and

postal acknowledgment were marked as Ex.P-1 to Ex.P-6.

3.The case of the complainant is that he lent Rs.2,80,000/- to the accused on 20.12.2007. She promised to repay the loan within 2 months and gave post-dated cheque (Ex.P-1). He presented the cheque for collection on 21.02.2018 through his bank. The bank returned the cheque with intimation that funds insufficient. The memo of cheque return issued by the accused bank is Ex.P-2. The debit advice challan issued by his bank is Ex.P-3. The accused was called upon to make the payment of Rs.2,80,000/- within 15 days through notice dated 26.02.2008. The accused received the notice, but not paid the money and thereby committed offence under Section 138 of N.I. Act.

4.The defence version is that the cheque was not issued by the accused. The cheque was stolen from the accused and misused by the complainant. There is no enforceable debt in respect of the cheque. The complainant has not proved his source for lending Rs.2,80,000/-. The complainant has not shown the said money transaction in his income tax returns.

5.The Trial Court negatived the defence version, accepted the case of the complainant and convicted the accused under Section 138 of N.I. Act and sentenced him to undergo 6 months simple imprisonment and to pay a fine of Rs.5,000/- in default to undergo 3 months simple imprisonment.

6.Aggrieved by the Trial Court judgment, the revision petitioner filed appeal in C.A.No.34 of 2011 before the learned Sessions Judge, Mahila Fast Track Court, Nagercoil.

7.In the appeal, it was contented that no prudent man will offer a huge amount without interest. The case of the complainant that he gave Rs.2,80,000/- to the accused on 20.12.2007 and on the same day she gave cheque for Rs.2,80,000/- to repay after 2 months without interest is unbelievable. The complainant has no money lending licence. The contradiction in the complainant case regarding the exact date and place of issuing the cheque has not been properly considered by the Trial Court. The Trial Court is erred in believing the complainant that he gave hand loan of Rs.2,80,000/- based on the post dated cheque even without knowing her repaying capacity and background of her family.

8.The first appellate Court pointing the inconsistency in the defence version and failure to prove the cheque was stolen from her, dismissed her appeal drawing presumption under Section 139 of N.I. Act.

9.The learned counsel appearing for the revision petitioner in this revision filed against the concurrent finding of the Courts below submitted that once the signature in the cheque denied by the accused, the complainant ought to have taken steps to prove the signature in the cheque is that of the accused. By denial of the signature the accused has shifted the burden of proof on the complainant. Hence, presumption under Section 139 of N.I. Act cannot



be drawn.

10. Relying upon the Judgment of the Supreme Court rendered in Krishna Janadhhan Bhat v. Dattatraya G. Hedge reported in 2008(4) SCC 54, the learned counsel submitted that stepping into witness box by the accused is not imperative to rebut the presumption. The cheque amount being huge, the complainant is bound to account for and the transaction ought to have been through cheque as per the provisions of Income Tax Act. In this case the complainant admittedly an assessee of income tax and allegedly he paid amount to the accused, but he has not shown in his income tax return.

11. The learned counsel further contented that a duty is cast on the Court to pragmatically balance the presumption of innocence and reverse burden. The accused has rebutted the presumption as far as possible. The decree of proof to rebut the presumption under Section 139 of N.I. Act is only preponderance of probability. Through cross examination of the complainant, she has probabilised the preponderance. However, the Courts below have failed to consider the improbability of advancing Rs.2,80,000/- to a relatively unknown lady without proper documents.

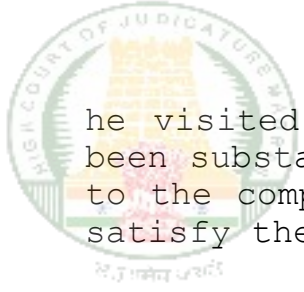
12. The learned counsel appearing for the complainant would submit that the accused after receiving loan and issuing cheque to deny the lawful enforceable debt, had taken not only inconsistent plea but destructive plea. At one breath she has denied any transaction with the complainant and another breath she admits that she know the complainant, who used to visit her house. She alleges the cheque was stolen from her house, but not lodged any complaint about it. She has denied her signature in the cheque, but did not attempt to prove it. The accused borrowed loan for a short period promising to repay within two months. She borrowed money to meet her urgent family expenses, since her husband was in prison at foreign land. Therefore, the same was given in cash. This fact is being elucidated in the deposition of the complainant. Since the transaction is not being a commercial transaction, the Judgment relied on by the learned counsel appearing for the revision petitioner does not apply to the facts of the case.

13. Heard the counsels representing the respective parties. Records perused.

14. Point for consideration:

"Whether there is any error in the reasoning or finding of the Courts below?"

15. The cheque (Ex.P-1) is in respect of the account maintained by the accused in Dena Bank, Nagercoil Branch. The accused though denies the execution of the cheque, she has not let any evidence to substantiate the same. Mere denial of signature by the accused is not adequate to hold she has rebutted the presumption. She alleges that the cheque was stolen from her house by the complainant, when



he visited her house to drink water. This allegation has also not been substantiated by her by any other way, except to put suggestion to the complainant during the cross examination. This also does not satisfy the requirement of reverse burden.

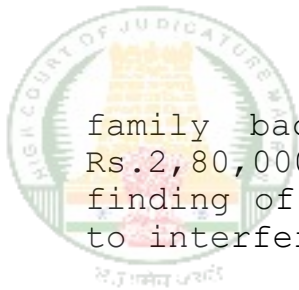
16. Apart from denial, she questions the financial capacity of the complainant to lend Rs.2,80,000/- and non-adherence of Income Tax provisions.

17. Under Section 118(a) of the N.I. Act, Court is obliged to presume, until the contrary is proved, that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.

18. In the present case, the accused has not brought out any fact on record for the Court to believe there was no passing of consideration. The complainant and accused are not strangers. The accused in the cross examination of the complainant by way of suggestion, admits that she knew the complainant and he used to visit the share broker office next to her residence and he used to come to her house. At no point of time before trial or during trial, she has explained the possession of her signed cheque with the complainant. It is also not the case of the accused that the complainant is man of no means.

19. In Rangappa v. Srimohan reported in 2010(11) SCC 441, three judges of the Hon'ble Supreme Court, while overruling the interpretation of two Judges Bench in Krishna Janardhan Bhat case cited supra, has held that, presumption mandated by Section 139 of the N.I. Act, does indeed include the existence of a legally enforceable debt or liability. It is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However there can be no doubt that there is an initial presumption which favours the complainant. If the accused is able to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution will fail. Therefore, an accused in cheque bounce case is not without any opportunity to discharge the burden of presumption. The opportunity shall be by either at the time of reply notice or through cross examination of the prosecution witnesses or through mounting the witness box or examining any other person in support of defence. The reverse burden can be discharged by raising bona-fide doubt in the mind of the Court regarding consideration or enforceable debt through all or any of the above said mode.

20. In this case, the accused had not opted any of the above mode to shift the burden. Except suggesting to the complainant that he has stolen the cheque and without knowing the financial and



family background, he could not have advanced a huge sum of Rs.2,80,000/- . In the said circumstances of the fact and law, the finding of the Courts below does not fall under any of the category to interfere in revision.

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21.The learned counsel appearing for the accused/revision petitioner submitted that the revision petitioner was arrested pursuant to the confirmation of the conviction by the first appellate Court. While preferring the revision petition, there was a delay of 502 days and in the meanwhile she was arrested on 01.02.2017. This Court directed her to deposit Rs.70,000/- being $\frac{1}{4}$ th of cheque amount as pre-condition to condone delay and to grant bail. As per the direction of this Court, the revision petitioner has paid Rs.70,000/- to the learned counsel appearing for the respondent/ complainant and the learned counsel also received the same. She has already suffered imprisonment for 80 days from the date of arrest till the date of release on bail. Therefore, the accused being a woman, if the Court finds no merit in the revision, the sentence may be modified into period of sentence already undergone by the revision petitioner and Rs.70,000/- paid to the respondent/ complainant as compensation.

22.Considering the above submission, this Court is of the opinion that while confirming the conviction, modification of the sentence needs to be made in view of the subsequent development after the Judgment of the first appellate Court confirming the Trial Court Judgment of conviction and sentence.

23.Taking note of the fact that the transaction is of the year 2008 and the accused being a woman, leniency is required balancing the interest of the complainant. The accused has been confined to prison for about 80 days pursuant to the Judgement. Therefore, no further sentence of imprisonment is required, instead, half of the cheque amount (Rs.1,40,000/-) is ordered as compensation payable to the complainant.

24.In the result,

(i)this Criminal Revision Case is partly allowed and the conviction passed by the Courts below are confirmed. However, the sentence imposed on the revision petitioner/accused is modified into period of sentence already undergone by the revision petitioner/accused.

(ii)Regarding the compensation, as per the direction of this Court, the revision petitioner/accused has paid Rs.70,000/- to the learned counsel appearing for the respondent/complainant. Therefore, the revision petitioner/accused is directed to deposit a balance sum of Rs.70,000/- in S.T.C.No.115 of 2009 within a period of 45 days from the date of receipt of this order, in default, she shall undergo simple imprisonment for 30 days.

(iii)The respondent/complainant is permitted to withdraw the said compensation on due application.



(iv) Bail bond if any executed by the revision petitioner/accused shall stand cancelled.

Sd/-
Assistant Registrar(C.O)

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Sub Assistant Registrar(CS-II)

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To

- 1.The Sessions Judge,
Mahila Fast Track Court,
Nagercoil.
- 2.The Second Additional District Munsif,
Nagercoil.
- 3.The Superintendent,
Central Prison,
Madurai.
- 4.The Record Keeper, (2 copies)
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.Niranjan S.Kumar, Advocate in SR No.89480
+1cc to Mr.S.Balamurugan, Advocate in SR No.89602

Cr1.R.C(MD)No.469 of 2017

NM/SV/SAR 2/11.10.18/6P/8C