

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.471 of 2018

M/s.Dhoot Impex,
Represented by its Proprietor,
Amith Dhoot

Petitioner/Appellant

Vs

Neelam Takiar

Respondent /Accused

PRAYER: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the order of acquittal dated 13.04.2018 made in C.A.No.320 of 2017 on the file of the II Additional District and Sessions Court, Erode, reversing the order dated 08.12.2017 made in S.T.C.No.87 of 2016 on the file of the Judicial Magistrate (Fact Track Court No-I), Erode.

For Petitioner : Mr.M.Guruprasad

For Respondent : Mr.P.Karthikeyan

O R D E R

This Criminal Appeal has been filed to set aside the order of acquittal dated 13.04.2018 made in C.A.No.320 of 2017 on the file of the II Additional District and Sessions Court, Erode, reversing the order dated 08.12.2017 made in S.T.C.No.87 of 2016 on the file of the Judicial Magistrate (Fact Track Court No-I), Erode.

2 The appellant filed a private complaint against the respondent under Section 200 of Cr.P.C., for the offence under Section 138 of Negotiable Instruments Act, before the learned Magistrate, Fast Track Court No-I, Erode, in S.T.C.No.87 of 2016. The learned Magistrate, Fast Track Court No-I, Erode, after enquiring the matter elaborately found the respondent guilty and convicted the respondent for the offence under Section 138 of the Negotiable Instruments Act, and sentenced him to undergo 6 months imprisonment and also directed to pay compensation for a sum of Rs.1,58,513/- for the offence under Section 357(3) of Cr.P.C. Challenging the judgment passed by the learned Magistrate, the accused filed an appeal before the

learned II Additional Sessions Judge, Erode, in Criminal Appeal No.320 of 2017. The learned II Additional Sessions Judge, Erode, after hearing the arguments set aside the judgment of conviction passed by the learned Magistrate, Fast Track Court No-I, Erode and acquitted the accused. As against the said judgment of acquittal, the appellant has filed the present Criminal Appeal, before this Court.

3 The appellate Court is a fact finding Court, it has got power to re-appreciate the evidence and to give an independent findings and to reverse the views of the trial Court.

4 The learned counsel for the appellant would submit that, the appellate Court has not properly appreciated the evidence. Though, he has given three reasons for allowing the appeal and set aside the judgment passed by the learned Magistrate, Fast Track Court No-I, Erode. The reasons are not sustainable either under law or on facts.

5 Notice have been sent within 30 days. Notice served to the very same address as stated in the complaint. Therefore, the reason stated by the appellate Court, the notice was not served also not correct. Further, they stated that subsequent to notice he had transaction and made payment that is also not correct. Therefore, the criminal appeal is liable to be set aside.

6 The learned counsel appearing on behalf of the respondent would submit that the appellant has not stated when he received the memo from the bank and he has not specifically stated in his complaint that on which date he received the memo issued by the bank. Therefore, notice not issued within 30 days. It is only beyond 30 days and he has no proof to show that the respondent received the notice despite receipt of the notice he did not make the payment. Therefore, the appellate Court rightly appreciated that, it is for the complainant has to prove his case. After receiving the returned cheque from the bank within 30 days, notice has been sent and on receipt of the notice within 30 days there is no payment. Hence, the complaint has been filed. This fact has not been proved. Therefore, the appellate Court rightly appreciated the evidence and set aside the judgment of the learned Magistrate.

7 Heard the learned counsel for the appellant as well as the learned counsel for the respondent and perused the materials available on records.

8 It is no doubt that the signature found in the cheque is not in dispute and transaction between the appellant and the respondent also not in dispute and cheque presented before the

bank which was returned on the same day is also not in dispute. Only the defence taken by the accused before the appellate Court is that the notice was not served within 30 days and the complaint has not been filed within 30 days.

9 On a perusal of the entire records and the submission made by the learned counsel for the appellant, though the notice was returned, but subsequently served in the very same address as stated in the complaint. If it is properly addressed and not served it is deemed service and it is for the respondent to prove that he has given the right address. Whereas, the notice sent to the wrong address therefore could not be served. Admittedly, he has not stated that the correct address to the appellant and the appellant wrongly addressed the notice, therefore, the contention raised by the learned counsel for the appellant is that if the correct address has been provided the notice would have been sent to the correct address.

10. Therefore, finding in this regard by the appellate Court is not acceptable. The contention raised by the learned counsel for the respondent as well as the finding given by the appellate Court is concerned, the notice was not sent within 30 days. Though, the intimation was sent by the bank on 30.07.2014 but the notice was issued on 30.08.2014 which is beyond 30 days. He has clearly stated that, he has sent the memo on 30.07.2014. Therefore, it is not possible that on the same day the intimation have been served to the appellant. The findings given by the appellate Court is also not correct. However, on reading of the entire materials that the appellant has sent a notice on 30.08.2014, but subsequently, the appellant had a transaction with the respondent and also it is not the case of the appellant that on the day of issuance of the cheque, due is Rs.1,58,513/- for which the respondent issued a cheque. When the appellant himself admitted that there was a balance of amount to be paid Rs.12,57,960/-, but the respondent alleged to have issued a cheque only for a sum of Rs.1,58,513/-. Admittedly, there was a several transaction, one of the such transaction is after receipt of the statutory notice. Therefore, this Court finds that the respondent has rebutted the presumption under Section 139 of Negotiable Instruments Act. If at all any default or dishonour of cheque proceeding is pending no prudent man would supply any materials or continue the transaction.

11. The respondent need not rebut the presumption by let in direct evidence even it can be rebutted by preponderance of probabilities or probable defence, even otherwise though cross examination of the witnesses. In this case, respondent has rebutted the statutory presumption by preponderance of probabilities.

12 In the result, this present Criminal Appeal is dismissed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

sbn/vkr

To

1.The II Additional District and Sessions Court,
Erode.

2.The Judicial Magistrate (Fact Track Court No-I),
Erode.

+1cc to Mr.M.Guruprasad, Advocate, S.R.No. 16878

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VG II(CO)
GN(27/11/2019)



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