BAIL SLIP

The Appellant/Accused namely M.Shakil Banu W/o.Malick Basha was directed to be released on bail as per order of this Court dated 24/01/2018 in Crl Mp No.687 of 2018 in Crl.R.C.No.92 of 2018 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON 21.12.2020	JUDGMENT PRONOUNCED ON 08.02.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

Crl.R.C.No.92 of 2018

M.Shakila Banu ...Petitioner

..vs..

K.Subramaniam ...Respondent

This Criminal Revision Case is filed under Section 397 and 401 of Cr.P.C., to set aside the conviction imposed in the judgment dated 05.12.2017 made in C.A.No.103 of 2017 on the file of the learned Second Additional District and Sessions Court, Erode, confirming the judgment dated 01.12.2016 made in STC No.389 of 2014 on the file of the learned Judicial Magistrate, Fast Track Court No.I, Erode, by allowing this Criminal Revision.

For Petitioner : Mr.N.Manokaran
For Respondent : Mr.M.Karthi for Mr.I.C.Vasudevan

JUDGMENT

This Criminal Revision Case is preferred against the judgment of the learned II Additional District and Sessions Judge, Erode in Crl.A.No.103 of 2017 dated 05.12.2017 confirming the judgment of the learned Judicial Magistrate, Fast Track Court No.I, Erode in STC No.389 of 2014 dated 01.12.2016.

2. The respondent filed a complaint against the petitioner under Section 200 Cr.P.C and Section 138 r/w 142 of Negotiable Instruments Act, alleging that the petitioner borrowed a sum of Rs.3,00,000/- from the respondent on

27.02.2014 promising to repay the amount with interest at the rate of 18% p.a and on the same date, issued a cheque bearing No.849916 for Rs.3,00,000/- for discharging the said loan. The respondent presented the cheque on 27.05.2014 for collection and the same was returned on 28.05.2014 for the reason that there was no sufficient fund. The respondent issued a legal notice dated 07.06.2014 demanding the petitioner to pay the cheque amount and the said notice was received by the petitioner on 09.06.2014. Even after the receipt of the notice, the petitioner failed to pay the amount nor did he send the reply to the notice. Therefore, this complaint.

3. On the petitioner entering appearance before the trial Court, she was questioned with regard to the substance of accusation against her and she denied the accusation and claimed to be tried. During the course of trial, on the side of the petitioner, PWs.1 and 2 were examined and Exs.P1 to P16 were marked and on the side of the respondent, DW.1 to DW.4 were examined and Exs.D1 to D3 were marked. On considering the oral and documentary evidence, the learned trial Judge found the petitioner/accused guilty under Section 138 of Negotiable Instruments Act and convicted and sentenced her to undergo six months simple imprisonment and ordered to pay the cheque amount of Rs.3,00,000/- as compensation to the respondent under Section 357(3) Cr.P.C, failing payment she was directed to undergo simple imprisonment for one month. Against the said judgment, the petitioner preferred Crl.A.No.103 of 2017 on the file of the II Additional District and Sessions Court, Erode. Finding that there was no reason to interfere with the judgment of the trial Court, the learned II Additional District and Sessions Judge, Erode confirmed the judgment of the learned trial Judge and dismissed the Appeal. Against the said order of dismissal, this Criminal Revision Case is filed.

4. The learned counsel for the petitioner submitted that the courts below have not considered the evidence in proper perspective. The oral and documentary evidence produced before the trial Court, especially, Exs.D1 to D3 produced by the petitioner had not been properly considered by the courts below. It is settled proposition of law that the accused need not prove her case beyond the reasonable doubt, but it is enough that she proved her case by preponderance of probabilities. In this regard, the learned counsel for the petitioner pressed into service the judgment of the Hon'ble Supreme Court reported in (2010) 11 SCC 441 (Rangappa ..vs.. Sri Mohan), wherein it is held as follows:-

> "28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that

when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. "

5. It is further submitted by the learned counsel for the petitioner that though the respondent has produced Exs.P1 to P16 documents, these documents are not sufficient to prove that the respondent had lent a sum of Rs.3,00,000/- to the petitioner and in order to discharge that amount the cheque in question was issued. Though the respondent admitted that he is an Income Tax assessee and he maintains accounts, he has not produced accounts and Income Tax Returns to show that Rs.3,00,000/- was given as loan to the petitioner. As per Section 269(ss) of Income Tax Act, any advance more than Rs.20,000/- has to be made only by a cheque. When that being the case, the case of the respondent that he gave Rs.3,00,000/- as loan in cash can not be entertained, especially when the respondent is not able to produce any accounts or Income Tax Returns to prove the lending of money. In this regard, the learned counsel for the petitioner relied on the ruling reported in (2009) 2 SCC 513 (Kumar Exports ..vs.. Sharma Carpets) for the proposition that when the accounts are not produced in the case of lending, issuance of cheque for discharging the loan cannot be believed. The relevant portions in the above judgment are extracted hereunder:-

"Under the circumstances the defence of the appellant that blank cheques were obtained by the respondent as advance payment also becomes probable and the onus of burden would shift on the complainant. The complainant did not produce any books of account or stock register maintained by him in the course of his regular business or any acknowledgment for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him to the appellant on August 6, 1994 for a sum of Rs.1,90,348.39. Having regard to the materials on record, this Court is of the opinion that the respondent failed to establish his case under Section 138 of the Act as required by law and, therefore, the impugned judgment of the High Court is liable to be set aside."

6. Finally, it was submitted that there is a confusion in the father's name of the respondent as to whether the father's name of the respondent is Kuppanna Gounder or Karuppanna Gounder. In conclusion, learned counsel for the petitioner submitted that the Courts below have not considered the oral and documentary evidence properly and wrongly convicted and sentenced the petitioner. So saying, he prayed for setting aside the judgment and for acquittal of the petitioner.

7. In response, learned counsel for the respondent submitted that the respondent has produced as many as 16 documents including the cheque to prove the lending of Rs.3,00,000/- on 27.02.2014 and issuance of cheque for discharging the loan. He has produced Exs.P6 to P16 to show that he has sufficient means to lend money. Not only from the evidence produced by the respondent, but also from the oral and documentary evidence produced by the petitioner, the case of the respondent was proved beyond reasonable doubt with regard to lending of money and issuance of cheque by the petitioner without sufficient funds in her account. The Courts below have rightly appreciated the evidence and correctly convicted and sentenced the petitioner. Therefore, the learned counsel for the respondent prayed for confirming the judgment of the Courts below and for dismissal of this Appeal.

8. The points for consideration in this case are:-

(1) Whether the judgments of the Courts below in convicting and sentencing the petitioner under Section 138 of Negotiable Instruments Act is correct ?

(2) Whether the judgments of the Courts below suffer from any incorrectness, impropriety and illegality requiring interference by this Court ?

9. Point Nos.1 and 2:

As already stated, respondent was examined as PW.1 and he produced Exs.P1 to P16 documents. Ex.P1 is the cheque. Ex.P2 is the returned memo issued by the bank. Ex.P3 is the copy of the Advocate Notice. Ex.P4 is the postal receipt. Ex.P5 is the intimation from the postal department with regard to the delivery of notice sent to the petitioner. Exs.P6 to P16 are the property tax receipt, receipt for selling coconut, bank statement, documents evidencing ownership in Ambal Finance and its registration certificate, copies of sale deeds and exchange deeds and also the registration of judgment in A.S.No.74 of 2010. Exs.P6 to P16 had been filed to show that the respondent is possessed of sufficient means to lend money.

10. It is seen from the admitted case of the petitioner that she admitted Ex.P1 as her cheque and the signature in Ex.P1-cheque is her signature. Admittedly, she has not issued

any reply to Ex.P4-notice. Her defence with regard to the cheque came to be known only through cross examination of respondent, who was examined as PW.1. It is seen from the cross examination of PW.1 that the petitioner and her husband had borrowed loan from Eswaran and gave the cheque to him and that cheque has now been used by the respondent for filing this case. In order to prove this case, the petitioner had examined the said Eswaran as DW.1. The said Eswaran, though admitted lending Rs.5,00,000/- to the petitioner and her husband on the basis of execution of mortgage deed, he denied receiving any unfilled cheque from them.

11. The notice issued on behalf of Eswaran is marked as Ex.D1. Through this document, Eswaran demanded the petitioner and her husband to pay a sum of Rs.7,02,000/- with subsequent interest on the basis of mortgage deed executed by the petitioner and her husband. When replying this notice through Ex.D2, the petitioner and her husband totally denied borrowing Rs.5,00,000/- from Eswaran and executing the mortgage deed. Interestingly, it is not mentioned in this reply that they gave unfilled cheque to Eswaran at the time of borrowal. However, when petitioner was examined in the Court as DW.4, she admitted borrowing money from Eswaran on the basis of mortgage. She has also admitted that she did not mention in Ex.D2-reply that she issued the cheque involved in this case at the time of borrowal of money from Eswaran. Thus, it is clear as crystal that the petitioner is not speaking truth, but giving false evidence, in order to escape from her liability to pay the cheque amount to the respondent. Interestingly, she admitted that her borrowal from Eswaran and Ex.P1 cheque has no connection with each other. She had also examined DW.2 and DW.3. Their evidence is also useful in support of the petitioner's case. On other hand, the evidence of DW.3 strengthens the case of the respondent. DW.3 clearly stated during his evidence that the petitioner borrowed a sum of Rs.3,00,000/- from the respondent on 27.02.2014 and issued Ex.P1-Cheque. Thus, the evidence of DW.1 to DW.4, instead of helping the case of the petitioner, helps the case of the respondent and it is proved from their evidence, especially from the evidence of DW.3 and aforesaid admissions made by DW.4 that the petitioner borrowed a sum of Rs.3,00,000/- from the respondent on 27.02.2014 and issued Ex.P1-Cheque for discharging the loan without sufficient funds in her account.

12. Though PW.1 was extensively cross examined, nothing incriminating was elicited from his evidence against his case. A suggestion was put to him that notice was not served on the petitioner. However, the evidence of PW.2 shows that Ex.P4-legal notice was served on the petitioner. It is true that

though the respondent admitted that he is an Income Tax assessee, he has not produced the Income Tax Return and any other accounts to show that the loan transaction was entered in the books of accounts and Income Tax Return. The non-filing of accounts and Income Tax Return may be a relevant factor, if the petitioner was able to prove by preponderance of probability that Ex.P1-cheque was given to Eswaran at the time of borrowal of Rs.5,00,000/-. However, as per her own evidence, the evidence of Eswaran and Ex.D2-reply, it can be gathered that Ex.P1-cheque has nothing to do with the mortgage loan obtained from Eswaran. Therefore, this Court is of the view that the judgment relied on by the learned counsel for the petitioner reported in (2010) 11 SCC 441 (cited supra) is not helpful to the case of the petitioner. For the same reason, the other judgment relied on by the learned counsel for the petitioner reported in (2009) 5 SCC 213 (cited supra) is also not useful to the case of the petitioner. The omission to produce Income Tax Return may be a ground for prosecuting the respondent under relevant provisions of Income Tax Act, but it is not good enough to reject the case of the respondent. The analysis of oral and documentary evidence clearly proved the case of the respondent that he lent a sum of Rs.3,00,000/- to the petitioner on 27.02.2014 and the petitioner issued Ex.P1-cheque without sufficient funds in her account. The Courts below rightly found the petitioner guilty under Section 138 of Negotiable Instruments Act and sentenced her to undergo simple imprisonment for six months and also to pay a compensation of Rs.3,00,000/-. This Court finds no reason to interfere with the judgment of the learned II Additional District and Sessions Judge, Erode in Crl.A.No.103 of 2017 dated 05.12.2017, confirming the judgment of the learned Judicial Magistrate, Fast Track Court No.I, Erode in STC No.389 of 2014 dated 01.12.2016 and dismisses this Criminal Revision Case. The learned trial Judge is directed to issue warrant against the accused for undergoing the sentence.

Sd/-
Assistant Registrar(CS V)

//True copy//

Sub Assistant Registrar

mra

To

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

2. The Judicial Magistrate, Fast Track Court No.I, Erode.

Copy to
The Section Officer,
Criminal Section(Records), High Court, Madras.

+1cc to M/s.N.Manokaran, Advocate SR.No.6934
+1cc to M/s.I.C.Vasudevan, Advocate SR.No.7113

Order
in
Crl.R.C.No.92 of 2018

VSN II (CO)
KKV/03/03/2021