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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 18.11.2021

Judgment Pronounced on : 30.11.2021

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.R.C.No.1188 of 2014

H.Stella Josephine Mary .. Petitioner

Versus

S.Muthulakshmi .. Respondent

Prayer : Criminal Revision Case is filed under Section 397 r/w 401 of Cr.P.C., against the judgment of conviction and sentence passed by the learned Metropolitan Magistrate-Fast Track Court No.II, Egmore, Chennai in C.C.No.12750 of 2003, dated 10.09.2012 confirmed and modified by the XV Additional Sessions Court at Chennai, on 05.11.2014 in Crl.A.No.178 of 2012.

For Petitioner : Mr.G.Saravanan

For Respondent : Mr.K.Ramanamoorthy

ORDER

This Criminal Revision Case is filed by the petitioner/accused, against the conviction for an offence under Section 138 of the Negotiable Instruments Act, by the learned Metropolitan Magistrate-Fast Track Court No.II, Egmore, Chennai, by judgment dated 10.09.2012 in C.C.No.12750 of 2003 and imposing a sentence of fine of Rs.2,20,000/- of which a sum of Rs.2,00,000/- was ordered to be paid to the respondent complainant and against the judgment of the XV Additional Sessions Court, Court in Crl.A.No.178 of 2012 dated 05.11.2014, thereby, confirming the conviction for the offence under Section 138 of Negotiable Instruments Act, but, however, modifying the sentence by incorporating the default clause for non-payment of fine by including that in default of payment of fine of Rs.2,20,000/- to undergo a Simple Imprisonment for six months.

2. This is a private complaint filed under Section 200 of Cr.P.C. The case of the complainant is that the accused had borrowed a sum of Rs.2,00,000/-, jointly along with her husband, from the complainant on 30.12.2002. The accused had also jointly executed a promissory note for the said sum of money. The accused, at the time of borrowal, agreed to repay the amount, within two months together with interest at the



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rate of 1% per month i.e., a sum of Rs.2,000/- per month, towards interest for the amount borrowed by her. On the date of borrowal i.e., on 30.12.2002 itself, the accused herein had issued three post dated cheques towards repayment of the amount borrowed by her. The accused issued a cheque dated 29.01.2003, bearing No.26619 drawn on Syndicate Bank, Fort St. George, Chennai for a sum of Rs.90,000/-; another cheque dated 02.02.2003, bearing no.266720, drawn on Syndicate Bank, Fort St. George, Chennai, for a sum of Rs.50,000/- and the third cheque dated 10.02.2003, bearing No.247422 drawn on Centurion Bank, Annasalai, for a sum of Rs.60,000/-. The first cheque dated 29.01.2003 was presented for collection with her banker namely, I.C.I.C.I Bank, Annasalai, Chennai on 25.06.2003 and the same was returned with an endorsement "funds insufficient" by communication dated 28.06.2003 along with a memo on dishonour of the bankers of the accused dated 26.06.2003. The second cheque bearing No.266720 was also presented with her aforesaid bankers on 05.07.2003 and the same was returned with an endorsement "funds insufficient" by communication dated 09.07.2003 with a memo of dishonour dated 07.07.2003. The third cheque, bearing No.247422 was presented to the aforesaid banker on 16.16.2003 and it was returned on 19.06.2003 along with memo of dishonour dated 17.06.2003 with an endorsement "funds insufficient". The complainant, therefore, caused a legal notice on 15.07.2003, which was received by the accused on 22.07.2003. However, after receipt of the notice, the accused neither made payment of the amount due under the cheques nor issued any reply notice and therefore, upon completion of 15 days time, from the date of receipt of the notice, the offence under Section 138 of Negotiable Instruments Act stood committed and therefore, complaint was presented on 29.08.2003.

3. The learned Magistrate recorded the sworn statement of the complainant on 24.09.2003, took the case on file and issued summons to the accused. Upon questioning, the accused denied the commission of offence and stood for trial. During the trial, the complainant examined herself as P.W.1. One C. Vijayakumar, an official from bankers of the accused in respect of the first two cheques, namely, Syndicate Bank, Fort St. George, Chennai was examined as P.W.2. One K.V. Sunil, the official from the bankers of the accused in respect of the third cheque, namely, Centurion Bank was examined as P.W.3. On behalf of the complainant, the promissory note, executed by the accused is marked as Ex.P1 and the three cheques, which were returned dishonoured were marked as Exs.P2 to P4 and the return memos, issued by the bankers of the accused, in respect of the three cheques respectively, were marked as Exs.P5 to P7, the debit advice issued by the complainant's bank for the three cheques respectively were marked as EX.P8 to P10, the statutory notice issued to the accused was marked as Ex.P11 and the acknowledgement card of the accused is marked as Ex.P12. The authorisation letter issued by the Syndicate Bank to P.W.2 was marked as Ex.P13 and the statement of accounts as Ex.P14 and similarly, the authorisation letter issued by the Centurion Bank to P.W.3 was marked as Ex.P15 and transaction history is



marked as Ex.P16. With these, the complainant rested her case.

4. Upon being questioned under Section 313 of Code of Criminal Procedure about the evidence adduced against the accused, and the incriminating circumstances, the accused denied them as false. Thereafter, on the side of the accused, one Sasikala and Priyadharshini, who are the daughters of the complainant, were examined as D.Ws.1 and 2, one Kuppusamy, the husband of the accused was examined as D.W.3, one Jamuna, the daughter of the accused was examined as D.W.4. One Siva Shankar, Manager of complainant bank and thereafter, one Babu Raj, also from the complainant bank, were examined as D.Ws.5 and 6, one Ashok, Inspector of Police, Rajamangalam, was examined as D.W.7 and finally, the accused examined herself as D.W.8. On the side of the accused, Ex.D1 namely, copy of the C.S.R.No.122 of 2003 issued in Rajamangalam Police Station was marked. Thereafter, the Trial Court heard the arguments of the learned Counsel on either side and by the judgment dated 10.09.2012 found the accused guilty for the offence under Section 138 of Negotiable Instruments Act.

5. The Trial Court had also, in paragraph No.9 of the judgment under revision, stated the defence of the accused from the cross-examination and the evidence produced on behalf of the accused, which is as follows:-

"The defence of the accused is that D.W.4 the daughter of the accused was running a beauty parlour in the Villivakkam market and that the daughters of the complainant D.W.1 and 2 who are customers of D.W.4 came forward to advance loan to D.W.4 for developing the parlour. At that time they gave Rs.40,000/- to her and since they insisted on a government servant's security they obtained a promissory note and 3 cheques from the accused who had then been employed in the Secretariat. D.W.4 returned Rs.30,000/- to the complainant in the year 2003 as the lender was in need of funds. She also later returned Rs.10,000/-. Thereafter they said that she need to pay a hiked interest of Rs.50,000/-. When they told that they cannot bear the same, the daughter's of the complainant D.W.1 and 2 along with 4 others came to the parlour and uttered obscene words against D.W.4. She closed the shop and told her father who later lodged a complaint before V4 Rajamangalam Police Station. D.W.3 the husband of the accused, admits that her daughter received Rs.40,000/- from the complainant for developing her palour for which she was unable to give the interest regularly. Therefore the complainant's daughters insisted for cheques from him and his wife the accused herein who were



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government servants as security. He and his wife executed a promissory note and also issued a cheque. Later the accused received arrear amount from her office of Rs.30,000/- and she paid the said amount. But the cheques were not returned to the accused. On 28.4.03 the daughters of the complainant went to the parlour and created a mess. Since he gave a complaint against the complainant's daughter they filed a false case against his wife. According to D.W.8 her daughter D.W.4 obtained Rs.10,000/- from the complainant in the year 2002 for which she issued the Grindlays Bank cheque. They paid the interest for nine months and later on 27.9.2002 once again they received Rs.30,000/- for which she gave interest of Rs.4,000/- per month from the tenth month. Later they were not able to pay the interest amount and hence the daughter of the complainant came to the parlour and created a problem. D.W.8 spoke over phone and compromised them. While so they uttered obscene words against her. Later on 6.5.03 she was enquired by Police. She applied for GPF loan and paid the amount. The complainant's daughter promised to return the cheque. She gave the cash to the complainant's daughter's in her office."

6. The Trial Court has correctly stated the legal position as to the discharge of burden by the complainant and rebuttal of the presumption by the accused in paragraph No.6 of its judgment, which is re-produced hereunder:-

"It is needless to say that the accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case of the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. No doubt to rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as it expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of



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consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had no incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act."

7. Thereafter, the Trial Court held that since D.W.2, daughter of the complainant got selected in the Police department in the year 2003 and therefore, it cannot be believed that under her influence, the cheque was obtained upon her influence through Rajamangalam Police. Further, the learned Counsel for the accused had in the cross examination, suggested to the complainant that she was in the habit of advancing thandal loan and only in that transaction, she has given money to the accused, the Trial Court rejected the defence version. Further, the Trial Court considered the circumstances that the accused did not issue a reply notice to the statutory notice. Further, the Trial Court, finally placing reliance on the promissory note, executed in the year 2002, held that once the signature in negotiable instrument is admitted, the presumption arises. It further held that even though it is the defence of the accused that the cheques were obtained in the Police Station, there was no such evidence as against the promissory note and therefore, on the basis of Ex.P1 promissory note, the Trial Court found the accused guilty.



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of CSR is in the year 2003. Whereas the transaction and the execution of the promissory note were in the year 2002. It is needless to say that when once the signature in a negotiable instrument is admitted, it gives right to the holder in due course to fill up the details."

9. The Appellate Court, in paragraph No.19, found that the evidence of the complainant that her husband is working in Lucas and that she got money from her brothers, for her share in her ancestral property coupled with the further suggestion from the learned Counsel for the accused that she had lend money as Thandal, would prima facie to prove the capability of the complainant. The Appellate Court, in paragraph No.20, had relied upon Ex.P1, promissory note and that on the same day, Exs.P2 to P4 cheques were issued and therefore, held that the complainant established a prima facie case and therefore, the burden shifted to the defence side to rebut the presumption. The Appellate Court further held that though an attempt is made by the defence, it is only futile and was not enough to rebut the presumption and the Appellate Court found that there is contradiction in the defence case as to whether one cheque or three cheques are issued as security to the daughter of the complainant. The Appellate Court also relied on the circumstances that the accused omitted to issue any reply to the statutory notice. Finally, relying upon the documents produced by the complainant in Exs.P1 to P10, the Appellate Court rejected the probable defence and held that the respondent/accused committed offence under Section 138 of Negotiable Instruments Act. Thereafter finding that the learned Magistrate though imposed fine of a sum of Rs.2,20,000/-, by oversight, has failed to exercise the requirement of Section 30 of Code of Criminal Procedure, modified the sentence only by adding the default clause namely, in default of payment of fine, the accused had to undergo a Simple Imprisonment for six months.

10. Mr.G.Saravanan, learned Counsel for the petitioner/accused, taking this Court through evidences adduced by both sides in this regard, would argue that though the finding is said to be a concurrent finding, if the lower Courts have erred on a point of law or have returned a perverse finding, this Court can interfere with the revisional jurisdiction. According to him both the Courts relying upon Ex.P1 as a negotiable instrument is erroneous in law as the name of the promisee is not even filled up. Even though this defense is specifically taken in the cross-examination of P.W.1 and also a specific ground is raised by the Appellate Court, both the Courts without answering the question as to whether Ex.P1 is a valid pronote or not relied upon the same and therefore, the finding of guilt is liable to be reversed.

11. His second submission is that the burden of proof expected by the accused to rebut the presumption under Section 139 of N.I.Act is one of preponderance of probabilities and a



cogent reading of the evidence on records would demonstrate that the accused has been successful in rebutting the presumption in this case and the finding of the Courts below in brushing aside the attempt as futile attempt is perverse. His further contention is that both the trial and first Appellate Court erred in giving undue weightage to the non-issuance of the reply notice to the statutory notice and omitted to be consider that the accused has a right to remain silent and therefore, the conviction cannot be based on the said factor alone.

12. Per contra, Mr.K.Ramanamoorthy, learned Counsel for the complainant would submit that the Courts below have rightly found the guilt of the petitioner/accused when the cheques and promissory note are marked as Exs.P1 to P4 and the other ingredients namely, the return of the cheque and issuance of statutory notice has been duly proved, the presumptions are therefore in favour of the complainant under Sections 118 and 139 of the Negotiable Instruments Act and the attempt of the defence is only a vague and false one so as to wriggle out of the liability to pay the cheque amount and their defence is self contradictory and in any event, there was no probable case of defence and therefore, this Court has nothing to interfere with the finding of guilt and the sentence. It is his further submission that incorporating the default sentence does not amount to enhancement of sentence and therefore, the bar under Section 386 (b), (ii) and (iii) of the Code of Criminal Procedure cannot be pressed into service.

13. After hearing the learned Counsel on either side, and consideration of the materials on record, the following questions arise for determination in the present case:-

(a) Whether the action of the lower Appellate Court in supplying a default clause in the event of non-payment of fine amounts to enhancement of sentence so as to attract the bar of Section 386 (b) (iii) in the absence of any cross appeal by the complainant?

(b) Whether Ex.P1 can be considered as promissory note within the definition contained in the Negotiable Instruments Act and presumption under Section 118 of N.I.Act is applicable for the said document?

(c) Whether on the basis of the evidence on record, the accused has rebutted the presumption?

Question No.1:-

14. The first submission made on behalf of the petitioner is that the lower Appellate Court in modifying the sentence of fine alone to that of payment of fine, in default to undergo Simple Imprisonment for six months amounts to enhancement of sentence and in view of Section 386(b), (iii) of the Code of Criminal Procedure, no enhancement can be done in the appeal filed by the accused. To appreciate this argument, one has to advert to Section 30 of the Code of Criminal Procedure, which reads as follows:-

"Section 30. Sentence of imprisonment in default of fine__ (1) The Court of a



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Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term ----

(a) is not in excess of the powers of the Magistrate under Section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29."

15. The Hon'ble Supreme Court of India in O.M.Churian @ Thankachan Vs. State of Kerala and others¹, in Paragraph No.11 has held that in matters where the sentence of imprisonment is imposed already as the punishment for the offence, the default sentence for non-payment of fine will be in excess of and will not run concurrently with the sentence of imprisonment to which the convict may have been sentenced.

16. In this case, the impugned sentence is only that of fine and therefore, this circumstance does not arise. The Hon'ble Supreme Court of India, as in Shanti Lal Vs. State of M.P ², has in Paragraph No.31, held as follows:-

"31. The next submission of the learned counsel for the appellant, however, has substance. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore,



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not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine."

17. Therefore, in view of the above categorical ruling of the Hon'ble Supreme Court of India, the default term of imprisonment cannot be considered as a 'sentence', and consequentially, the bar under Section 386(b), (iii) is only in the case of enhancement of 'sentence'. Therefore, the exercise of power by the Appellate Court is in order.

Question No.2:-

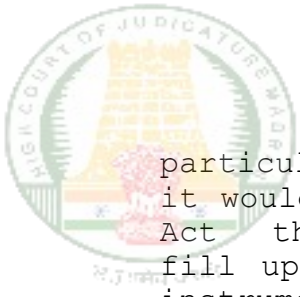
18. The fulcrum of the case of the complainant is the Ex.P1 promissory note, which is said to have been executed in consideration of the loan advanced in cash. The promissory note is a printed form. As per the form, four lines are left for filling up the name of the promisor and promisee. But, however, while it contains the name of the promisors, the name of the promisee is not at all filled up or mentioned either in the said space or anywhere in the said promissory note. Section 4 of the Negotiable Instruments Act reads thus:-

"Section 4:- A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

19. Therefore, an instrument has to contain an undertaking, signed by the maker to pay a certain sum of money only to or to the order of said person or bearer of the instrument. The certain person's name is absent in the instrument. Only if the instrument satisfies the definition under Section 4 of N.I.Act, it is a negotiable instrument as per Section 13 of the Act and only if it is a negotiable instrument, the presumption under Section 118 of the Act follows. The law regarding the subject is wholesomely dealt with by a learned Judge of this Court in M/s.Malar Finance Corporation represented by its Managing Partner, Pandurangan Vs. G.Rathinam and others³, whereby, the learned Judge has considered all the earlier judgments of this Court as well as the other High Courts on the subject and the following appears to be the legal possession:-

(a) An instrument to be called as a promissory note within the meaning of Section 4 of Act should contain the name of the promisee, otherwise, it does not satisfy Section 4 of the Negotiable Instruments Act and can at best be considered as a hand note;

(b) When ever such instrument is executed and all the



particulars include the name of the promisee is not filled up, it would be an inchoate document and as per Section 20 of the Act there is an implied authority for the holder, so as to fill up the unfilled particulars, so as to make it a complete instrument;

(c) But the authority should be exercised by the person claiming as the promisee under the instrument and in some cases, even after filling of a suit, the plaintiff was allowed to take back the instrument and fill up and resubmit;

(d) However, if he does not fill up the name by exercising his implied authority, the document is not a promissory note.

The legal position being thus, it is clear that the respondent/complainant herein cannot claim any benefit or presumption on the strength of the Ex.P1 promissory note and both the Trial Court and the first Appellate Court failed in not considering the issue and placing reliance upon the promissory note.

20. It is seen that the specific defence has been taken by cross-examining P.W.1, the complainant and a specific ground has been raised in ground (i) in the memorandum of appeal and the Trial Court as well as the Appellate Court completely overlooked this aspect and erred in placing reliance upon the Ex.P1.

Question No.3:-

21. Now, therefore, it remains to be seen that in the absence of Ex.P1, whether or not the complainant proved her case that the presumption under the Section 118 and 139 of the Negotiable Instruments Act, regarding Exs.P2 to P4 cheques or whether the defendant has rebutted the presumption. It is also pointed out by the Trial Court and the lower Appellate Court, as highlighted by the learned Counsel for the respondent/complainant, there is a contradiction in the defence itself as to whether one cheque or all the three cheques were obtained at the Police Station and even though, it is the defence case that there is no such borrowal, the defence had also cross-examined the complainant by suggesting that the complainant had given money from out of her Thandal money :

"...நான் தண்டலுக்கு பணம் விடுவது வழக்கம் என்றும் அந்த பணத்தை தான் எதிரிக்கு கொடுத்தேன் என்றால் சரியல்ல..." And the accused also did not issue a reply to the statutory notice.

22. Be that as it may, but as pointed out by the learned Counsel for the petitioner/accused, in the complaint and in Ex.P11 notice it is mentioned that the petitioner/accused issued the cheques on the date of borrowal itself but it is mentioned in the sworn statement of the complainant before the learned magistrate that subsequently, when the payment was demanded the cheques were issued.

23. Further, regarding the capacity to advance the loan, originally the complainant in one part of the cross-examination states that:



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"....என் கணவர் லூக்காசில் வேலை செய்கிறார். என் மூதாதையர் சொத்தில் என் உடன் பிறந்தவர்கள் 7 பேர்கள் நான் ஒரே பெண் ஆனதனால் எனக்கு கொடுத்தார்கள். எனக்கு வந்த பங்கு பணம் வைத்திருந்தேன், கொடுத்தேன்...."

However in the later part of the cross-examination, she deposed that:

"எதிரிக்கு ரூ.2 லட்சம் கடன் கொடுக்கும் அளவுக்கு எனக்கு நிதி வசதி இல்லை என்றால் சரிதான். நான் வருமானவரி எதுவும் செலுத்தவில்லை."

24. This apart, another circumstance is that the daughter of the accused is made as witness in Ex.P1 promissory note and she was examined as D.W.4 and she had deposed that the promissory note was executed when she borrowed the money from the complainant's daughter and the transaction alleged by the complaint as incorrect. Further, the accused herself has entered into the box as D.W.8 and deposed about her defence that the cheques were not actually issued to the complainant and that the borrowal of Rs.2,00,000/- never took place.

25. As a corroboratory evidence, D.W.7, the Inspector of Police was examined and the C.S.R was marked as Ex.D1. But, however, on the basis of Ex.D1, the accused even summoned the complainant's daughters as D.Ws.1 and 2. But, however, D.Ws.1 and 2 totally denied any such incident about the earlier complaint and as such, their evidence does not inspire confidence. The petitioner herein would also point out about the dates of the cheques, date of presentation and the alleged date of borrowal and would bring home the fallacy in the case of the complainant as if money was borrowed under Ex.P1 and on the same date, in discharged thereof the cheques were given. But, however, there is three months gap as to the dates of the cheque and to the date of the presentation and the dates of events are inexplicable by the complainant. Thus, the accused had established a probable defense and the presumption under Section 118 and 139 of the Act stands rebutted in the instant case and in the absence of any other positive/corroborative evidence on record, the accused is entitled for acquittal. I hold that the judgment of the Trial Court and the Appellate Court have missed out on the question of law relating to Ex-P1, and but for the same, the finding of guilt is liable to be reversed and thus making this a case for interference in the exercise of revisionary jurisdiction.

26. For the reasons stated above, this Criminal Revision Petition in CrI.R.C.No.1188 of 2014 is allowed. The judgment dated 10.09.2012 by the Metropolitan Magistrate-Fast Track Court, Egmore in C.C.No.12750 of 2003 and the judgment dated 05.11.2014 of the XV Additional Sessions Court, Chennai in



Crl.A.No.178 of 2012 are set aside. The accused is acquitted of the offence under Section 138 of the Negotiable Instruments Act. Fine amount, if any, paid by the accused, shall be refunded to her.

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Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

grs

To

- 1.The XV Additional Sessions Judge, Chennai.
- 2.The Metropolitan Magistrate, Fast Track Court No.II, Egmore, Chennai 8.

Copy to:
The Section Officer,
VR Section,
High Court, Madras

+1 cc to Mr.K.Ramanamoorthy, Advocate Sr.NO. 62435

Crl.R.C.No.1188 of 2014

BR(CO)
A.SK(09.12.2021)