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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 24.11.2021

Judgment Pronounced on : 30.11.2021

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

CrI.R.C.No.607 of 2014

J.Rosy Kumari

.. Petitioner

Versus

A.Nallasivam

.. Respondent

Prayer : Criminal Revision Case is filed under Section 397 and 401 of Cr.P.C., set aside the conviction imposed in the judgment, dated 20.03.2012 made in S.T.C.No.1313 of 2010 on the file of the learned Judicial Magistrate No.I, Erode confirmed in judgment dated 25.09.2012 made in C.A.No.109 of 2012 on the file of the learned Principal Sessions Judge, Erode, by allowing this Criminal Revision Petition.

For Petitioner : Mr.M.Guruprasad

For Respondent : Mr.D.Balachandran

ORDER

This Criminal Revision Case is filed by the petitioner/accused, aggrieved by the conviction for an offence under Section 138 of the Negotiable Instruments Act, by the judgment, dated 20.03.2012 of the learned Judicial Magistrate No.I, Erode in S.T.C.No.1313 of 2010, thereby imposing a sentence of six months Simple Imprisonment and Rs.2,000/- fine and the judgment, dated 25.09.2012 in Criminal Appeal No.109 of 2012, confirming the conviction and sentence.

2. The respondent herein, A.Nallasivam, filed a complaint under Section 200 of Code of Criminal Procedure alleging that on 28.09.2010, the accused has borrowed a sum of Rs.1,00,000/- for urgent family expenses and in discharge of the aforesaid liability, the accused has issued a post dated cheque, bearing No.597330 drawn on Indian Overseas bank, Surampatty branch, dated 28.10.2010 for the said sum of Rs.1,00,000/-. The complainant presented the said cheque for collection through his bankers namely, Indian Overseas Bank, Erode, but, however, the same was returned with the indorsement "funds insufficient" along with the memo of dishonour, dated 01.11.2010. The complainant issued a legal notice on 19.11.2010, which was served on the complainant on 20.11.2010. However, within the 15 days time, the accused did not pay the amount and hence, the



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complaint was filed on 09.12.2010. The learned Magistrate recorded the sworn statement on the same day and took cognizance of the offence and issue summons to the accused. After appearance and supplying of copies, the accused was questioned and she denied the offence and stood trial.

3. On behalf of the complainant, the complainant, Nallasivam was examined as P.W.1. The cheque dated 28.10.2010 issued by the accused was marked as Ex.P1. The return memo issued for dishonour of cheque, dated 01.11.2010 was marked as Ex.P2. The legal notice issued by the complainant was marked as Ex.P3 and the postal receipt for issuance thereof was marked as Ex.P4. The acknowledgement card was marked as Ex.P5 and the prosecution rested its case.

4. Upon being questioned under Section 313 of Cr.P.C., about the incriminating circumstances and the evidence on record, the accused denied the same as false. Thereafter, on behalf of the defence, the accused examined herself as D.W.1 and the reply notice issued by her on 05.01.2011 to the legal notice issued by the complainant is marked as Ex.D1. Thereafter, the Trial Court proceeded to hear the learned Counsel on either side and by its judgment dated 20.03.2012 found that the defence of the accused in this case is that the husband of the accused had obtained loan from M/s. Selvam Finance and an unfilled cheque was handed over to the said Selvam Finance by her husband as a security for a borrowal of Rs.25,000/-. The said sum had already been repaid and now, the cheque has been misused. The Trial Court further found that even though to prove her defence, the accused had cited her husband as a defence witness, she did not examine her husband. Similarly, in her chief-examination, she had also stated that her husband has given this cheque without her knowledge to M/s. Kannan Finance. Therefore, considering the contradictions in the defence and since, except for her ipse dixit, the accused did not let in any credible evidence in proof of defence, the Trial Court found that the accused is guilty of the offence under Section 138 of N.I. Act and imposed a sentence of six months Simple Imprisonment and fine of Rs.1,000/-, in default of payment of fine, one month Simple Imprisonment.

5. Aggrieved by the judgment, the petitioner/accused filed Crl.A.No.109 of 2012 on the file of the learned Principal Sessions Judge, Erode. The learned Sessions Judge, after considering the material on record and the judgment of the learned Magistrate found that the defence taken while examining the accused as D.W.1, the stand in the reply notice and the defence taken by way of cross-examination of P.W.1 were totally inconsistent. Therefore, the Appellate Court did not accept the defence that the cheque in question was misused. The Appellate Court also further held that to prove the defence version no proof for discharge of the loan with M/s. Selvam Finance was produced and nobody from the said Selvam Finance was examined. Therefore, the Appellate Court held that the defence as vague. Finding that the accused has no probable



defence to dislodge legal presumption, the appeal was dismissed. The conviction and sentence imposed by the Trial Court was confirmed by the Appellate Court, aggrieved by which, the present revision is laid before this Court.

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6. Heard Mr.M.Guruprasad, learned Counsel for the petitioner. The learned Counsel submitted that in the first place, the complainant totally suppressed the reply notice issued by the petitioner/accused, dated 05.01.2011 and therefore, did not approach the Court with clean hands. The cheque was handed over to M/s. Selvam Finance and M/s. Kannan Finance also being run by the same persons in very the same premises and therefore, the Trial Court and the lower Appellate Court did not consider the said fact and erred in holding as if the defence was inconsistent. He would submit that from the cross-examination of P.W.1, the accused has established that the complainant had no proper income at all to advance such huge sum of Rs.1,00,000/-. Further, the complainant has been cross-examined in detail as to who filled up the cheque whether it was filled up and when it was filled up and the complainant is unable to answer these questions which shows that the cheque has been misused. Therefore, it is submitted that the accused has duly discharged his onus of rebutting the presumption and she has brought plausible and valid defence. She ought not to have been convicted by the Trial Court and therefore, the judgment of the Courts below, convicting her require to be interfered by this Court in exercise of the powers in this revision.

7. On the other hand, Mr. Balachandran, the learned counsel appearing for the complaint would submit that except for making a vauge attempt, the accused did not discharge her burden to dislodge the presumptions under Section 118 and 139 of the Negotiable Instruments Act and the ingredients of the offence having been proved, there is no scope for any interference by this Court.

8. I have considered the submissions made by the learned Counsel on either side. I have gone through the entire case records. The submissions of the learned Counsel for the petitioner that the complainant is unable to answer the filling up of the cheque will not lead the petitioner anyway, because, first, if the cheque had been duly filled up by the accused, then the complainant cannot have any knowledge; and second even if it is handed over unfulled and filled up by the complainant, still by virtue of Section 20 of the N.I. Act, the bearer of the instrument has the authority to fill up the same and therefore, the questions relating to filling up of the cheque will not have any bearing on the question where the offence has been committed or not. Similarly, as far as the capacity of the complainant is concerned, it is not a very huge sum as claimed by the petitioner's counsel as the cheque is for a sum of Rs.1,00,000/- and the complainant is armed with the presumption under Section 118 read with 139 of N.I.Act and therefore, the arguments that the complainant has been cross-examined in detail about his capacity to pay fails.



9. The primary contention of the petitioner/accused is that the cheque was handed over only to M/s. Selvam Finance towards borrowal of Rs.25,000/- and the said loan has been discharged and one Sitheesh, the employee represented to them that the cheque has been misplaced and thereafter, the cheque is misused. As pointed out by the lower Appellate Court, nothing prevented the accused to produce the document for discharge of the said loan, or to examine the said Sitheesh or other office bearers of M/s. Selvam Finance by summoning them. As pointed out by the Trial Court, even though it is the specific defence of the petitioner that it is her husband, who gave the cheque without her knowledge to the complainant and even though the petitioner has listed her husband as defence witness, she failed to examine him.

10. Thus, except attempting to put forth a defence theory, the accused had not discharged her onus to rebut the presumption under Section 118 read with 139 of the N.I.Act, as such and the Trial Court and the lower Appellate Court have rightly convicted the accused.

11. However, considering the petitioner/accused is a lady and the other facts and circumstances of the case, the sentence imposed by the Trial Court that the accused should undergo a Simple Imprisonment for a period of six months is modified as four months and the fine amount is confirmed as such.

12. Therefore, in the result, this Criminal Revision Case is partly allowed. The conviction of the accused for the offence under Section 138 of N.I. Act is upheld. However, the sentence is modified that the petitioner/accused shall undergo simple imprisonment for a period of four months and also pay a fine of Rs.2000/- and in default to undergo simple imprisonment for a period of one month.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

grs

To

1.The Principal Sessions Judge,
Erode.

<https://hcservices.ecourts.gov.in/hcservices/>
2.The Judicial Magistrate No.I,
Erode.



3. The Section Officer,
Criminal Section/Records,
High Court, Madras.

+1cc to Mr.M.Guruprasad, Advocate SR.No.62733

+1cc to Mr.D.Balachandran, Advocate, Sr.No.62863(07/04/2022)

Cr1.R.C.No.607 of 2014

RSV (CO)

GMV (08/12/2021)