IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.10.2022

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.A.No.212 of 2018

S.Karthikeyan ...Appellant

-Vs-

D.Murugesan ... Respondent

Prayer: Criminal Appeal filed under Section 378 of Code of Criminal Procedure, to set aside the order and judgment dated 27.11.2017 made in Crl.Appeal.No.210 of 2017 on the file of the I Additional District and Sessions Judge, Erode, in reversing the order dated 24.07.2017 made in C.C.No.210 of 2010 on the file of the Judicial Magistrate Court, No.I, Erode, to allow the above criminal revision case.

For Appellant : Mr.C.Prabakaran

For Respondent : Mr.R.Shase
for Mr.M.Guruprasad

ORDER

This Criminal Appeal is directed as against the judgment passed in C.A.No.210 of 2017 dated 27.11.2017 on the file of the I Additional District and Sessions Judge, Erode, thereby reversing the findings of the trial Court passed in C.C.No.210 of 2010 on the file of the Judicial Magistrate No.I, Erode, thereby convicting the respondent for the offence under Section 138 of Negotiable Instruments Act.

2. The petitioner is the complainant and the respondent is the accused in this case.

3. The case of the complainant is that the respondent borrowed a sum of Rs.4,60,000/- for his urgent business needs. In order to discharge the said liability he issued two post-dated cheques. On instruction, both the cheques were presented for collection and the same have been returned dishonoured for the reason "Account closed". Thereafter, the petitioner caused legal notice and lodged a complaint.

4. On the side of the appellant PW1 was examined and Exs.P1 to 8 were marked and on the side of the respondent DWs1 to 3 were examined and Exs.D1 to 7 were marked.

5. On perusal of oral and documentary evidence, the trial Court found the respondent guilty for the offence under Section 138 of NI Act and sentenced him to undergo one year simple imprisonment and also imposed fine of

Rs.5000/- in default to undergo three months simple imprisonment. Aggrieved by the same, the respondent preferred an appeal and the same was allowed thereby setting aside the conviction and sentence imposed by the trial Court. Hence this appeal.

6. The learned counsel for the appellant submitted that there is absolutely no consequences warranting reversal of the findings of the trial Court thereby convicted the respondent for the offence under section 138 of NI Act. The appellant proved his case beyond any reasonable doubt and also discharged his initial burden to presume that the cheque was issued for discharge of his legal liability. The first Appellate Court acquitted the accused on the ground that the appellant failed to implead the mandate holder. The first Appellate Court reversed the findings of the trial Court on the ground that the appellant failed to implead the proprietrix concern as an accused since the cheque was issued in the name of proprietorship whereas the respondent authorised his own son as mandate holder for running the business. Though he has signed the cheque as a proprietor, he is only a mandate holder and no need to implead the mandate holder as an accused.

7. In fact, the respondent has not disputed that his son was appointed as mandate holder of the cheque under the capacity and the cheque was issued on behalf of the respondent, which is not disputed and more particularly, even in the evidence of DWs1 and 3, have deposed that the marriage of the son of the accused took place during the year 2006 and the said business was continuing till 2009. It shows that they have continuously and jointly doing business. The mandate holder issued the cheque for their business transaction. Therefore, the rebuttal of presumption made by the respondent is unsustainable in law. Even according to the respondent he has closed the account for the loss in the business during the year 2009, but the same was not communicated either to the mandate holder or to the appellant through a proper notice. Therefore, the trial Court rightly convicted the respondent for the offence under Section 138 of NI Act.

8. Per contra, the learned counsel for the respondent submitted that admittedly the respondent is a proprietor of M/s.Lakshmi Enterprises and his son was appointed as mandate holder to run the business. However, he got love marriage and he had been living separately from the year 2006. There was, no cordial relationship between them. The specific case of the respondent is that his son had taken all the cheque leaves and issued cheque as if he is the proprietor of M/s.Lakshmi Enterprises. Admittedly, the respondent is the proprietor of said

firm and his son is only the mandate holder. When the mandate holder signed the cheque he is a necessary party in the complaint however, the appellant failed to implead him as an accused and lodged complaint as against the respondent who is no way connected with the issuance of cheque. In fact, after receipt of the statutory notice, the respondent categorically denied the issuance of cheque and any legally enforceable debt in favour of the appellant herein. Therefore, the first appellate Court rightly reversed the finding of the trial Court and it does not warrant any interference by this Court.

9. Heard the learned counsel for the appellant and the learned Government Advocate (Crl. Side) for the respondent and perused the materials available on record.

10. On perusal of records revealed that the appellant lodged a complaint for the offence under Section 138 of NI Act alleging that the respondent borrowed a sum of Rs.4,60,000/- for his urgent business need and to discharge the said liability he issued two post dated cheques. When both the cheques presented for collection the same were returned dishonoured for the reason "Account closed". After causing statutory notice the appellant lodged complaint. On receipt of the statutory notice, which was marked as Ex.P4, the respondent

denied the entire allegations and caused reply notice it revealed that his son got love marriage and living separately and there was no cordial relationship between them. Though he was appointed as mandate holder and authorised operator of Current Account maintained by the respondent, the respondent never issued any cheque in favour of the appellant herein.

11. Further, on perusal of cheques which were marked as Exs.P1 and 2 it revealed that the mandate holder, son of the respondent, only signed the cheque however. However, the appellant did not issue any notice to him and failed to implead him as an accused. In the reply notice dated 31.07.2009 it is stated that he is the proprietor of said M/s.Lakshmi Enterprises and he permitted his son namely Vijayakumar as mandate holder to act on behalf of him. Due to a misunderstanding between him and his son Vijayakumar, the said Vijayakumar stealthily retained the cheque leaves and colluded with the complainant and fabricated the cheques and filed this case. Therefore, he clearly rebutted the presumption arising out of the provision under Section 138 of NI Act.

12. Further, to maintain a complaint under Section 138 of NI Act the complainant has to initially discharge that the cheque was drawn by a person on an account maintained him with a Banker for payment of any amount of money

to another person and the cheque was issued from out of that account for the discharge, in whole or in part, of any debt or other liability is returned by the Bank unpaid, either because of the amount of money standing to the credit of the at account is insufficient to honour the cheque or that exceeds the amount arranged to be paid from that account.

13. Thus, it is clear that to maintain a complaint under Section 138 of NI Act, the cheque should be drawn by the person on an account maintained by him with a Banker and it should be issued in payment of amount to another person, from out of that account for the discharge in whole or in part of any other debt or liability. Hence the appellant has to discharge his initial burden that the cheque was issued by the respondent for a payment of any amount in whole or in part to the complainant.

14. Admittedly, the cheques were not signed by the respondent and it was also admitted by the appellant. The cheques were singed only by the respondent's mandate holder on behalf of the respondent herein. The respondent is a proprietor of M/s.Lakshmi Enterprises and he permitted his son, namely Vijayakumar, as mandate holder to operate his bank account on behalf of him. Due to misunderstanding between them, he is residing separately and is not

looking after the business. Utilizing the said circumstances, his son colluded with the appellant and misused the cheque.

15. In support of the said contention, the respondent also examined DWs1 to 3. Therefore, the respondent clearly rebutted the presumption and the first Appellate Court rightly acquitted the respondent for the offence under Section 138 of NI Act. That apart, it is not the case of the appellant that he had business transaction with him and M/s.Lakshmi Enterprises and on behalf of said Lakshmi Enterprises the respondent borrowed loan and in order to repay the said loan amount, he issued two post dated cheques whereas the appellant subsequently pleaded that the respondent borrowed loan in order to discharge the said liability and he issued two cheques.

16. Admittedly, the cheques were signed by the mandate holder of the respondent and there was no pleading in the complainant to this effect that the money was borrowed by the accused for the said Lakshmi Enterprises. Whereas the cheques were issued on behalf of Lakshmi Enterprises. The signatory of the cheques is very much necessary party to maintain the complaint under Section 138 of NI Act and to draw the presumption under Section 139 of NI Act attached to the cheques and to enable the respondent to rebut the presumption

attached with the cheques. Admittedly, the drawer of the cheques was not at all impleaded as an accused in the complaint. Therefore, the non-joinder of the drawer of the cheques is fatal to the case of the appellant. Hence, the first Appellate Court rightly reversed the findings of the trial Court and this Court finds no infirmity or illegality in the judgment passed by the Court below.

17. Accordingly, the criminal appeal stands dismissed.

14.10.2022

Index : Yes/No
Speaking/Non Speaking order
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G.K.ILANTHIRAIYAN. J,

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To

1. The I Additional District and Sessions Judge,
   Erode.
2. The Judicial Magistrate No.I,
   Erode.
3. The Public Prosecutor,
   Madras High Court,
   Chennai.

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