IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.09.2022

CORAM

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

Crl.A.No.25 of 2018

P.Ramraj ... Appellant

Vs

S.Sasikala ... Respondent

Prayer:- Criminal Appeal filed under Section 378 of Criminal Procedure Code, to set aside the order of acquittal dated 26.09.2016 made in Crl.A.No.75 of 2016 on the file of the learned V Additional District and Sessions Judge, Coimbatore reversing the judgment of conviction and sentence imposed in C.C.No.276 of 2013 on the file of the Judicial Magistrate Fast Track Court No.1, Coimbatore by allowing this Criminal Appeal.

For Appellant : Mr.R.Prabakar

For Respondent : No appearance

JUDGMENT

This Criminal Appeal is directed as against the order of acquittal dated 26.09.2016, made in Crl.A.No.75 of 2016 on the file of the learned V Additional District and Sessions Judge, Coimbatore thereby reversing the judgement of conviction and sentence imposed in

C.C.No.276 of 2013 on the file of the Judicial Magistrate Fast Track Court No.1, Coimbatore, for the offence under Section 138 of Negotiable Instruments Act, 1881 (herein after referred to as "the NI Act").

2. The appellant is the complainant and the respondent is the accused in the complaint lodged for the offence punishable under Section 138 of NI Act. The case of the complainant is that the respondent borrowed loan for the purpose of her business to the tune of Rs.4,00,000/- on 05.05.2010 and a sum of Rs.3,00,000/- on 20.07.2010 in total sum of Rs.7,00,000/- and promised to repay the said amount. In order to repay the amount, the respondent issued cheque for a sum of Rs.7,00,000/- and the same was presented for collection. However, it was returned dishonoured for the reason that account closed. After causing legal notice, the appellant filed the present complaint.

3. The appellant was examined himself as P.W.1 and marked Ex.P.1 to Ex.P.5. On the side of the respondent, no one was examined and no document has been marked. On a perusal of oral and documentary

evidence, the trial Court found the respondent guilty and convicted for the offence punishable under Section 138 of NI Act and sentenced her to undergo simple imprisonment for the period of six months and also pay the compensation of Rs.7,00,000/- as contemplated under Section 357(3) of Cr.P.C., within a period of two months. Aggrieved by the same, the respondent preferred an appeal and the appellate Court set aside the order of conviction and allowed the appeal, as against which the present appeal.

4. The learned counsel appearing for the appellant submitted that the appellate Court reversed the findings of the trial Court only on the ground that the appellant failed to prove his source of income to lend a sum of Rs.7,00,000/-. Without even examining any of the witness and without even issuance of reply notice by the respondent, the appellate Court concluded that the respondent rebutted the evidence of the appellant and reversed the finding of the trial Court. Further concluded that the appellant failed to produce any document for the alleged transactions with the respondent and he failed to establish his case except

the cheque, which was marked as Ex.P.1, by other document to show the transaction and liability. Whereas, the appellant categorically proved his case beyond reasonable doubt and the trial Court rightly convicted the respondent.

4.1. He further submitted that in fact, the respondent never denied the signature found in the cheque and issuance of the cheque. The respondent failed to adduce any evidence and failed to produce piece of document to show that the appellant did not have any source of income and how the cheque had come in possession of the appellant. The existence of legally enforceable debt is not the matter of presumption under Section 139 of NI Act. Therefore, he prayed to allow the present appeal.

5. Heard Mr.R.Prabakar, learned counsel appearing for the appellant. Though notice served on the respondent and the learned counsel entered appearance, and name of the respondent printed in the cause list, no one is appeared on behalf of the respondent either by

person or through pleader.

6. The only ground raised by the respondent before the first appellate Court is that, the appellant failed to produce any document to show the transactions between the respondent and the appellant. The appellant failed to produce source of income from which, the loan was made to the respondent, thereby presumption is rebutted. In order to prove the presumption under Section 138 of NI Act, the appellant was examined as P.W.1 and marked Ex.P.1 to Ex.P.5. Admittedly, the respondent never disputed his signature and the issuance of the alleged cheque.

7. That apart, the legal notice dated 10.11.2012, which was marked as Ex.P.3 was duly received by the respondent and the acknowledgement card was marked as Ex.P.5. Even then, the respondent failed to rebut the case of the appellant. Further the respondent did not even examine any witness and failed to mark any document to rebut the case of the appellant. Only in the cross-examination, the appellant

deposed that he had not produced any document to show that he had such a sum of Rs.7,00,000/- during the relevant period and he had not mentioned the same in his income tax returns. However there was no oral or documentary evidence to show that the respondent rebutted the case of the appellant.

8. Further the first appellate Court reversed the findings of the trial Court on the ground that the appellant failed to produce any document related to the alleged transaction with the respondent except the cheque which was marked as Ex.P.1 and the appellant has no other transactions to show the liability of the respondent. Therefore, the respondent rebutted the case of the appellant and as such the onus shifted to the appellant to prove that the Ex.P.1 had been issued for discharging the legally subsisting liability. Further the appellant had not produced any material on record to establish the same. Therefore, the first appellate Court reversed the findings of the trial Court and acquitted the respondent herein.

9. In this regard, it is relevant to relay upon the judgment

reported in ***2022 SCC OnLine SC 302*** in the case of ***Tedhi Singh Vs. Narayan Dass Mehant***, in which the Hon'ble Supreme Court of India held that in the case under Section 138 of the NI Act, the complainant need not to show in the first instance that he had capacity to lend loan, unless a case is set up in the reply notice to the statutory notice, that the complainant did not have the wherewithal, it cannot be expected the complainant to initially lead evidence to show that he had the financial capacity. However, the accused had the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing out the materials produced by the complainant himself. Further he must establish the case that the complainant has no source of income even in the statement given under Section 313 of Cr.P.C.

10. In the case on hand, the respondent after receipt of the legal

notice failed to send any reply. She did not even examine any of the witness to rebut the case of the appellant herein and she did not even mark piece of document. That apart, in the statement recorded under Section 313 of Cr.P.C., she never denied the issuance of cheque and the signature found in the cheque. She simply denied the allegation as false and pleaded on her side. But the respondent failed to let any evidence on her side. However, the first appellate Court without considering the above facts and circumstances mechanically reversed the findings of the trial Court only on the ground that the appellant failed to prove his source of income and failed to prove the transactions between the appellant and the respondent.

11. It is settled law that in the case under Section 138 of NI Act, Section 139 of NI Act provides that the Court shall presume that the holder of a cheque received the cheque of the nature referred into Section 138 of NI Act, for the discharge, in whole or in part or any debt or other liability. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the

accused to establish that there is no consideration received. It is in the context of this provision that the theory of probable defence has grown.

12. Without considering the above facts, the first appellate Court mechanically reversed the judgement of the trial Court and this Court has no hesitation to interfere with the impugned judgement. Accordingly, the judgement dated 26.09.2016, made in Crl.A.No.75 of 2016 on the file of the learned V Additional District and Sessions Judge, Coimbatore, is hereby set aside and the judgement dated 06.05.2016 made in C.C.No.276 of 2013 on the file of the Judicial Magistrate Fast Track Court No.1, Coimbatore, is hereby restored. The trial Court is directed to take steps to secure the respondent/accused and commit her to undergo sentence imposed upon her by an order dated 06.05.2016. Accordingly, the Criminal Appeal stands allowed.

29.09.2022

Index:Yes/No
Internet:Yes/No
Speaking/Non-speaking order
rts

G.K.ILANTHIRAIYAN, J.,

rts

To

1. The V Additional District and Sessions Judge,
   Coimbatore

2. The Judicial Magistrate,
   Fast Track Court No.1,
   Coimbatore.

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