IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.10.2022

Pronounced on : 31.10.2022

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.RC.No.208 of 2018

Shayatullah ... Petitioner

Versus

Shakeela ... Respondent

PRAYER:

Criminal Revision has been filed under Section 397 and 401 of the Code of Criminal Procedure to set aside the judgment of conviction dated 25.11.2016 in STC.No.12 of 2013 on the file of the Judicial Magistrate (Fast Track Court), Omalur, which was confirmed by the judgment dated 19.08.2017 in CA.No.122 of 2016 on the file of the learned III Additional Sessions Judge, Salem.

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| For Petitioner | : | Mr.D.Shivakumaran |
| For Respondent | : | Mr.C.Venkatesan<br>for Mr.R.Murugabharathy |

**ORDER**

This criminal revision has been filed as against the judgment passed in Crl.A.No.122 of 2016 dated 19.08.2017 by the learned III Additional Sessions Judge, Salem, thereby confirming the judgment passed in STC.No.12 of 2013 dated 25.11.2016 by the learned Judicial Magistrate (Fast Track Court), Omalur, thereby convicted the petitioner for the offence punishable under Section 138 of NI Act.

2. The petitioner is the accused in the complaint lodged by the respondent. The crux of the complaint is that the petitioner is having earth moving vehicle and doing the said business. The respondent is a house wife. They were friends for the past several years. Due to their relationship, they acquainted with each other. While being so, on 15.07.2013, the petitioner borrowed a sum of Rs.6,00,000/- as a loan from the respondent to meet out

his family and business needs. At the time of borrowal of loan, he issued a post dated cheque for the said sum. When the respondent approached the petitioner and demanded to repay the said amount, the petitioner dragged the issue and did not pay the same. Therefore, the respondent presented the cheque for collection and the same was returned for the reason "funds insufficient". Thereafter the respondent caused statutory notice and lodged complaint.

3. On the side of the respondent, she examined PW1 and PW2 and marked Ex.P1 to Ex.P5. On the side of the petitioner, he examined DW1 and DW2 and marked Ex.D1 and Ex.D2. The court marked Ex.1 and Ex.2. On perusal of oral and documentary evidence, the trial court found the petitioner guilty for the offence punishable under Section 138 of NI Act and sentenced him to undergo one year rigorous imprisonment and imposed fine of Rs.5,000/-, in default to undergo one month simple imprisonment. Aggrieved by the same, the petitioner preferred appeal and the same was also dismissed and confirmed the order of conviction passed by the trial court.

4. The learned counsel for the petitioner submitted that the respondent had no source of income to lend such a huge amount of Rs.6,00,000/-. She categorically admitted that her salary was only Rs.4,000/- p.m. and she was working in a furniture shop. Her brother was working for daily wages. She further admitted that except her monthly income, she had no other income. Insofar as Rs.6,00,000/-, she had withdrawn Rs.2,00,000/- from State Bank of India and the remaining Rs.4,00,000/- was given by her father. However, her father died seven or eight years before lending Rs.6,00,000/-. She also admitted that she did not mark any evidence to prove her source of money. Therefore, the petitioner rebutted the presumption discharged by the respondent under Section 138 of NI Act by extensive cross examination of PW1. The respondent also failed to prove the passing of consideration to establish the existence of legally enforceable liability which is condition precedent to invoke the presumption available under Section 139 of NI Act. There were serious contradictions between the deposition of PW1 and PW2 and it goes to the root of the case of the complainant. Therefore in the absence of categorical proof beyond all

reasonable doubts, the respondent failed to prove her case. The signature found in the cheque was also disputed by the petitioner and when it being so, the respondent ought to have sent the cheque for handwriting expert opinion to prove her case. The respondent failed to do the same and even then, the courts below convicted the petitioner for the offence punishable under Section 138 of NI Act.

4.1 He further submitted that the respondent did not even whisper about the date of borrowal and date of issuance of cheque. Therefore, the respondent failed to discharge her initial burden as contemplated under Section 138 of NI Act. In support of his contention, he relied upon the following judgments:

(i) ***Basalingappa Vs. Mudibasappa*** reported in ***(2019) 2 ACR 1978***

(ii) ***Rangappa Vs. Sri Mohan*** reported in ***(2010) 11 SCC 441***

(iii)***John K Abraham Vs. Simon C Abraham and Another*** reported in ***(2014) 2 SCC 236***

(iv) ***Krishna Janardhan Bhat*** Vs. ***Dattatraya G. Hegde*** reported in ***2008 1 Supreme 306***

5. Per contra, the learned counsel for the respondent would submit that the respondent discharged her initial burden to prove her case as contemplated under Section 138 of NI Act. In order to disprove the case of the respondent, the petitioner ought to have rebutted the presumption discharged by the respondent by probable defence. However, the respondent failed to disprove the case of the respondent by preponderance of probabilities and as such, the courts below rightly convicted the petitioner for the offence punishable under Section 138 of NI Act. He further submitted that the petitioner never disputed the signature and issuance of cheque and as such, he prayed for dismissal of the criminal revision.

6. Heard, Mr.D.Shivakumaran, the learned counsel for the petitioner and Mr.C.Venkatesan, the learned counsel for the respondent.

7. The respondent lodged complaint for the offence punishable

under Section 138 of NI Act against the petitioner. The crux of the complaint is that the petitioner borrowed a sum of Rs.6,00,000/- on 15.07.2013 and on the same day, he issued post dated cheque dated 16.08.2013. It was returned dishonoured for the reason “funds insufficient”. After causing statutory notice, the respondent lodged complaint. The cheque was marked as Ex.P1. The statutory notice was marked as Ex.P3. On receipt of the statutory notice, the petitioner issued reply notice dated 14.09.2013 which was marked as Ex.P5. On perusal of Ex.P5, revealed that all the allegations made in the statutory notice are denied by the petitioner. Further, the petitioner also denied the signature found in the cheque and issuance of cheque. Since there was no legally enforceable debt in favour of the respondent and as such no need to issue any cheque. Though the petitioner specifically denied the signature and the issuance of cheque, the petitioner did not take any steps to substantiate the said denial before the trial court. He did not file any petition for handwriting expert opinion with regards to Ex.P1.

8. That apart, the petitioner failed to state anything about the

source of income of the respondent to lend such huge sum. The petitioner never stated in the statement recorded under Section 313 of Cr.P.C. with regards to the source of income of the respondent. Only in the cross examination, the petitioner put suggestion about her income. The respondent categorically deposed that she had withdrawn a sum of Rs.2,00,000/- from the State Bank of India and the remaining sum of Rs.4,00,000/- was given by her father. Though her father died seven or eight years before, that is immaterial since while he was alive he had given the said amount.

9. The respondent also deposed that originally his wife demanded the loan. On 15.07.2013, the petitioner and his wife and his brother in law had come to her house and received a sum of Rs.6,00,000/-. In support of the evidence of PW1, the respondent examined PW2, who supported the case of the respondent that he was also present at the time of borrowal of loan. On the date of borrowal of loan, the petitioner issued Ex.P1. The contradictions between PW1 and PW2 are nothing to do with the case of the respondent and it would not be fatal to the case of the respondent. The petitioner was examined as DW1, who deposed that he does not know about

the respondent and he never borrowed any amount from the respondent and he never issued cheque in favour of the respondent. He also denied the signature found in Ex.P1. However, the petitioner failed to substantiate the said evidence by any material. Mere denial would not serve any purpose and it would not amount to rebut the presumption arising out of Section 138 of NI Act since the petitioner failed to rebut the presumption by probable defence. When the petitioner was denying the signature found in the cheque and issuance of the cheque, he ought to have sent for the cheque for handwriting expert's opinion as contemplated under the Evidence Act.

10. Admittedly, the petitioner did not take any steps to send for the cheque for handwriting expert opinion and also failed to place any material on record to disprove the issuance of cheque. The petitioner also filed summons received in the divorce proceedings which were marked as Ex.D1 and Ex.D2. Those are all not at all connected with the present proceedings and it would not serve any purpose to disprove the case of the respondent. Insofar as the initial of the petitioner in Ex.P1, though the petitioner denied the same, it is revealed from court Ex.1 and 2 that the initial put up by the

petitioner in the surrender petition as 'A'. The initial found in the deposition 'A' and subsequently corrected as 'H'.

11. Further, the petitioner had taken the stand that his wife got separated from him even before 3 ½ years. While she was living separately, she had taken the cheque and the said cheque was misused by the respondent and presented the same. However, the petitioner did not lodge any complaint even after receipt of the statutory notice as against his wife or against the respondent herein. It is nothing but after thought and only to escape from the clutches of the proceedings initiated by the respondent under Section 138 of NI Act, the petitioner created new story for his defence. It is nothing to do with the proceedings initiated under Section 138 of NI Act. Therefore, the judgments cited by the learned counsel for the petitioner are not helpful to the case on hand.

12. The learned counsel for the petitioner vehemently contended that the respondent had no source of income to lend such huge money. However, the petitioner failed to substantiate the said contention by any

piece of evidence. In this regard, it is relevant to rely 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. The petitioner failed to make any statement with regards to source of income and failed to even issue any reply notice.

13. 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.

14. Further, in respect of statutory presumption drawn under Sections 118 and 139 of NI Act, it is relevant to rely upon the judgment in the case of ***M/s.Kalamani Tex Vs. P.Balasubramanian*** reported in ***CDJ 2021 SC 098***, wherein it is held as follows:

> *14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become*

*operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat10 in the following words:*

> *"In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellantaccused....."*

*15. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought* *to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay. Such approach of the trial Court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.*

Therefore, once the signature on the cheque is admitted, the obligation shifts upon the accused to discharge the presumption imposed upon him.

15. Hence, the courts below rightly convicted the petitioner for the offene punishable under Section 138 of NI Act and this Court finds no infirmity or illegality in the orders passed by the courts below. Accordingly, this criminal revision is dismissed.

31.10.2022

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

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To
1.The learned III Additional Sessions Judge,
Salem.
2.The learned Judicial Magistrate (Fast Track Court),
Omalur.

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