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CRL.R.C.No.566 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2022

CORAM:

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

CRL.R.C.No.566 of 2018

M.Jyothimani

... Petitioner

Vs.

S.Mahalingam

... Respondent

Prayer: The Criminal Revision case filed under Section 397 r/w 401 of Cr.P.C. praying to set aside the order dated 09.08.2017 passed in C.A.No.3 of 2016 on the file of the II Additional District and Sessions Judge, Tiruppur, in confirming the judgment dated 08.12.2015 in C.C.No.543 of 2012 on the file of the Judicial Magistrate, Avinashi.

For Petitioner : Mr.K.Myilsamy

For Respondent : Ms.P.Abinaya
for Mr.M.Guruprasad

ORDER

This Criminal Revision case has been filed as against the judgment passed in C.A.No.3 of 2016 dated 09.08.2017 on the file of the II Additional District and Sessions Judge, Tiruppur, thereby confirming the judgment passed



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in C.C.No.543 of 2012 dated 08.12.2015 on the file of the Judicial Magistrate, Avinashi, for the offence under Section 138 of Negotiable Instruments Act.

2. The petitioner is an accused in the complaint lodged by the respondent. The crux of the complaint is that the petitioner borrowed a sum of Rs.15,00,000/- for her urgent expenses and in order to repay the said amount, she issued a cheque, when the said cheque was presented for collection, the same has been returned dishonored for the reason "funds insufficient". Thereafter, the respondent caused legal notice to the petitioner and lodged a complaint.

3. On the side of the respondent PW1 was examined and Exs.P1 to 5 were marked as Exhibits and on the side of the petitioner, DW1 and DW2 were examined and Exs.D1 to 7 were marked as Exhibits.

4. On perusal of oral and documentary evidence on either side, the trial Court found the petitioner guilty for the offence under Section 138 of NI Act, and sentenced him to undergo six months simple imprisonment and also awarded compensation of cheque amount. Aggrieved by the same, the petitioner preferred an appeal and the same was dismissed and confirmed the conviction imposed by the trial Court.



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5. The learned counsel for the petitioner vehemently contended that the said cheque was not at all issued in favour of the respondent for any legally enforceable debt since the petitioner never borrowed any amount from the respondent. Therefore, no consideration was passed for issuance of cheque. DW2, who is none other than her son, admittedly, the respondent had transaction with DW2 in respect of the property, the respondent executed three Power of Attorneys in respect of different properties, which were marked as Exs.D1 to 3 to deal with the said properties. Accordingly, DW2 obtained approval from the Panchayat and layout the said property. Thereafter, on the strength of the Power of Attorney, he also executed sale deed in favour of various persons and those sale deeds were marked as Ex.D5 to 7. Further, the said cheque was filled up by the complainant which shows that the ink which was used to fill up the cheques. That apart, the respondent has no source of income to lend such a huge amount of Rs.15 lakhs. Further, without considering those aspects, the Court below convicted the petitioner for the offence under Section 138 of NI Act.

6. On a perusal of records revealed that the petitioner borrowed a sum of Rs.15 lakhs from the respondent and in order to repay the said amount, he issued a cheque. After receipt of a statutory notice, the petitioner failed to reply



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to rebut the evidence of the respondent herein. However, the petitioner came before the trial Court with a defence that she never borrowed loan from the respondent herein. The alleged cheque, which was marked as Ex.P1, was not issued for any consideration in favour of the respondent herein. The said cheque was misused by the respondent for no consideration. He further contended that the signed cheque was used by her son to avail loan from the private financier, from the said private financier the said cheque was handed over to the respondent and the same was misused for lodging a complaint for the offence punishable under Section 138 of NI Act.

7. Further to substantiate the said contentions, the petitioner failed to adduce any evidence and failed to produce any piece of evidence to rebut the case of the respondent herein. Though, the petitioner had taken a stand that the respondent had no source of income to lend a huge amount of Rs.15 lakhs; Firstly, the petitioner failed to reply for the statutory notice. Secondly, she did not even make any statement recorded under Section 313 Cr.P.C, that the respondent had no source of income to lend such a huge amount.

8. In respect of source of income, it is relevant to rely upon the judgment reported in **2022 SCC OnLine SC 302** in the case of **Tedhi Singh Vs. Narayan**



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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.

9. 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



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consideration received. It is in the context of this provision that the theory of probable defence has grown.

10. Thus it is clear that the petitioner failed to rebut the evidence of the respondent herein. In so far as, the difference in filling up of Ex.P1 is concerned, the complainant can very well fill up the cheque for the legally enforceable debt. That apart, to verify the difference in the ink used to fill up the cheque, there is no laboratory available in our country. In respect of the transaction between the respondent and the DW2, who is none other than the own son of the petitioner is concerned, admittedly, the respondent executed three Power of Attorneys in respect of the three different properties in favour of the DW2. In pursuant to the execution of Power of Attorneys, he obtained approval from the Panchayatars to layout the land and executed sale deeds in favour of their parties. However, it has nothing to do with the transaction between the petitioner and the respondent. In fact, it is also clear that the respondent had no source of income to lend a huge amount of Rs.15 lakhs in favour of the petitioner herein.

11. This Court, while suspending the sentence of the petitioner, imposed a condition that the petitioner shall deposit 30% of the amount awarded by the



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trial Court. However, the petitioner failed to comply with the said condition even till today. Therefore, both the Courts below rightly found the petitioner guilty for the offence under Section 138 of NI Act and this Court finds no infirmity or illegality in the orders passed by the Courts below.

12. Accordingly, the Criminal Revision case stands dismissed.

13.10.2022

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Index : Yes / No

Speaking / Non Speaking order

To

1. The Second Additional District and Sessions Court,
Tiruppur.
2. The Judicial Magistrate,
Avinashi.



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G.K.ILANTHIRAIYAN, J.
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