BEFORE THE MADURAI BENGH OF MADRAS HIGH COURT

RESERVED ON : 04.04.2022

PRONOUNCED ON : 07.04.2022

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C(MD)No.335 of 2021

R.Uma ... Petitioner/Appellant/Accused

Vs.

G.Lenin Muthu ... Respondent/Respondent/Complainant

PRAYER: Criminal Revision Case filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records of the learned II Additional District and Sessions Judge, Thanjavur in C.A.No.34 of 2019, dated 04.01.2021, confirming the Judgment and conviction of the learned Fast Track Judicial Magistrate, Thanjavur in S.T.C.No.52 of 2016, dated 27.02.2019 and set aside the judgment and conviction of the Courts below.

For Petitioner : Mr.A.Saravanan

For Respondent : Mrs.M.P.Roniga

ORDER

This revision is directed as against the order passed in C.A.No.34 of 2019, dated 04.01.2021 on the file of the learned II Additional District and Sessions Judge, Thanjavur, confirming the order passed in S.T.C.No.52 of 2016, dated 27.02.2019 on the file of the learned Fast Track Judicial Magistrate, Thanjavur, thereby convicted the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

2.The respondent lodged a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act as against the petitioner herein alleging that the petitioner borrowed a sum of Rs.7,00,000/- on 10.02.2014. She also assured that she will pay the interest at the rate of 24% per annum. After repeated request, on 20.08.2015, in order to repay the said amount along with interest, she issued cheque for a sum of Rs.8,50,000/-. The said cheque was presented for collection and the same was returned dishonoured for the reason that the 'funds insufficient'. Thereafter, the respondent issued statutory notice as required under Section 138 of the Negotiable Instruments Act and lodged the complaint.

3.On the side of the respondent, he himself was examined P.W.1 and marked Ex.P.1 to Ex.P.5 and on the side of the petitioner, no one was examined and no documents were marked.

4.On a perusal of oral and documentary evidence, the trial Court found that the petitioner was guilty and sentenced her to undergo simple imprisonment for the period of three months and also awarded compensation for a sum of Rs.8,50,000/- under Section 357(3) of Cr.P.C. Aggrieved by the same, the petitioner preferred an appeal and the first Appellate Court confirmed the conviction and sentence imposed by the trial Court. Challenging the same, the petitioner has filed the present revision petition.

5.The learned counsel appearing for the petitioner would submit that the petitioner is a stranger to the respondent herein and she never parted any loan from the respondent as alleged by the respondent herein. There was absolutely no money transaction between them. The petitioner had money transaction only with the uncle of the respondent herein. When the petitioner borrowed loan from the uncle of the respondent in the year 2012, at the time of borrowal of loan, she had issued the alleged cheque which was marked as Ex.P.1 for security and also executed pro-note. Both were signed by the petitioner in the unfilled form of cheque and pro-note. After repaying the entire loan amount, the uncle of the respondent failed to return the cheque and pro-note and the same were handed over to the respondent and to extract more money, the respondent filled up the cheque and also filled up the pro-note and lodged the complaint for the offence punishable under Section 138 of the Negotiable Instruments Act. In fact, the respondent did not even whisper about the pro-note allegedly executed by the petitioner in favour of the respondent in the statutory notice as well as the complaint. When the respondent was examined as P.W.1, he suddenly marked the pro-note as Ex.P.5, dated 10.02.2014. Further, the respondent had no source of income to lend a huge sum of Rs.7,00,000/-. That apart, no prudent man will lend such a huge sum without any execution of other document such as pro-note. At the time of lending loan, the respondent was in abroad and he had no source of income to lend such a huge amount. The petitioner categorically rebut the evidence of the respondent by cross-examination and as such, the burden again shifted to the shoulder of the respondent to prove his case beyond doubt. The respondent failed to prove his case after rebutting the evidence of the respondent. Unfortunately, both the Courts below did not consider the same and convicted the petitioner herein. He further submitted that the petitioner is a staff nurse and she is residing at Chennai. There is absolutely no need for her to go to Thanjavur and borrow the amount from the respondent, who is the permanent resident of Thanajvur.

6.The learned counsel appearing for the petitioner would further submit that the respondent also failed to prove the existing liability between the petitioner and the respondent. The respondent also did not whisper about the date on which, the petitioner borrowed loan and failed to mention the time and place of borrowal of loan. In support of his contention, he relied upon the Judgment of the Honourable Supreme Court of India in ***Crl.A.No.636 of 2019 in the case of Basalingappa Vs. Mudibasappa***, in which the Honourable Supreme Court of India held that non-production of any document by the complainant to show his earning and the complainant has not executed any document before lending such huge amount to the accused. Such circumstances raises serious doubt on the transaction as claimed by the complainant. Thus, the accused satisfied that she has raised a probable defence and the findings of the trial Court that the complainant failed to prove his financial capacity are based on the evidence led by the defence.

7.The learned counsel appearing for the petitioner also relied upon the Judgment of this Court in the case of ***Ramkumar Vs. Chelladurai (2022 (1) MWN (Cr.) DCC 28 (Mad.))***, in which this Court held that the liability to repay an unaccounted loan amount admittedly not disclosed in Income-Tax Returns cannot be legally recovered liability. If such a liability is held to be legally recoverable debt, it will rendered the explanation to Section 138 of the Negotiable Instruments Act.

8.Per contra, the learned counsel appearing for the respondent would submit that the signature and issuance of cheque are not disputed by the petitioner. If at all the petitioner had taken a stand that she is a stranger to the respondent and she never borrowed any loan from the respondent, definitely she would have issued reply notice after receipt of the statutory notice dated 27.08.2015. The petitioner did not issue any reply notice on the statutory notice issued by the respondent. The petitioner also failed to examine any witness to rebut the evidence of the respondent herein and also failed to mark any documents in support of her contention. The petitioner also failed to make a statement under Section 313 of Cr.P.C about the denial of borrowal and denial of issuance of cheque. She simply stated that the respondent lodged false complaint. Even according to the petitioner, she borrowed loan in the year 2012 from the uncle of the respondent herein, it is obvious that without knowing the respondent she could not state that she borrowed loan only from the uncle of the respondent herein. Therefore, both the Courts below rightly convicted the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

9.Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent and perused the materials available on record.

10.According to the respondent, the petitioner borrowed a sum of Rs.7,00,000/- and also assured that she will pay interest at the rate of 24% along with principal amount. In order to repay the same, she issued cheque dated 20.08.2015 for a sum of Rs.8,50,000/-, which was presented for collection and the same was returned dishonoured for the reason that 'funds insufficient'. After causing statutory notice, lodged the complaint. The statutory notice dated 27.08.2015 was duly received by the petitioner by the acknowledgment dated 01.09.2015, which was marked as Ex.P.4. Though the petitioner had taken specific stand while cross-examining the respondent that the respondent is a stranger to her and she never borrowed any loan from the respondent as alleged in the complaint, the petitioner failed to issue any reply notice. She also failed to examine any one of the witness to substantiate her contention that she borrowed loan only from the respondent's uncle in the year 2012 and at the time of borrowal of loan, she had given Ex.P.1 and Ex.P.5 for security purpose. Further, the learned counsel appearing for the petitioner vehemently contended that while borrowing the alleged loan that too such a huge amount, no prudent man will leave the borrower without execution of any document. Further, he contended that the respondent failed to account the amount which was lent by her and he has also failed to show in the income tax returns and as such, it is unaccounted money and it is not legally recoverable one. However, the petitioner failed to mark any of the document and failed to examine any of the witnesses to substantiate these contentions before the Court below or before the first Appellate Court. The petitioner also had taken a specific stand that the respondent had no source of income to lend such a huge sum. However, the petitioner failed to make any statement when she was questioned under Section 313 of Cr.P.C.

11.In this regard it is relevant to rely upon the Judgment of the Honourable Supreme Court of India in ***Crl.A.No.362 of 2002 in the case of Tedhi Singh Vs. Narayan Dass Mahant***, in which the Honourable Supreme Court of India held that unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. However, the accused has 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 to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

12.This Court has gone through the nature of the evidence. In the case on hand, admittedly, the petitioner failed to issue reply notice for the statutory notice caused by the respondent herein. The petitioner also failed to examine any witness and failed to mark any document to substantiate her contention except the cross-examination.

13.On a perusal of cross-examination of P.W.1 also revealed that all the suggestions put up by the petitioner were denied by the respondent. In fact, the signature and issuance of cheque were categorically admitted by the petitioner herein. As held by the Honourable Supreme of India, if at all the petitioner wanted to take a specific stand that the respondent had no source of income to lend such a huge amount, the petitioner has to demonstrate that the complainant did not have capacity.

14.As stated supra, admittedly, the petitioner failed to establish the same. It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of 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. In the case cited by the learned counsel appearing for the petitioner in ***Crl.A.No.636 of 2019 in the case of Basalingappa Vs. Mudibasappa,*** the Honourable Supreme Court of India held that Section 139 of the N.I. Act is an example of reverse onus. It is also true that the accused is not expected to discharge an unduly high standard of proof. Accordingly the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist.

15.In the case on hand, as stated supra, the petitioner failed to establish her probable defence except cross-examination of P.W.1. Therefore, the Judgments cited by the learned counsel appearing for the petitioner are not helpful to the case on hand. The failure to whisper about Ex.P.5 in the complaint and the statutory notice is not the fatal to the case of the respondent herein. It is only a supportive document and as stated supra, the issuance of cheque itself the Court presume that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. Therefore, the Courts below rightly convicted the petitioner herein for the offence under Section 138 of the Negotiable Instruments Act. Hence, this Court finds no infirmity or illegality in the order passed by the Courts below. Accordingly, this Criminal Revision Case is dismissed.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The II Additional District and Sessions Judge,
Thanjavur.

2.The Fast Track Judicial Magistrate,
Thanjavur.

Copy to:
The Section Officer,Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.P. RONIGA, Advocate (SR-17659[F] dated 08/04/2022)

+1 CC to M/s.A. SARAVANAN, Advocate (SR-17266[F] dated 07/04/2022)

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MGJ(27.04.2022) 6P 7C