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Crl.A.No.79 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :11.04.2023

Pronounced on :21.04.2023

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THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.79 of 2020

D.Eswaramoorthy

.. Appellant

/versus/

Archana Sabarwal

.. Respondent

Prayer : Criminal Appeal has been filed under Section 378 of Cr.P.C., to set aside the judgment dated 28.09.2018 passed in C.A.No.69 of 2018 on the file of the Court of Second Additional District Sessions Judge, Erode reversing the judgment dated 07.02.2018 passed in S.T.C.No.157/2017 on the file of the Judicial Magistrate, Fast Track Court No.1, Erode by allowing the present appeal and convict the respondent in accordance with law.

For Appellant :Mr.M.Karthik

For Respondent : Mr.L.Mouli

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JUDGMENT

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The police referred by one Eswaramoorthy, who is the complainant in S.T.C.No.157 of 2017 on the file of Judicial Magistrate, Fast Track Court No.1, Erode.

2. A complaint under Section 138 of the Negotiable Instruments Act, 1881 was filed by the appellant herein alleging that the respondent/Archana Sabarwal, on 05.12.2015 approached him for a hand loan of Rs.8,00,000/- to meet out her business purpose and received it. To discharge the said loan, she gave a post dated cheque dated 21.01.2016 drawn on State Bank of Patiala, R.S.Puram, Coimbatore bearing No.832537 for Rs.8,00,000/- and promised that the cheque will be honoured on presentation and also she promised to pay 12% interest for the loan amount. When the cheque was presented on 21.01.2016 at Erode District Central Co-operative Bank, where the complainant have account, the cheque was returned for “insufficient of fund” along with the memo dated 27.01.2016. Immediately, on receipt of the returned cheque the complainant sent a notice through his counsel on 02.02.2016 calling upon the accused to pay the cheque amount or else to face the consequence. The



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respondent received the registered notice on 10.02.2016 but failed to reply. Therefore the complaint was filed and the same was taken on file by the Judicial Magistrate, Fast Track Court No.I, Erode and assigned S.T.C.No.157 of 2017.

3. To prove the averments made in the complaint, the complainant examined himself and his daughter Ruby to show that, he had sufficient source to advance the loan amount of Rs.8 lakhs and cheque marked as Ex.P1 was issued by the respondent to discharge the loan amount. The return memo, notice copy and title deed of the property held by the complainant were marked as other exhibits to show income and the salary certificate of PW2 was marked as Ex.P-7.

4. In defence, the respondent mounted the witness box and marked four exhibits to show that she sold her properties between the months of April and December 2014 and had sufficient fund in her hand. Hence, she had no necessity to borrow Rs.8,00,000/- from the complainant. It is also contended by the respondent that the said cheque Ex.P1 was not issued by her and the signature found in it was not her signature. She had no



acquaintance with the complainant and she does not know him.

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5. The trial Court however found that the defence taken by the accuse has not been properly proved by the defence and having not proved that the cheque was not signed by her, the presumption against her squarely attracts.

6. Aggrieved by the said judgment, the respondent preferred appeal before the II Additional District and Sessions Judge, Erode in C.A.No.69 of 2018. The Appellate Court after reappreciated the evidence held that the foundation fact that a sum of Rs.8 lakhs was advanced to the accused not proved. No corroboration to support the case of the complainant about the debt. The accused in the cross-examination stated that the cheque was given to her husband and she is not aware how the cheque reached the complainant. The lower appellate Court admitting and accepting the explanation given by the accused that by selling a property she had sufficient fund is in her hand and there was no necessity for her to borrow money to improve her business reversed the finding of the trial Court and acquitted the appellant/accused.



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7. Being aggrieved by the reversal judgement, the present appeal is filed by the complainant.

8. The learned counsel appearing for the appellant submitted that the accused on receipt of the statutory notice did not reply. Later, she contended that the signature in the cheque is not her signature and it was not issued by her to discharge any liability. However, she did not take steps to send the cheque for signature comparison. The trial Court on seeing the signature found in the cheque and in the sale deed marked as Exs.D1 & D2, found that they look similar in the naked eye. In the cross examination she had admitted that she signed the cheque and given to her husband. She does not know how it reached the hands of the complainant. The accused having candidly admitted that the cheque is signed by her. The burden to rebut the presumption falls on her. PW-1-the complainant had disposed that he is involved in real estate business and in the course of the business transaction, he had acquaintance with the husband of the accused, and in that context, loan was availed. His evidence is more probable and having failed to prove that the cheque was not issued by her



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the trial Court rightly held her guilty. Whereas the lower appellate Court erroneously shifted the burden on the complainant and in spite of producing documents to show his source of income to lend Rs.8 lakhs, the same has been disbelieved by the appellate Court, hence sought for reversal of the findings given by the lower appellate Court and pray to restore the judgement of sentence and conviction imposed by the trial Court.

9. The learned counsel appearing for the respondent/accused submitted that when two views are possible, the view in favour of the accused to be taken. The appellant Court has rightly gone into the merits of the evidence and found that the complaint had a small extent of land and the agriculture income from out of the land not sufficient to lent Rs.8 lakhs as loan. Further, PW-2 the daughter of the accused, who claims that she has income of around Rs.34,000 per month and she used to give her savings to her father through bank transaction, failed to mention or produce the documents, how the money was transferred to the complainant. Further, in the cross-examination, she admits that she does not know the bank account number of her father. The complainant who



claims that he had surplus of Rs.8 lakhs to lend the money for interest had admitted that he is not an income tax assessee and he does not maintain any accounts. Therefore, having failed to prove the foundational fact of source for Rs.8,00,000/- to lend money on a particular day or the borrowing of the accused or the cheque was given to discharge the money borrowed, the judgement of the lower Court is more probable and is based on the probability projected by the accused and therefore needs no interference.

10. The point for determination is whether the foundational fact that Ex.P1 cheque for Rs.8 lakhs given by the respondent was to discharge the existing liability.

11. According to the complaint, Ex.P1 the post dated cheque was given on 5.12.2015 at the time of borrowing the money. The return memo Ex.P2 shows that the cheque was returned since there was no sufficient fund in the account maintained by the respondent. It is to be noted that the cheque was not returned on the ground of signatures vary but only for insufficient of fund, Ruby the complainant's daughter examined as PW-2



through the property document and the salary certificate had placed before the court that there was source of income for the complainant. The complainant (PW-1) and his daughter (PW-2) by mounting the witness box had disclosed the source. On the side of the accused being examined as DW1, she claims the cheque which is marked as Ex.P1 was not signed by her. She had no necessity to borrow Rs.8 lakhs from the complainant. Few months prior to the alleged borrowing, she sold property to 3 different persons under sale deeds Exs.D1 to D3 to a tune of Rs.2 crore. Therefore the allegation that during the month of December 2015, she borrowed Rs.8 lakhs and promised to pay it on 21.01.2016 is improbable. Relying upon the income tax returns for the financial year 2012-13, 2013-14, 2014-15, she claims that she had enough income and no necessity to borrow.

12. To know whether the said defence is sufficient to hold the accused, discharged the burden of rebuttal, the sale deeds Exs.D1 to D3 indicates she sold her properties between April to December year 2014 for totally for a tune of Rs.2,43,00,00. This may lead to an interference that the respondent was in distress and therefore selling her property.



Therefore, it is probable that should have also borrowed Rs.8 lakhs with the promised to repay within a month and given the post dated cheque marked as Ex.P1. The other probability is that having sufficient fund in her hand by selling her properties, there is no necessity for her to borrow money from the complainant.

13. If the second probability is to be believed, then the respondent should also proved that the cheque was not signed by her and not given by her to the complainant to discharge her liability. Whereas in the cross-examination the respondent admits that she does not know to whom she gave the cheque. Only her husband know about it. She has not taken any steps for retrieving the misplaced signed cheque. She admits that the notice sent to her company address was received by her, but she has not replied to the notice which is normally expected from any person who receives a statutory notice under Section 138 of Negotiable Instruments Act, 1881. Therefore, the defence taken by the respondent regarding the genuineness of the cheque as well as the liability fails and is not sufficient to probablist an acceptable defence. It is only a denial of liability that too much late without taking steps to prove the fact that the cheque was not



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signed by her. There is no material to show that the banker has returned the cheque for variation in the signature found in the cheque. Therefore, the defence that the cheque was not drawn by her falls to ground for want of proof. Therefore, the Court finds that the accused failed to rebut the presumption whereas the complainant through Exs.P1 to P7 as well as through his own deposition and the deposition of his daughter (PW2) has proved the complaint averments. Hence, the finding of the trial Court holding guilty of the accused for the offence under Section 138 of the NI Act, has to be restored.

14. As far as the sentence of 6 months SI and compensation of Rs.8lakhs payable to the complainant and in default one month SI is concerned, this Court is of the view that the accused being a widow, she may be given an opportunity to avoid imprisonment if she pay the cheque amount with some additional amount as compensation within a specific period.



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15. As a result, **this Criminal Appeal is Party allowed** and the judgment of the II Additional District and Sessions Court, Erode in C.A.No.69 of 2018, dated 28.09.2018, is set aside and the judgment of the Judicial Magistrate, Fast Track Court No.1, Erode in S.T.C.No.157 of 2017, dated 07.02.2018, is confirmed in part. The trial Court shall secure the accused and commit her to the prison to undergo 6 months SI, for default, if she fails to pay the compensation of Rs.10,00,000/- within a period of 8 weeks from the date of this order.

21.04.2023

Index:yes/no
Speaking order/non Speaking order
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To:

- 1.The Second Additional District Sessions Judge, Erode.
- 2.The Judicial Magistrate, Fast Track Court No.1, Erode.
- 3.The Public Prosecutor, High Court, Madras.



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Dr.G.JAYACHANDRAN, J.

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delivery judgment made in
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