



CrI.A.No.156 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on: 13.04.2023

Pronounced on:25.04.2023

CORAM

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN**

**Criminal Appeal No.156 of 2020**

V.Ezhilvanan

.. Appellant

/versus/

Mr.R.Pugazhendhi

.. Respondent

Prayer: Criminal Appeal has been filed under Section 378 of Cr.P.C., praying to set aside the order of the I Additional District and Sessions Judge, Tiruvallur dated 18.11.2019 in CrI.A.No.40 of 2018 and restore the order of conviction and sentence passed by the Judicial Magistrate, Fast Track Court (Magistrate Level) Ambattur dated 12.07.2017 in Summary Trial Case No.12 of 2016.

For Appellant :Mrs.Nalini Chidambaram  
Senior Counsel for  
Mrs.C.Uma

For Respondent :Mr.K.Kannan



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## **J U D G M E N T**

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The private complaint filed under Section 138 of the Negotiable Instruments Act, 1881 alleging that from the complainant, the accused used to borrow upto Rs.50,000/- regularly and repay it back with 24% interest. Thereby, the accused gained confidence and the total borrowing on several occasions in the year 2008 reached Rs.9,80,000/-. The accused then stopped repaying. After much pursuation to discharge the loan, in the month of April 2009, he gave the post dated cheque bearing No:342942 for Rs.9,80,000/- drawn on Axis Bank, Anna Salai Branch, Chennai-2. The said cheque dated 20/05/2009 was presented for collection, but returned on 18/06/2009 with the endorsement “Account Frozen”. The complainant caused statutory notice through his counsel calling upon the accused to pay the cheque amount or will be facing prosecution under Section 138 of the Negotiable Instruments Act, 1881. The accused received the notice on 22/06/2009 but did not reply.

2. The private complaint taken on file by the Judicial Magistrate, Ambattur. Later, on constitution of Fast Track Court, it was transferred to Fast Track Court, Ambattur and renumbered as S.T.C.No:12/2016. Before



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the trial Court, the complainant was examined as PW-1. The cheque, return memo, copy of the statutory notice and the acknowledgment card were marked as Ex.P-1 to Ex.P-4. On behalf of the accused, no ocular or documentary evidence filed. However, in the cross examination of PW-1, the accused denied the liability and projected a defence that the cheque was given to the brother of the complainant as security in exchange of the credit card of the complainant brother. After the demise of his brother, the complainant had misused the cheque by filling it for Rs 9,80,000/-. Further the cheque was not honoured because the account was frozen. Therefore, Section 138 of the Negotiable Instruments Act, 1881 will not get attracted.

3. The trial Court held the accused having admitted the issuance of the cheque, failed to probablize his defence through evidence. The suggestions and admissions in the cross examination of PW-1 does not satisfy the requirement of a rebuttal to the statutory presumption. The reason why his account was freezed was not explained by the accused. Taking note of the fact that the accused failed to give reply to the statutory notice, he did not adduce evidence to substantiate the defence that the cheque was issued as security to the brother of the complainant in lieu of



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using the credit card of his brother. Hence, held the accused guilty of offence under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to undergo 7 months SI and to pay compensation of Rs.9,80,000/- being the cheque amount within one month in default one month SI.

4. On appeal by the accused, the I Additional District and Sessions Judge, Tiruvallur in Crl.A.No.40/2018 vide, order dated 18<sup>th</sup> November 2019 reversed the trial Court judgment and set aside the conviction and sentence. The appellate Court observed that the complaint is vague about the payment of money to the accused. No details about the dates and amount advanced to the accused during the year 2008, which fall overdue and payable. The complaint which lacks material particulars and bereft of details besides absence of proof of the foundational facts, is liable to be dismissed.

5. Being aggrieved, this Criminal Appeal is filed by the complainant. The learned Senior Counsel appearing for the appellant/complainant



argued primarily on the ground that, to sustain a complaint under Section 138 of the Negotiable Instruments Act, 1881, the proof of issuance of cheque by the accused is the foundational fact. In this case, the accused admits that the cheque Ex.P-1 was issued by him and he is not disputing the signature in it. The case of the accused is that the cheque was given to the brother of the complainant. When he gave the signed cheque, it was blank otherwise. So, admitting the issuance of cheque and taken the defence that the cheque was given to the brother of the complainant for different reason, the burden to prove that fact shifts on the accused.

6. By way of cross examination, the accused had suggested to PW-1 (complainant) that the cheque was not given to the complainant, but to the brother of the complainant as security for permitting him to use the credit card of the complainant's brother. If that is true at least the accused should have produced the credit card details which he was using. To believe that the cheque was given to the person, who is no more and claiming that as a security for using the credit card of the said person, the blank cheque was given, the accused ought to have placed evidence to probablize the said defence. While there is no evidence to that effect, the trial Court has rightly



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convicted the accused whereas the lower appellate Court reversed the trial Court judgment and the same is perverse contrary to law and facts.

7. Per contra, the learned counsel for the respondent/accused submitted that the lower appellate Court having found that Ex.P1 to Ex.P4 and the oral evidence of the complainant are not sufficient to prove the foundational fact of liability. In the absence of date and amount of borrowing, the complaint suffers bereft of material facts. The complainant not placed document to show that he and the accused had any financial transaction previously. The alleged compromise entered pending appeal cannot be considered as a confession or admission of the liability.

8. In support of his argument, the learned counsel for the respondent/ accused placed the judgement of the Hon'ble Supreme Court rendered in *John K.John –vs- Tom Vargheese and another* reported in *[(2007)12 SCC 714]* and submitted that the dictum laid by the Hon'ble Supreme Court in that case squarely applies to the case in hand.

9. The principle of law is now well settled. Before drawing statutory



presumption under Section 139 of the Negotiable Instruments Act, 1881, the Court should satisfy whether the complainant has placed details about the foundational fact and evidence to prove it. The foundational facts are the proximity between the parties, the nature of transaction leading to liability and the subject cheque given to discharge that liability. If the complainant *prima facie* satisfy the Court providing the above details either in the notice or in the complaint or through documentary evidence, the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881 should be drawn. In the absence of material to substantiate the foundational fact, presumption under Section 139 of the Negotiable Instruments Act, 1881 cannot be drawn merely because the signature found in the cheque is that of the accused.

10. In the complaint nor in the deposition, the complainant has mentioned the place, dates or amount. A vague averment that on various dates the accused borrowed money from him without any evidence for the alleged loan and the financial proximity between them.

11. In the judgment of ***John K.John –vs- Tom Vargheese and***



**another** reported in **[(2007)12 SCC 714]** relied by the respondent/accused

and cited supra, the Hon'ble Supreme Court has observed that,

*“Presumption raised in terms of Section 139 of the Act is rebuttable. If, upon analysis of the evidence brought on record by the parties, in a fact situation obtaining in the instant case, a finding of fact has been arrived at by the High Court that the cheques had not been issued by the respondent in discharge of any debt, in our opinion, the view of the High Court cannot be said to be perverse warranting interference by us in exercise of our discretionary jurisdiction under Article 136 of the Constitution. The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the Court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only had no document been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent was not even in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the*



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*respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken.”*

12. In the case under consideration also, the complainant though claims, he used to lend money to the accused and collect it with interest and advanced loan on various dates to the accused, no instrument for borrowing or discharge of the loan due in part or full produced. The appellant has failed to place the material facts, which require to prove money transaction. Except the signed cheque, return memo, the statutory notice and the Acknowledgment of receipt of the notice, there is no other evidence to infer, there was transaction between the accused and the complainant as averred in the complaint and in PW-1 testimony. When the accused through cross examination of PW-1 had probablaised his case that the cheque given only to the brother of the complainant and that been misused. On behalf of the complainant, no evidence placed before the Court that the cheque was given to the complainant for discharge of an existing debt.

13. The Omission to reply to the statutory notice or the agreement to settle the dispute pending appeal cannot be taken adverse to the accused.

Whether to reply to the notice or to the suggesting settlement are the



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prerogative of the persons accused of any offence. The responsibility of the complainant under Section 138 of the Negotiable Instruments Act, 1881 to prove the foundational facts cannot be shifted for these reasons. The Court shall exercise its discretion of drawing the presumption, if the necessary foundational facts are proved. Without proof of foundational fact, the Court cannot draw presumption contemplated under Section 139 of the Negotiable Instruments Act, 1881.

14. Therefore, this Court finds the lower appellate Court has rightly concluded that Ex.P-1 to Ex.P-4 along with the testimony of PW-1 not adequate to prove the foundational facts.

15. As a result, **this Criminal Appeal is dismissed.** The judgment of the trial Court namely, the Judicial Magistrate, Fast Track Court (Magistrate Level) Ambattur made in S.T.C.No.12 of 2016, dated 12.07.2017 is set aside. The Judgment of the lower appellate Court namely, I Additional District and Sessions Court, Tiruvallur dated 18.11.2019 is confirmed.



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Index:yes/no

Speaking order/non speaking order

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To:

1.I Additional District and Sessions Court, Tiruvallur.

2.The Judicial Magistrate, Fast Track Court (Magistrate Level) Ambattur.

Dr.G.JAYACHANDRAN, J.

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delivery Judgment made in  
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