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Crl.R.C(MD)No.670 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.06.2023

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C(MD)No.670 of 2018

1. M/s.Arrow Fashions
Rep.by its Managing Partner
A.Joseph Gnanarajan Arivarasu
No.8/2A, Sengunthapuram, 6th Cross
Karur-2

2.A.Joseph Gnanarajan Arivarasu

....Petitioners

Vs.

Md.A.Tajudeen

... Respondent

PRAYER: Criminal Revision Case filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to set aside the order of judgment of conviction and sentence imposed upon the appellants by the Mahalir Neethimandram(Fast Track Mahila Court) Karur in Criminal Appeal No. 92 of 2017 dated 27.07.2018, whereby convicting and sentencing the first appellant to pay a fine of Rs.1000/- and sentencing the second appellant to undergo six months simple imprisonment by reversing the order of acquittal passed by the learned Judicial Magistrate, Fast Track Court at Magisterial Level , Karur in STC No.1048 of 2011 dated 21.07.2015.



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For Petitioners : Mr.K.Suresh
For Respondent : Mr.K.Suyambulinga Bharathi
for Mr.R.Tamilvanan

ORDER

This revision has been filed to set aside the order of judgment of conviction and sentence imposed upon the appellants by the learned Additional Sessions Judge, Fast Track Mahila Court, Karur in Criminal Appeal No. 92 of 2017 dated 27.07.2018 reversing the order of acquittal passed by the learned Judicial Magistrate, Fast Track Court (Magisterial Level) , Karur in STC No.1048 of 2011 dated 21.07.2015.

2. The petitioners herein were arrayed as A1 and A2 in the complaint lodged by the respondent herein for the offence under section 138 of the Negotiable Instrument Act.

3. The crux of the complaint is that, the respondent is the proprietor of Aathikaa Textiles and doing business in handloom, textile and other businesses incidental thereto. The first appellant is a registered partnership firm doing textile business and the second appellant being Managing Partner of the firm and doing business along with one another and they involved in day to day business affairs and the management of the first accused firm. During the course of business transaction, the first accused firm is liable to



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pay a sum of Rs.7,77,529/- as on 31.12.2008 to the complainant. In order to settle the above said dues, the first appellant issued two post dated cheques dated 18.02.2009 for a sum of Rs.7,77,529/-. Both the cheques were presented for collection on 08.05.2009. However, it was returned having dishonoured, for the reason 'insufficient funds'. After causing statutory notice, the respondent filed the complaint.

4. On the side of the respondent, he had examined three witnesses and marked exhibits Exs.P.1 to P.16. On the side of the accused, he was examined as D.W.1 and Court witnesses were also examined as Ex.X.1 to Ex.X.7.

5. On perusal of the oral and documentary evidence, the trial court found the accused persons not guilty for the offence under section 138 of the Negotiable Instrument Act and acquitted them. Aggrieved over the same, the respondent filed an appeal and while allowing the appeal the appellate court had convicted the first accused and directed the second accused to pay a fine of Rs.1000/- on behalf of the first accused in default of payment of which the second accused shall undergo simple imprisonment for one month and the second and third accused are convicted and sentenced to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1000/- each in default of payment of which they shall undergo simple imprisonment for a



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further one month. Aggrieved over the same, the present revision has been filed by the first and second accused alone. The third accused did not file any revision so far. At the same time, the respondent did not take any steps to execute the order of the first appellate court as against the third accused.

6. The learned counsel for the appellants would submit that admittedly the first accused had business transaction with the respondent with regard to the textile business. As per Ex.P.12 and 13, the accused were having outstanding liability to the tune of Rs.7,83,121/-, whereas, two cheques were issued for a total sum of Rs.7,77,529/-. If at all, there is liability on the part of the accused, they would have issued single cheque, whereas, both cheques were given for security at the time of commencement of business transaction between them. Even after presentation of the alleged cheques, the accused had issued another cheque for a sum of Rs.2 lakhs and the same was honoured on 18.03.2009 itself. Another cheque was also issued for a sum of Rs.2,10,000/- and the same was returned as dishonoured. Thereafter, the statutory notice had been issued and the same amount was also settled by the second petitioner herein. Even then the said amount was not deducted by way of specific endorsement, as contemplated under section 56 of the Negotiable Instrument Act. Therefore, without making any endorsement to the subsequent payment made, the respondent initiated proceedings under section 138 of the Negotiable Instrument Act. As such,



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conviction cannot be sustained as against the petitioners. In support of his contention, he relied on the judgment of the Hon'ble Supreme Court, in the case of ***Dashrathabhai Trikambahi patel .vs. Hitesh Mahendrabhai patel*** and another in ***Criminal Appeal No.1497 of 2022***.

7. Per Contra, the learned counsel for the respondent contended that the respondent, discharged his initial burden as contemplated under section 138 of the Negotiable Instrument Act. The petitioners categorically admitted their signatures found in the cheques and issuance of cheques. Therefore, the petitioners ought to have rebutted the presumption as contemplated under section 118 and 139 of the Negotiable Instrument Act in the manner known to law. However, they failed to rebut the presumption. As such, the trial Court convicted them and it does not require any interference by this Court. He further submitted that before the court below, A1 and A2 engaged separate counsel and A3 engaged separate counsel due to the dispute between them. However, during cross examination, the third accused explained about the subsequent payment made by him, in respect of separate transaction and not any amount under Ex.Ps.12 and 13. It is not a case of the petitioners that they paid part amount due, under Exps.12 and 13. All along during the cross examination, it is the contention of the respondent that the cheques were issued for security purpose and there is no legally enforceable debt and therefore, the judgements cited by the learned counsel



“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



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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 Gujarat*¹⁰ 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 appellant /accused....."

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.

8. Heard both sides and persued the materials available on record.

9. The petitioners were arrayed as A1 and A2 in the complaint lodged by the respondent for the offence under section 138 of the Negotiable Instrument Act. The trial court acquitted all the accused persons on the ground that the accused categorically rebutted the presumption by preponderance of probabilities. The specific case of the respondent is that the



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accused persons are liable to pay a sum of Rs.7,83,151/- and towards the said liability they issued two cheques bearing Nos.368328 and 368335, which were marked as Exs.P3 and P4, dated 18.02.2009 for a sum of Rs.7,00,000/- and Rs.72,529/- respectively whereas, the total liability is Rs.7,83,151/- The specific case of the appellant is that, both the cheques were issued for security purpose at the time of commencement of business transaction. Even before the date of presentation of cheques, the accused issued another two cheques vide ref.No.368362 and 368363 for a sum of Rs.2,00,000/- and Rs.10,000/-respectively, in which, the first cheque was honoured by the accused and the second cheque was only returned as dishonoured.

10. After initiation of complaint under 138 of the N.I.Act, the said amount (the dishonoured cheque amount) was also settled by the accused persons in favour of the respondent herein. Therefore, they had paid in total a sum of Rs.4,10,000/-. In other words, part of the amount was settled out of the total amount due ie., Rs.7,83,121/-. However, the respondent without taking into account the amount paid, presented the cheques for the entire amount. The respondent ought to have deducted the amount which was received by them and ought to have made endorsement under section 56 of the NI Act and ought to have presented the cheque for only the remaining amount



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11. The only point raised in this revision is that the appellants have established the part payment of Rs.4,10,000/- made by them as part of the liability after issuance of Exps. 3 and 4. On perusal of the deposition of PW.1 it is clear that the accused issued postdated cheque Exps.3 and 4 for a sum of Rs.7,77,529/- dated 18.02.2009. Both the cheques were returned unpaid for the reason insufficient funds, on the same day. In the meanwhile, the accused was issued another two cheques bearing No.368362 for the sum of Rs.2 lakhs dated 18.02.2009 and another cheque no.368363, dated 24.03.2009 for a sum of Rs.10,000/- in favour of the complainant. The first cheque was duly signed by the respondent and realized and encashed and the second cheque returned dishonoured. After causing statutory notice, the respondent initiated complaint under section 138 of the N.I.Act. However, it was returned for some reason and while representing the said complaint, the cheque amount was also settled by the accused person in favour of the respondent. Thereafter, the respondent did not proceed further under section 138 of the N.I.Act as against the accused persons. The first cheque was presented for collection on 18.02.2009 i.e., before presentation of Exps. 3 and 4. The second cheque was presented for collection on 24.03.2009 and the same was returned as dishonoured. Again it was re-presented on 08.05.2009 namely, at the time of presentation of Exps.3 and 4., while pending complaint, the said amount was also settled by the accused persons. Therefore, there is no need for deducting the amount of Rs.2,10,000/- from



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Exps.3 and 4 whereas, even before presentation of Exps.3 and 4, a sum of Rs.2 lakhs was encashed by the respondent and the same was not deducted while presenting Exs.3 and 4, as contemplated under section 56 of the NI Act.

12. It is relevant to extract the provisions of section 56 of the N.I.Act which reads as follows:

"No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance"

which stipulates that, if there is an endorsement on a negotiable instrument, that a part of the sum mentioned in the cheque has been paid, then the instrument may be negotiated for the balance.

13.The learned counsel for the petitioner relied on the judgement of the Hon'ble Apex Court in the case of ***Dashrathnhai Trikambhal Patel -vs Hiteh Mahendrabhai Patel and another*** in ***Criminal Appeal No. 1497 of 2022***, wherein it is held as follows:

"28. A Division Bench of the Kerala High Court has held in Joseph Sartho v. Gopinathan¹² that since the representation in the cheque was for a sum higher than the amount that was due on the date that it was presented for encashment, the drawer of the cheque cannot be convicted for the offence under Section 138 of the Act. The



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High Court of Delhi addressed the same issue in *Alliance Infrastructure Project Ltd. v. Vinay Mittal*¹³. The High Court observed that when part payment is made after the cheque is drawn, the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that a part payment was made according to the provisions of Section 56 of the Act. It was also held that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum, before the issue of notice, cannot be valid under Section 138(b) of the Act. A similar view was taken by the High Court of Gujarat in *Shree Corporation v. Anilbhai Puranbhai Bansal*¹⁴.

29. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part-payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

30. In view of the discussion above, we summarise our findings below:

- (i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;
- (ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;
- (iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted;
- iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds; and
- (v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of



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Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.

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14. Thus, it is clear that representation of the cheque was for a sum higher than the amount that was due on the date it was presented for encashment the drawer of cheque cannot be convicted for the offence under section 138 of the Act. Further part payment is made after the cheque is drawn the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that part payment was made according to the provisions of Section 56 of the Act. Thus, it is clear that notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part payment against the sum, before the issue of notice, cannot be valid under section 138(b) of the Act.

15. In the case on hand, admittedly a sum of Rs.2,00,000/- was encashed by the respondent before the presenting Ex.P.3 and 4, therefore, conviction and sentence cannot be sustained and it is liable to be set aside.

16. The learned counsel for the respondent would submit that, the petitioners admitted their signature found in Exs.P3 and P4 and the issuance of Exs.P3 and P4. The respondent discharged the initial burden as contemplated under section 138 of the N.I.Act. When the accused failed to



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rebut the same by preponderance of probabilities, they are liable to be convicted under section 138 of the N.I.Act.

17. No doubt it is settled law that, when the accused admits the signature in the cheque, the trial Court ought to have presumed that, the cheque was issued as a consideration for a legally enforceable debt. The complainant discharged the initial burden as contemplated under section 138 of the N.I.Act. Statutory presumption drawn under section 118 and 139 of the N.I.Act, However, this presumption are rebuttable in nature by probable defence need to be raised, which must meet the standard of preponderance of probability and not mere possibility.

18. In the case on hand as stated supra, the petitioner proved that even before presentation of Exs.P3 and P4, they had paid a sum of Rs. 2,10,000/- on 18.03.2009 and while pending complaint they also paid another sum of Rs.2,00,000/-, therefore, the petitioners rebutted the presumption as contemplated under section 118 and 139 of the N.I.Act. Hence, the burden once again shifted on the respondent, to prove that Exs.P. 3 and P4 were issued for legally enforceable debt. After examination of P.W. 1, to the effect that a sum of Rs.4,00,000/- was paid to the respondent, even then, the respondent failed to prove that those payments were made for separate transaction and not for any dues under Exs.P.1 and P.2. Therefore,



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the above judgements cited by the learned counsel for the respondent is not helpful to the case on hand.

19. In view of the above discussions the appellate Court without considering the above mechanically convicted the appellants which cannot be sustained as against the respondent.

20. Accordingly this Criminal Revision is allowed and the conviction and sentence imposed by the learned Judicial Magistrate, Fast Track Court at Magisterial Level , Karur in STC No.1048 of 2011 dated 21.07.2015 is hereby set aside.

19.06.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

1. The Additional District and Sessions Court, Theni
2. The District Munsif, Theni



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G.K.ILANTHIRAIYAN, J.

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Order made in
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