IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2024

CORAM :

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

Crl.A.No.396 of 2018

V.M.Balasubramaniam ... Appellant/Complainant

Versus

S.Dhanalakshmi ... Respondent/Accused

Prayer: Criminal Appeal is filed under Section 378 (4) of Criminal Procedure Code, 1973, to call for the records in C.A.No.50 of 2017 on the file of the II-Additional District & Sessions Court, Erode and set aside the judgment dated 15.12.2017 passed in C.A.No.50 of 2017, reversing the order passed in S.T.C.No.135 of 2015 on the file of the Judicial Magistrate No.I, (FTC), Erode, dated 13.02.2017.

For Appellant : Mr. C.S. Saravanan

For Respondent : Mr. N. Manoharan

JUDGMENT

Being aggrieved by the order of acquittal dated 15.12.2017 passed in C.A.No.50 of 2017 by the learned II-Additional District and Sessions Judge, Erode, the complainant herein has preferred this criminal appeal.

2. Details of the decisions before the Courts below:

S. No.	*Case No., Judgment date, and Party Name*	*Decision of the Trial Court*	*Decision of the Appellate Court*
1.	S.T.C.No.135 of 2015, dated 13.02.2017 Mr.V.M.Balasubramaniam ... Complainant. Vs. Mrs. S.Dhanalakshmi ... Respondent.	Learned Judicial Magistrate No.1, (Fast Track Court), Erode, convicted the respondent/accused for the offence punishable under Section 138 of the Negotiable Instruments Act,1881 and imposed a punishment of six months Simple Imprisonment and to pay the cheque amount of Rs.3,00,000/- (Rupees Three Lakhs only) to the complainant as compensation, in default to undergo further period of one month Simple Imprisonment.	--
2.	C.A.No.50 of 2017, dated 15.12.2017 Mrs. S.Dhanalakshmi ... appellant/respondent Vs. Mr.V.M.Balasubramaniam – Complainant/respondent.	--	Learned II-Additional District Sessions Judge, Erode, acquitted the appellant/ accused from the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, by setting aside the Judgment of conviction passed by the Judicial Magistrate No.1, (Fast Track Court), Erode in S.T.C.No.135 of 2015, dated 13.02.2017.

3. The case of the complainant in brief is given as follows:

- The accused borrowed a sum of Rs.3,00,000/- (Rupees Three Lakhs only), for her urgent business puposes. On the same day, the accused issued a post-dated cheque for a sum of Rs.3 Lakhs towards discharge of her liability to repay the debt.
- The said cheque was drawn on Axis Bank Ltd., Erode – 638 011,(bearing No.038219) issued in favour of the complainant.
- The said cheque was presented by the complainant through his banker - Indian Overseas Bank, Erode Moolapalayam branch, Erode, on 25.02.2014.
- It was returned on 26.02.2014 with an endorsement "Exceeds arrangements".
- The complainant issued statutory notice on 28.03.2014, calling upon the accused to repay the debt within 15 days from the date of receipt of notice, as his cheque was returned for the reason as mentioned supra.
- The accused received the legal notice on 29.03.2014 and issued a reply to the said notice on 04.04.2014 containing false details.
- Alleging that the accused issued the cheque without arranging sufficient funds to honour her cheque, the cheque was returned as "Exceeds arrangements", and after issuance of statutory notice also did not repay th debt; thereby, she committed fraud and her actions are liable to be punished under Section 138 of the Negotiable Instruments Act,1881.

4. The defence set up by the accused are summed up hereunder:

- She has out rightly denied that she does have any transactions with the complainant. Her husband was doing business of selling two-wheelers and running a company in her name. He was managing the entire business. She does not have any connection with the affairs of the said company and it was closed in the year 2014 by her husband.
- It is her specific contention that, at present she is in separation from her husband as she demanded the accounts of the company.
- As regards the case cheque (EX.P.1), it is specifically contended that when she had parked her two-wheeler in front of Erode Jayasurya Market in the month of February 2014 and she came back from the market, she found her vehicle's seat lock was broken and her cheque book issued by the Erode Axis Bank, and other papers were found missing and she lodged a complaint before the Erode Town Police Station (Copy of the Complaint Ex.R4).
- It is her specific case that she did not sign in the cheque at all and she did not receive any loan from the complainant.
- She has laid a complaint against her husband, Sankar, Balasubramaniam (Appellant/Defacto complainant) and one Varatharajan before the Judicial Magistrate Court, No.1, Erode.

5. The submissions of the appellant's counsel :

Mr. C. S. Saravanan, the learned counsel appearing for the appellant would strenuously argue that the accused borrowed a sum of Rs.3 Lakhs on 27.01.2014 from the complainant and issued a post-dated cheque (25.02.2014) for the said sum. He further contended that the said cheque was presented on the same day and returned on 26.02.2014 with an endorsement as “Exceeds Arrangements”. After the receipt of legal notice of the complainant, the accused issued a reply notice dated 04.04.2014 with false details. It is his further arguments that the accused having received the loan, issued Ex.P1/Cheque, therefore, the accused is liable to be punished under Section 138 of the Negotiable Instruments Act, 1881.

6. The submissions of the respondent counsel :

Mr. N. Monoharan, learned counsel appearing for the respondent would vehemently contend that the accused has denied the execution of Promissory Note in her reply notice (Ex.P6), he drew the attention of this Court to the evidence of D.W.2, who is none other than the husband of accused and it is his further argument that D.W.2 has stated that it is he put the signature of his wife in the cheque. He also drew the attention of this Court to the evidence of D.W.3/Father-in-law of the accused, in support of the contention of his son to the effect that, his son and daughter-in-law are in separation.

7.The main contention of the learned counsel for the respondent is that the accused has taken a stand that she did not sign in the cheque, and the complainant should have to prove the execution of the cheque which was not done by him. Reliance was placed, upon the following judgments.

(i) The judgment of the High Court of Kerala, in *Santhi, C. Vs. Mary Sherly and Ors.,* reported in (*2011 (4) CCC 134*; and

(ii) The judgment of this Court, in *P.Krishnasamy Vs. Delta Knit Wearables, rep.by its Partners, and Ors., reported in* (2011 (3) MWN (Cr.) (DCC) 1.

8. Before the Trial Court :

At trial, on the complainant side, the complainant has examined himself as P.W.1 and 6 documents were marked. Ex.P1 is the cheque dated 25.02.2014 (No.038219) for the amount of Rs.3 Lakhs drawn on Axis Bank, Erode; Ex.P2 is the return memorandum dated 26.02.2014; Ex.P3 is the Legal Notice issued to the accused on behalf of the complainant; Ex.P4 is the Postal receipt; Ex.P5 is the Acknowledgment card; Ex.P6 is the Reply Notice. On the accused side, 5 witnesses were examined. D.W.1/ Varatharajan, who is a creditor to the accused; The husband and the father-in-law of the accused were examined as D.W.2 & D.W.3; D.W.4/Saroja is the mother of the accused. The accused has examined herself as D.W.5; and 6 documents were marked.

9. Mr. N. Monoharan, the learned counsel appearing for the respondent would contend that no suggestion was put to D.W.5 to the effect that she received the amount of Rs.3 Lakhs and issued a cheque and now she is giving false evidence. In support of his contention, the learned counsel for the respondent relied upon the judgment of the Hon'ble Supreme Court, in *Muddasani Venkata Narsaiah (Dead) Through Legal Representatives. Vs. Muddasani Sarojana (2012 SCC 288).* The Hon'ble Supreme Court has observed that the fact at cross-examination is that the statement of witness has been disputed.

10. After a perusal of the cross-examination of D.W.5 (Dhanalakshmi), I find that she was suitably cross-examined as follows:-

> "....வாதியிடம் கடன் பெற்றுக் கொண்டு வழக்கு காசோலை கொடுத்து விட்டு தற்போது இல்லை என்று பொய் சாட்சியம் அளிக்கிறேன் என்றால் சரியல்ல...."

In view of the above said cross-examination, I find no force in the arguments of the learned counsel for the accused.

11. The next point that was put forth by the learned counsel for the respondent is that once the signature found in the cheque is disputed by the accused then the burden heavily rests upon to the complainant to prove that the cheque was executed by the accused. He would further contend that in order to prove the same, the complainant had not examined any witness, therefore, the execution of the cheque is not proved by the complainant and no offence was committed by the accused. In support of his contention the judgment of *Santhi, C. Vs. Mary Sherly and Ors.,* reported in (*2011 (4) CCC 134*, of Kerala High Court was referred to.

> *"6.True, the expression, "execution" is not used in Section 138 of the Act. A reading of Section 138 of the Act however, shows that to prove the offence under the said section, prosecution shall inevitably prove that the cheque was "drawn" by accused. The only overt act which makes a person liable for the offence under Section 138 of the Act is "drawing" of cheque by him. So, the main factor to be proved by complainant to establish guilt of accused under Section 138 of the Act is that accused has "drawn" the cheque."*

12. However, contrary to the above said arguments, following suggestions have been made during cross examination of P.W.1. In order to appreciate the above said arguments in proper perspective, the details of cross examination of P.W.1 is extracted here under.

"...எதிரிக்கு தெரியாமல் எதிரியின் கணவர்

என்னுடைய பைனான்ஸ் க்கு பூர்த்தி செய்யப்படாத காசோலைகளை கொடுத்தார் என்றால் சரியல்ல. அவ்வாறு பெறப்பட்ட காசோலைகளை நாலே பூர்த்தி செய்து எதிரி மீது பொய் வழக்கு தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல..."

the above said details of cross examination explicate that the husband of the accused gave the cheque to the finance company.

13. P.W.1 has stated during his cross examination that to obtain the loan, accused and her husband had come to him. The accused has taken stand that Ex.P.1 Cheque was lost and she lodged a complaint on 10.02.2014. The copy of the complaint is marked as Ex.R.4. The proof for having sent the complaint to the respective police station is not filed before the trial Court. In a way, accused indirectly does not dispute her signature found in Ex.P.1- cheque.

14. The accused who was examined has D.W.5 would state that though "Pavisri Motors" stands in her name, as her husband did not administer the company properly, he closed the company in the month of June, 2014. Now she is not living with her husband. As she asked him to give accounts for the company, difference of opinion arose and she took her household articles and went to her mother's place.

15. It is not her evidence that it is she invested and running the company. The company was being run by her husband in the name of the accused. In these circumstances, accused asked her husband to render proper accounts and for that misunderstanding she got separated from her husband is totally unbelievable and only for the purpose of this case it was put forth.

16. It is relevant to note that accused (D.W.5) has deposed that her cheque book was lost and she lodged a complaint before the Erode Town Police Station. If really a person looses cheque book, then fearing of possibility of misusing the cheque she should have given instructions to her banker in writing. But that was not done by her would go to show that these details are put forth for the purpose of this case.

17. The reason for the misunderstanding which has been given by D.W.5 (Accused) is not stated by her husband who is examined as D.W.2. Had it been true he would have given the same reason when he was examined (D.W.2 Shankar, husband of accused Dhanalakshmi). D.W.2 has given another story by stating that with the knowledge of his wife he signed his wife signature in the cheques and also in Ex.P.1 cheque.

18. Father in Law of the accused Dhanalakshmi is examined as D.W.3

(Natesan). It is his evidence that due to misunderstanding between his son and daughter in law Dhanalakshmi, she went to her parents home. Admittedly, Dhanalakshmi was not owner of the company and she does not have any responsibility over the same. The reasons assigned by D.W.5 for the separation of the husband and wife is not spoken out either by her husband (D.W.2) or by her father in law (D.W.3). It is so strange to see that when husband and wife are in separation, on behalf of wife, the husband who is in separation and father in law of the accused have given evidence in support of wife and daughter in law respectively. I am of the considered view that their evidence are totally not believable.

19. Based on the details of cross examination as mentioned supra, it should not be lie in the mouth of the accused that she lost the cheque and she lodged a complaint before the Erode Town Police Station to this effect.

20. The accused has taken a stand that the cheque was lost (Ex.P.1 Cheque). Her husband D.W.2 Shankar has taken a stand that, in fact in Ex.P.1 Cheque, he has put the signature of his wife. In order to rebut the borrowal of loan, they have taken very many inconsistent stand, which are not believable. As per Section 101 of Indian Evidence Act, one who pleads has to prove. Therefore, the accused should have taken steps to prove that the signature in Ex.P1 - Cheque is not her signature.

21. As per the above said cross examination details, the accused has given blank signed cheques. In *Bir Singh vs. Mukesh Kumar* reported in *2019 (1) MWN (Cr.) DCC 164 (SC)* the Apex Court held that:

> *"37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.*
>
> *38. It was further held by the Apex Court that if a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the Accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence."*

22. Therefore, the legal position is that even if the accused had given unfilled signed cheques, still the payee remains liable and he is under obligation to rebut the presumption that the cheque was not issued for the payment of debt or in discharge of liability. Even if the blank cheque leaf

signed and issued by the accused, with regard to some payment still the said act attracts presumption under Section 139, in the absence of evidence to show that the cheque was not issued in discharge of debt.

23. Accused has stated in the reply notice itself that the cheque was not issued by her to the complainant. But during the cross examination of P.W.1, suggestions were put to him to the effect that the unfilled signed cheque of the accused was given by D.W.2 Shankar to the complainant, was answered in negative.

24. It is useful to refer to the observations made by the Hon'ble Supreme Court as regards the presumption enumerated under Section 139 of the Negotiable Instruments Act, 1881:

1. In K.Baskaran vs. Sankaran Vaidhyan Balan reported in 1999 (3) CTC 358 the Apex Court has analaysed the prime elements of offence as per Section 138 of the Negotiable Instruments Act, 1881 as under:-

> *"14. ...The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the Cheque, (ii) presentation of the Cheque to the Bank, (3) returning the Cheque unpaid by the Drawee Bank, (4) giving Notice in writing to the drawer of the Cheque demanding payment of the Cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the Notice."*

2. In *Rangappa vs. Mohan reported in 2010 (4) CTC 118 (SC)* wherein it has been held that:

> *"...The standard of proof to discharge the evidential burden is not as heavy as that usually seen in situations, where the prosecution is required to prove the guilt of an Accused. The Accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The Accused must meet the standard of -preponderance of probabilities-, similar to a Defendant in a Civil proceeding."*

3. In *Basalingappa vs. Mudibasappa reported in AIR 2019 SC 1983* the Apex Court has held that:

> *"... In order to rebut the presumption and prove to the contrary, it is open to the Accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words "until the contrary is proved" occurring in Section 139 of Negotiable Instruments Act, 1881 do not mean that Accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability. But the Accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the cases, to act upon the supposition that the debt/liability did not exist."*

4. The Hon'ble Supreme Court in *Gimpex Private Limited vs. Manoj Goel* ***[(2022) 11 SCC 705]*** has listed the ingredients forming the basis of the offences under Section 138 of the Negotiable Instruments Act, 1881 which is given here under:-

> 1. *"The drawing of a cheque by person on an account maintained by him with the banker for the payment of any amount of money to another from that account;*
> 2. *The cheque being drawn for the discharge in whole or in part of any debt or other liability;*
> 3. *Presentation of the cheque to the bank arranged to be paid from that account;*
> 4. *The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount;*
> 5. *A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and*
> 6. *The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice."*

25. Therefore, once the signature found in Ex.P.1 cheque is admitted, then the legal presumption adumbrated under Section 139 of the NI Act arise in favour of the complainant that the cheque was issued for the legally

enforceable debt/liability. The presumption is a rebuttable one. The accused may rebut the presumption through oral or documentary evidence or even through the admissions made by the opposite party. It may also comprise of circumstantial evidence or presumption of law or fact. The pivot point is that whether the accused has raised a probable defence.

26. From the evidence of D.W.5 and D.W.2, it is pellucid that husband of the accused was running the company in the name of his wife Dhanalakshmi, accused herein. Even for arguments sake when they are in separation, having issued the cheque to the complainant, the accused is legally answerable to the complainant in case of dishonor of cheque.

27. More so, it is not the case of accused/D.W.5 that her husband committed defraud upon her.

28. The trial Court has taken much pains and discussed about the evidence of defence witnesses in detail and completely rejected their evidence and concluded that based on the above said suggestions, the signature found in the cheque is admitted by the accused and raised presumption as per Section 139 of the NI Act and held that the same was not rebutted suitably by the accused and convicted the accused.

29. Whereas the appellate Court, II Additional District Sessions Court, Erode has observed that the complainant who is a money lender without receiving any other documents except the cheque stated to have been disbursed a loan of Rs.3,00,000/- to the accused is not believable and passed an order of acquittal.

30. Of course as observed by the appellate Court as mentioned supra, P.W.1 has stated that he did not receive any documents at the time of issuance of loan Ex.P.1 cheque. P.W.1 (Complainant) has deposed that the accused along with her husband came to him and she borrowed a sum of Rs.3,00,000/- from him and issued Ex.P.1 cheque. The husband of accused D.W.2 Shankar would also admit the issuance of Ex.P.1 cheque to the complainant. It is the evidence of D.W.2 (Shankar – Husband of the accused) that he signed in the cheque of the accused. If that be the case, it is for the accused to have taken steps to prove the same by sending the cheque to the forensic lab.

31. Already it is decided that the defence taken by the accused to the effect that the cheque book which was kept in her two wheeler was lost and she lodged a complaint to the Erode Town Police Station is not believable. No proof for the complaint (Ex.R.4) is filed. Based on the aforesaid discussions, I am of the considered view that the judgment of the appellate Court suffers

from perversity, it needs to be interfered with. In fine, this Criminal Appeal stands allowed. In the result, the judgment passed by the II Additional District Sessions Court in C.A.No.50 of 2007 dated 15.12.2017 stands set aside.

32. The trial Court shall issue warrant against the accused and send her to the prison to serve the sentence imposed by the trial Court within a period of one month from the date of receipt of copy of this judgment.

28.03.2024

Index : Yes/No
Speaking Order : Yes/No
Neutral Case Citation : Yes/No

klt/mac

To

1.The II-Additional District & Sessions Court, Erode.

2.The Judicial Magistrate No.I, (FTC), Erode.

R.KALAIMATHI, J.

klt/mac

Crl.A.No.396 of 2018

28.03.2024