THE HON'BLE SRI JUSTICE V.SURI APPA RAO

CRIMINAL APPEAL No. of 530 OF 2007

Dated 31st December, 2013

Between :

Shyam Sunder Sharma

… Appellant

And

The State of A.P. & another

… Respondents

THE HON'BLE SRI JUSTICE V.SURI APPA RAO

CRIMINAL APPEAL No.530 of 2007

JUDGMENT :

This appeal has been preferred by the appellant-complainant by invoking the provision under Section 378 (4) of the Code of Criminal Procedure Code (in short 'Cr.P.C.') challenging the judgment dated 24.08.2006 rendered in C.C.No.434 of 2004 by the Judicial Magistrate of First Class, Godavarikhani, whereby the learned Magistrate acquitted the accused-R.2 under Section 255 (1) Cr.P.C. for the offence under Section 138 of Negotiable Instruments Act (in short 'N.I. Act').

For the sake of convenience, parties hereinafter are referred to as they are arrayed before the trial Court

Brief facts of the case are as follows:

Accused being the relative of the complainant approached him (complainant) along with her husband and obtained a loan of Rs.2,00,000/- on 21.06.2001 for construction of house and promised to repay the amount on demand. *In spite* of several demands made by the complainant, accused and her husband did not repay the amount and finally they executed a document dated 22.02.2003 agreeing to repay the amount of Rs.2 lakhs in two instalments i.e. Rs.1 lakh each on 20.10.2003 and 20.01.2004. Accordingly, accused issued two cheques bearing Nos.232559 and 232563 dated 20.10.2003 and 20.01.2004 respectively payable at Bank of Maharastra, Jahbad, Hyderabad. Complainant thereafter presented cheque dated 20.10.2003 on 13.02.2004, but the same was returned due to out of date. Complainant further presented another cheque dated 20.01.2004 before his banker i.e. Karimnagar District Co-operative Bank, Godavarikhani, on 12.05.2004 which was dishonorued with return memo 'funds insufficient'. Complainant thereafter got issued a legal notice demanding payment of Rs.1 lakh. Accused got issued reply with false allegations. Therefore, the complainant filed complaint before the trial Court under section 138 of N.I. Act.

On behalf of the complainant, PWs 1 to 3 are examined and Exs.P.1 to P.10 are marked. No oral and documentary evidence was adduced on behalf of the accused. Considering the evidence available on record both oral and documentary, the trial Court acquitted the accused vide impugned judgment on the ground that the complainant could not discharge his initial burden by proving that he paid Rs.2 lakhs to the accused and the accused issued Ex.P.2 cheque towards discharge of her legally enforceable debt. Aggrieved by the aforesaid findings of the trial Court, complainant filed this appeal.

Learned counsel for the appellant submits that when the trial Court observed that the accused issued the cheque in question, it was not justified in acquitting the accused. When the complainant advanced the amount in the presence of eye witness, the trial Court ought to have drawn presumption in favour of the holder of the cheque that the instrument was issued towards legally enforceable debt unless and until contrary is proved by the accused. He further submits that burden is on the accused to prove that Ex.P.2 cheque was not issued towards legally enforceable debt. But, contrarily, the trial Court gave a finding that the burden is on the complainant to discharge his initial burden by proving that he advanced an amount of Rs.2 lakhs to the accused. It is also contended that Ex.P.1 bond paper executed by the accused itself clearly indicates that the accused issued cheque in view of discharge of debt.

In support of said contention, the learned counsel for the appellant placed reliance on ***Rangappa v. Sri Mohan***[1] wherein the Supreme Court held that presumption mandated by section 139 includes a presumption that there exists a legally enforceable debt or liability, however, such presumption is rebuttable in nature. The Supreme Court at para 26 of the said judgment further observed as under:

> "Presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability to that extent, the impugned observations in Krishna Janardhan Bhat v. Dattatraya G.Hegde[2] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

Learned counsel also placed reliance on ***ICDS Ltd. v. Beena Shabeer and another***[3] wherein the Supreme Court held as follows:

> "The words "any cheque" and "other liability" occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt

> that for whatever reason it may be, the liability under Section 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature."

Reliance is also placed by the learned counsel for the appellants in ***Anil Sachar and another v. Shree Nath Spinners Private Limited***[4]. In the said case, there was an understanding among the parties that in consideration of supply of goods to S, A was to make payment. In such a situation, the Supreme Court held that cheques are presumed to have been given for consideration, presumption under S.139 not rebutted by accused. Accused, who had signed cheques for A, was held guilty of offence under section 138 of N.I. Act.

Learned counsel for the appellant also placed reliance on ***K.N.Beena v Muniyappan and another***[5] wherein the Supreme Court held that in view of the provisions contained in sections 118 and 119 of N.I. Act, the Court has to presume that the cheque had been issued for the discharge of a debt or liability, however, the said presumption can be rebutted by proving the contrary, mere denial or rebuttal by the accused in the reply to the legal notice sent by the complainant is not enough. The accused has to prove by cogent evidence that there was no debt or liability.

Per contra, learned counsel for the respondent No.2 submits that the complainant has not produced any corroborative evidence substantiating advancement of loan of Rs.2 lakhs to the accused and her husband, Ex.P.1 also do not contain the details of the cheque number and name of the bank at which it was drawn, the complainant also failed to file the alleged promissory note said to have been executed by the accused and her husband. It is further contended that the fact that the first cheque was presented after expiry of statutory period itself clearly indicates that there was no legally enforceable debt. He further contended that the trial Court after appreciating the entire evidence on record rightly came to the conclusion that the complainant failed to prove his initial burden that he advanced Rs.2 lakhs to the accused and that Ex.P.2 was issued towards discharge of legally enforceable debt and hence there are no grounds to interfere with the impugned judgment acquitting the accused.

In support of said contention, learned counsel for the accused placed reliance on ***R.Indrasena Reddy v. M.Prabhavathi***[6] wherein this Court held that presumption under section 139 can be rebutted by the accused by producing necessary evidence or by relying upon the evidence produced by the complainant and material available on record without examining himself. Burden can be discharged by the accused on the basis of preponderance of probabilities.

He further placed reliance on ***A.Bhoosanrao v. Purushothamdas Pantani and another***[7] wherein this Court held that the complainant failed to prove that he had sufficient capacity to lend the amount that too by cheque, also he could not prove that said amount was actually drawn by the accused and hence the accused is not liable for punishment for the offence under section 138 of N.I. Act.

In the instant case, according to the complainant, the accused obtained a loan of Rs.2 lakhs on 21.06.2001 for construction of house and promised to repay the amount later. In the year 2003 i.e. on 22.02.2003 accused and her husband executed Ex.A.1 document agreeing to repay the same in two instalments @ Rs.1 lakh each in the year 2003 and another

Rs.1 lakh in the year 2004 and issued two post dated cheques out of which one cheque was presented after expiry of the statutory period and another cheque was dishonoured with endorsement ‘insufficient funds’ in the account of the accused.

In this context, the appellant mainly relies on contents of Ex.P.1, which are as under:

> "We Shri Brij Mohan Sharma and Smt.Radha Sarma received an amount of Rs.2,00,000/- (Rupees two lakhs only) as hand loan vide cheque No.____________________ Bank from Shri Shyam Sunder Sharma for the construction of our house at Gowliguda, without interest.
>
> The above said amount shall be repaid through the account of Smt.Radha Sharma as under:
>
> Rs.1,00,000/- dt.20.10.03 vide Ch.No.232559 of Bank of Maharashtra.
>
> Rs.1,00,000/- dt.20.1.04 vide ch.No.232563 of Bank of Maharashtra.
>
> If the above said amount will not cleared by us in time Shri Shyamsundar Sharma can proceed legally against us and the costs and consequences liable to us."

It is therefore clear from the contents of Ex.P.1 that the complainant advanced Rs.2 lakhs through a cheque. But Ex.P.1 is silent about the cheque number and name of the bank. The trial Court relying on Ex.P.1 held that the complainant failed to prove the initial burden that he advanced Rs.2 lakhs through cheque and that the accused had drawn the cheque amount of Rs.2 lakhs and the accused issued two post dated cheques towards discharge of said legally enforceable debt. Nowhere in Ex.P.1 it is mentioned that he paid the amount in cash. Complainant got examined PWs 2 and 3 G.V.Rajaveeru and K.Ramakrishna respectively.

P.W.2 G.V.Rajaveeru is Bank Manager of KDCC Bank Ltd. at GDK, who has testified that on 12.05.2004 cheque bearing No.232563 dated 20.01.2004 for Rs.1 lakh was presented by P.W.1 for encashment, on 17.05.2004 the cheque was bounced due to insufficient funds and the same was intimated to the complainant.

P.W.3 K.Rama Krishna is the Accountant in Bank of Maharastra, who stated that on 17.05.2004 their Bank received Ex.P.2 from KDCC Bank, GDK, for realization. But, on verification of account, it was found that there was no balance and accordingly the cheque was returned to KDCC Bank with endorsement 'insufficient funds'.

Thus, the complainant examined only two witnesses who are attached to their respective Banks to speak about dishonour of cheque due to insufficient funds. But, the complainant did not choose to examine the attestors of Ex.P.1 document said to have been executed by the accused to prove that he lent an amount of Rs.2 lakhs to the accused. For the notice issued by the complainant, accused issued reply under Ex.P.6 denying the averments made in the notice issued by the complainant and contending that the accused never obtained any amount of
Rs.2 lakhs from the complainant and the cheque mentioned in the notice are not issued by the respondents. He further alleged that the respondent-accused has not received any amount from the complainant. Therefore, it is clear that from inception itself the accused is denying issuance of cheque under Ex.P.2 and that he never borrowed any amount from the complainant. The fact that the cheque number and name of the bank are silent in Ex.P.1 bond itself shows that the complainant has not issued any cheque for Rs.2 lakhs towards advance.

In order to attract the provisions of section 138 of N.I. Act, the complainant, in the first instance, has to prove that he advanced an amount of Rs.2 lakhs to the accused and in discharge of the said debt or liability the accused issued Ex.P.2 cheque. In that event only, the burden shifts on the accused to rebut the same.

In the instant case, the complainant failed to discharge his initial burden by proving that he advanced Rs.2 lakhs under Ex.P.1-bond through cheque, accused had drawn the amount from the bank and the accused issued Ex.P.2 towards discharge of such loan. The trial Court after appreciating the entire evidence on record particularly on the material produced by the complainant, observed that the complainant failed to prove the initial burden that he advanced an amount of Rs.2 lakhs to the accused.

In that view of the matter, though the accused can rebut the presumption under section 139 of the N.I. Act even without examining himself and relying on the document produced by the complainant, he can discharge the burden on the basis of preponderance of probabilities that the complainant has not advanced any amount under Ex.P.1 Bond and thereby the accused has not issued Ex.P.2 cheque towards discharge of legally enforceable debt due under Ex.P.1 bond. The trial Court after considering the entire evidence in proper perspective and rightly came to the conclusion that the complainant failed to discharge initial burden on him and also failed to prove that he advanced Rs.2 lakhs through cheque to the accused and thereby rightly acquitted the accused for the offence under section 138 of N.I. Act. Therefore, I see no infirmities in the impugned judgment warranting interference by this Court.

Hence, the Criminal Appeal is dismissed.

Miscellaneous petitions pending in this appeal, if any, shall stand closed.

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V.SURI APPA RAO, J

31st December, 2013.
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[1] (2010) 11 SCC 441

[2] (2008) 4 SCC 54

[3] (2002) 6 SCC 426

[4] (2011) 13 SCC 148

[5] (2001) 8 SCC 458

[6] 2012 (2) ALD (Crl.) 704 (AP)

[7] 1998 CRI.L.J. 906