HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL APPEAL No.1283 of 2010

JUDGMENT :

The unsuccessful complainant of C.C.No.30 of 2009 filed this appeal against the accused, for the Ex.P.1-cheque, dated 29.09.2008, for Rs.46,000/- stated issued by the accused in favour of the complainant for the so-called sum borrowed on 10.08.2008, having failed to repay, when cheque presented returned dishonoured vide Ex.P.2 and P.3 presentation and return memo, with intimation for the statutory legal notice Ex.P.4 issued and acknowledged under Ex.P.5 stated given reply with false contents under Ex.P.6, without payment and from the accrual of cause of action maintained the complaint case for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act') and the same was taken cognizance after recording statement and from, accused secured presence and supplied copies of documents and when questioned pleaded not guilty and claimed to be tried for the examination under Section 251 Cr.P.C. and from that the parties were put to trial.

2. In the course of trial, on behalf of the complainant, he himself was examined as PW.1 by placed reliance upon Exs.P.1 to P.6 supra and was cross-examined by accused and was confronted with Ex.D.1 document and in the 313 Cr.P.C. examination of the accused, he denied

truth of the incriminating evidence against him from that of complainant with reference to Exs.P.1 to P.6, though accused did not come to witness box much less examined any defence witness and after closure of evidence and from hearing, the trial Court acquitted the accused vide judgment dated 25.06.2010 in C.C.No.30 of 2009.

3. The contentions in the grounds of appeal impugning the acquittal judgment are that the trial Court failed to see that despite complainant proved the case of accused borrowed the amount and issued cheque and failed to repay even after the statutory notice and from the cause of action accrued, the complainant filed; when the burden is on accused to rebut the evidence, who did not even come to witness box, there is nothing to acquit the accused or disbelieve the case of the complainant and thus went wrong in acquitting and thereby sought for setting aside the acquittal judgment and convict the accused by allowing the appeal according to law. The learned counsel for the appellant reiterated the same.

4. Whereas it is the contention of the counsel for the accused that the trial Court's acquittal judgment is fully supported by reasons and for this Court while sitting in appeal that too against the double presumption of innocence, there is nothing to interfere and hence to dismiss the appeal.

5. Heard. Perused the material on record. The parties referred to as they are arrayed before the trial Court.

6. Now the points that arise for consideration in the appeal are:

1. Whether the cheque is not rooted from the account of the accused, if rooted, it is not issued by her and if issued whether it is legally enforceable or other liability legally enforceable and whether the acquittal judgment is unsustainable and if so to what extent this Court while sitting in appeal and with what observations?
2. To what result?

POINT No.1:

7-(A) Before advert to the merits of the matter, it is beneficial to quote; the provisions incorporated in Chapter XVII of the N.I. Act make a civil transaction to be an offence **by fiction of law and with certain (rebuttable) presumptions that shall be drawn**. Sections.138 to 142 are incorporated in the N.I.Act,1881 as Chapter XVII by the Banking Public Financial Institutions and Negotiable instruments Laws (Amendment) Act,1981 (66 of 1988) which came into force w.e.f.01-04-1989 and the N.I.Act was further amended by Act,2002 (55 of 2002) which came into force w.e.f. 06-02-2003 incorporating new sections 143 to 147 in this Chapter XVII and further some of the existing provisions not only of the Chapter XVII but also of other Chapters amended to overcome the defects and drawbacks in dealing with the matters relating to dishonour of cheques.

7-(B). The object and intention of these penal provisions of the Chapter XVII (Sections 138 – 147), in particular, Sections 138 & 139 (besides civil remedy), are to prevent issuing of cheques in playful manner or with dishonest intention or with no mind to honour or without sufficient funds in the account maintained by the drawer in Bank and induce the Payee/Holder or Holder in due course to act upon it. The remedy available in a Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. Since a cheque that is dishonoured may cause uncountable loss, injury or inconvenience to the Payee due to the latter's unexpected disappointment, these provisions incorporated are in order to provide a speedy remedy to avoid inconvenience and injury to the Payee and further to encourage the culture of use of cheques and enhancing credibility of the instruments as a trustworthy substitute for cash payment and to inculcate faith in the efficacy of Banking operations - GOA PLAST (PVT.) LTD. v. CHICO URSULA D'SOUZA[1].

7-(C). To fulfill the objective, the Legislature while amending the Act has made the following procedure:

In the opening words of the Section 138 it is stated: "Where any **cheque drawn by a person** on an account maintained by him with a banker for payment of any amount of money to another person from out of that account **for the discharge,** in whole or in part, **of any debt or other liability,** is **returned by the bank unpaid**,---------, such person **shall be deemed to have committed an offence** and shall, **without prejudice to any other provision of this Act (See Sec.143)**, be punished ----. Provided, nothing contained in this section shall apply unless,-(a), (b); and (c) Explanation---(supra)."

"(i) Under Section 138 a deeming offence is created **by fiction of law**.

> (ii) An **explanation** is provided **to Section 138** to define the words **"debt or other liability" to mean a legally enforceable debt or other liability."**
>
> (iii) In Section 139, a presumption is ingrained that the **holder of the cheque received** it in discharge of debt or other liability.
>
> (iv) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.
>
> (v) As per Section 146(new section) the production of **the Bank's slip or Memo with official mark** denoting that the cheque has been dishonoured **is prima facie evidence** for the Court to presume the fact of dishonour of such cheque unless such fact is disproved by the accused.

7-(D). Further the provision for issuing notice within thirty days under section 138 after dishonour is to afford an opportunity to the Drawer of the cheque to rectify his mistakes or negligence or in action and to pay the amount within fifteen days of receipt of notice, failing which the drawer is liable for prosecution and penal consequences.

7-(E). <u>Reasonability of cause for non-payment is not at all a deciding factor. Mensrea is irrelevant. It is a strict liability incorporated in public interest.</u>

7-(F). Availability of alternative remedy is no bar to the prosecution

7-(G). In the words-where **any** cheque, the word any suggests that for whatever reason **if a cheque is drawn** on an account maintained by him with a Banker in favour of another person **for the discharge of any debt or other liability**, the **liability cannot be avoided in the event of the cheque stands returned by the Banker unpaid.**

8-A. The Apex Court in NARAYAN MENON v. STATE OF KERALA[2] held that once the complainant shown that the cheque was drawn by the accused on the account maintained by him with a banker for payment of any amount in favour of the complainant from out of that account for its discharge and the same when presented returned by the Bank unpaid for insufficiency of funds or exceeds arrangement, such person shall be deemed to have been committed an offence under Section 138 of N.I. Act. What Section 139 of the Act speaks of the presumption against the accused to rebut is the holder of a cheque received the cheque of the nature referred in Section 138 of the Act for discharge of debt. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Accused need not enter into the witness box and examine other witnesses in support of his defence. Accused need not disprove the prosecution case in its entirety. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

8-B. The presumption that further applied among clauses (a) to (g) of Section 118 of N.I. Act also, like the presumption under Section 139 of the Act, as per Section 4 of the Evidence Act, is a rebuttable presumption for which the burden is on the accused, however, to rebut the presumption if a case is made out by accused either by pointing out from the case of the complainant including very documents and cross-examination or by examining any person and need not be always by coming to witness box vide decision in KUMAR EXPORTS PVT. LTD. V. SHARMA CARPETS[3].

8-C. Further, as per the expression of the Apex Court in RANGAPPA vs. MOHAN[4] (3-Judges Bench) paras-9 to

15 referring to Goa Plast's case (supra), KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE[5] by distinguishing at para-14 saying the observation in KRISHNA JANARDHAN BHAT (supra) of the presumption mandated by Section 139 does not indeed include the existence of a legally enforceable debt or liability is not correct, though in other respects correctness of the decision does not in any way cause doubted; by also referring to HITEN P. DALAL v. BRATINDRANATH BANERJEE[6] holding at paras-22 and 23 therein of the obligation on the part of the Court to raise the presumption under 138, 139 and 118 of the N.I. Act, in every case where the factual basis for raising the presumption has been established since introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused, as a presumption of law distinguished from a presumption of fact as part of rules of evidence and no way in conflict with presumption of innocence and the proof by prosecution against the accused beyond reasonable doubt, but for saying to rebut the accused can discharge the burden showing reasonable probability of non-existence of the presumption of fact and to that proposition, the earlier expression in BHARAT BARREL & DRUM MANUFACTURING COMPANY v. AMIN CHAND PYARELAL[7] para-12 showing the burden on the

accused is to bring on record by preponderance of probability either direct evidence or by referring to circumstances upon which he relies, rather than bare denial of the passing of the consideration; apparently that does not appear to be of any defence, to get the benefit in discharge of the onus against, also held referring the M.M.T.C. LTD. AND ANOTHER v. MEDCHL CHEMICALS & PHARMA (P) LTD[8] that where the accused able to show justification of stop payment letter even from funds are there, but no existence of debt or liability at the time of presentation of cheque for encashment to say no offence under Section 138 of the N.I. Act made out in discharge of the burden. It was concluded referring to the above, including of MALLAVARAPU KASIVISWESWARA RAO v. THADIKONDA RAMULU FIRM & ORS[9] paras-14 and 15 that the initial presumption lays in favour of the complainant and Section 139 is an example of a reverse onus clause, which has been included in furtherance of the legitimate objection of improving the credibility of the negotiable instruments. While Section 138 specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. Bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions and the test of proportionality should guide the construction and interpretation of reverse onus clause and the accused cannot be expected to discharge an unduly high standard or proof and in the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden to discharge by preponderance of probabilities by raising creation of doubt about the existence of a legally enforceable debt or liability to fail the prosecution and for that the accused can rely on the material submitted by the complainant also in order to raise such a defence and he may not need to adduce any evidence of his own.

8-D**.** It was also observed in para-15 that the accused appear to be aware of the fact that the cheque was with the complainant, further-more the very fact that the accused has failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. It was also held by this court way back **Chapala Hanumaiah Vs Kavuri Venkateshwarlu**[10] that having received and acknowledged the statutory legal notice after dishonour of cheque, non-giving of reply to said legal notice, improbablises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

9. From the above prepositions of law, coming to the

facts, save those that are referred supra, but for to the extent of relevancy at the cost of repetition; Ex.P.1 is the cheque drawn on State Bank of India, bearing No.520586 – 530002006 for Rs.46,000/- in the name of M.Sankar Rao-complainant, signed by K.Neelaveni-accused, which is according to the complainant the accused that issued, which was dated 29.09.2008. As per the complainant, from Ex.A.4-legal notice, dated 11.12.2008, Ex.P.1 cheque issued by the accused having earlier borrowed on 10.08.2008 of Rs.46,000/- out of acquaintance with a promise to repay and for demands, having issued the cheque, when presented returned dishonoured including for second time on 02.12.2008 under Ex.P.3; by demanding to pay the amount else to take legal recourse to prosecute, having received by Ex.P.5 acknowledgment and issued Ex.P.6 reply by the accused through her Advocate denying the borrowal and issuance of the cheque; which the version that the complainant is the Proprietor of Eswar Jewellers of Town Kotha Road, Visakhapatnam, who launched a scheme for arrangement of the gold ornaments to customers for which customers have to pay monthly installments and the accused joined the scheme and paid completely and on 23.07.2007 she approached the complainant for purchasing gold ornaments and in that context she gave her old ornaments for making new and the complainant stated that there is extra gold required to be added in preparing the new ornaments and finalized the bill for Rs.36,600/- and the old ornaments worth of the accused valued for Rs.28,800/- and balance is for cost of one tola gold Rs.9,600/- and making charges etc., Rs.3,450/- and finalized the bill with so-called discount for Rs.22,600/- in all to pay by 23.07.2007 and even the accused approached several times, the complainant to pay the balance, he was not available and it is on her approach, he asked her to give blank cheque and she issued the cheque to fill and present for the bill amount of Rs.22,600/-, however it was misused. From the said notice, the accused admits she issued blank cheque in favour of the complainant by admitting her signature and rooted from her account. In support of the case of the respective parties supra, in the course of evidence of the complainant as PW.1, he reiterated his chief examination affidavit and denied the reply notice. Whereas in his cross-examination, he deposed that he is doing goldsmith business and he is Proprietor of Eswar Jewellers, which is a shop running by him at Town Kotha Road I Town, Visakhapatnam in manufacturing of gold ornaments and sell the gold ornaments and also take orders for preparing gold ornaments. He deposed that "*I have not mentioned in my complaint or in my legal notice and in the chief affidavit that I am doing gold business. It is true the accused is my customer. I do not remember whether accused ordered for manufacturing gold ornaments on*

23.07.2008. It is true the receipt shown to me was issued by me, and the same is marked as Ex.D.1. In the month of August 2008, I gave hand loan to the accused but I do not remember the date. It is true there is no documents to show that I gave hand loan to accused. Accused issued a cheque to me in the month of September, 2008. I gave instructions to my counsel to prepare complaint. I do not know the full details of my legal notice. The accused not filled the date in cheque but she put only the signature and she has not written the body of the cheque. It is not true to suggest that there are business transactions between me and accused but there are no debtor or creditor relations between me and accused and I am deposing falsehood. It is not true to suggest that as accused issued a blank cheque to me towards security, I fabricated the cheque and field this case and this complaint is not maintainable". This is what all the cross-examination of PW.1 by accused and accused did not come to witness box. Now the crux is Ex.D.1 document in support of the evidence placed reliance by the accused i.e., admittedly issued by the complainant. Ex.D.1 is the estimation, dated 23.07.2007 for preparing the gold ornaments and the estimation shows out of the amount arrived and on demand of the balance due Rs.25,600/-. Date of delivery mentioned 20.08.2007. <u>There is also an endorsement of Rs.3,000/- paid and Rs.22,600/- due</u>. The receipt can be said to be nothing to do with Ex.P.1

cheque, dated 29.09.2008 as said receipt was dated 23.07.2007 even from Ex.P.6 reply notice of the accused in saying the amount of Rs.22,600/- due with, what Ex.D.1 reflects payable of the balance by 23.07.2007 i.e., the date of Ex.D.1 receipt and in the para 3 page 2 of the reply, further reads that the accused several times approached the complainant to pay the balance, but complainant was not available, during her visits to his shop when she approached him for payment, he requested her to issue the blank cheque so that he can fill and present accordingly she issued. It is not even her reply that the gold ornament was not delivered to her.

10. Section 20 of the Act speaks that where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instrument then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount. Here, though it is the wording of a person signed and delivers to another a paper stamped in accordance with the law relating to negotiable instrument even in force in India

and the cheque is for not required to affix with revenue or adhesive stamp, it does not mean Section 20 of the Act has no application to cheque for inchoate instrument given to use as negotiable instrument by filling the remaining contents to make use. When undisputedly it is the accused that issued the blank cheque in favour of the complainant duly signed and undisputedly saying by 23.07.2007 she fallen due Rs.22,600/- to the complainant under Ex.D.1-receipt and that was not even paid, she cannot contend that there is no consideration for the cheque apart from Section 20 of the Act and cuts her very defence, the presumption under Section 118 of the Act equally under Section 139 apply here and the accused even not come to witness box and the reply given by the accused also no way discharges her burden under reverse onus clause, much less to rebut the presumptions which version in the cross examination of PW.1 by her even with reference to Ex.D.1. Thus, the trial Court went wrong in acquitting the accused instead of convicting. Accordingly, point No.1 is answered.

POINT No.2:

a. In the result, the appeal is allowed setting aside the trial Court's acquittal judgment and the accused is found guilty for the offence under Section 138 of the Act.

b. For hearing on sentence and for appearance of the accused posted to 30.01.2015.

Dr. B. SIVA SANKARA RAO, J

23.01.2015.
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Heard on sentence the counsel for the accused/respondent as well as counsel for complainant/appellant. Following the expression of the Apex Court in ***Somnath Sarka V. Utpal Basu Mallick***[11] that the Act not contemplated grant of compensation but envisages imposition of fine not exceeding twice the amount of dishonoured cheque and out of said fine amount, the complainant be compensated under Section 357 Cr.P.C and that '*unlike for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque."*

Having regard to the above and from the submission by the appellant/complainant of the endeavour is to recover the amount of compensation from out of fine or otherwise, rather than sentencing the accused to jail, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.40,000/- of which Rs.5,000/- shall go to the Government and the balance amount of Rs.35,000/- which the complainant is entitled towards compensation and the accused is directed to pay or deposit the same within six weeks from the date of receipt of copy of this Judgment. It is thereby directed the learned Magistrate to secure the presence of accused on warrant to undergo the sentence in that open Court and also to cause recover the fine amount under Section 431 read with Section 421 of Cr.P.C. by issuing warrant levying the fine with default sentence of three months Simple Imprisonment as per Sections 65 to 68 read with 53(6) I.P.C.

Dr. JUSTICE B. SIVA SANKARA RAO

13.03.2015.
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[1] AIR 2003 SC 2035
[2] (2006)3 SCC 30
[3] (2009) 2 SCC 513
[4] AIR 2010 SC 1898
[5] AIR 2008 SC 1325
[6] AIR 2001 SC 3897
[7] AIR 1999 SC 1008
[8] AIR 2002 SC 182
[9] AIR 2008 SC 2898
[10] 1971 (1) An.W.R. 65
[11] 2014(1) ALT (Crl) 145