HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL REVISION CASE No.609 OF 2009

ORDER:-

The criminal revision case is filed against the Judgment dated 08.04.2009 in Criminal Appeal No.126 of 2003 on the file of the VIII Additional District & Sessions Judge (FTC), Chittoor. The petitioner/accused was tried for an offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act') by the learned Judicial Magistrate of First Class, Pakala in C.C.No.2 of 2002 and by Judgment dated 24.04.2003, the learned Magistrate found the petitioner/accused guilty of the offence punishable under Section 138 of the Act and convicted and sentenced him to undergo simple imprisonment for a period of one year and shall also pay compensation of Rs.2,00,000/- to the complainant. The petitioner/accused preferred the appeal and the learned appellate Court confirmed the findings of the trial Magistrate and dismissed the appeal. Hence, the revision.

2. The 2nd respondent/*de facto* complainant filed the complaint alleging that the petitioner/accused borrowed an amount of Rs.1,50,000/- on 01.11.2001 from the complaint as hand loan and issued a hand receipt to that effect with the promise to repay the same with interest, that on 15.11.2001 the petitioner/accused issued Ex.P1-post-dated cheque bearing No.080542 for a sum of Rs.1,50,000/- drawn on Bank of India, Tirupati, that when the cheque was presented for collection on 23.11.2001 to State Bank of India, Main Branch, Tirupathi, the same returned dishonoured with an endorsement that "referred to drawer", that on receiving the intimation from the bank, the respondent/complainant got issued Ex.P3-legal notice on 30.11.2001, that the petitioner/accused received the same under Ex.P4-acknowledgment, but failed to pay the amount or even give reply to the

notice. Hence, the complaint.

3. During the course of trial, the complainant examined himself as PW.1 besides examining P.Ws.2 to 5 and produced Exs.P.1 to P.12. The petitioner/accused denied the evidence on record. In defence, the petitioner/accused examined himself as D.W.1 and also examined DW 2 on his behalf and produced Exs.D1 and D2.

4. Learned Counsel appearing for the petitioner/accused submits that the conviction and sentence of the petitioner/accused by both the Courts below is erroneous. Learned Counsel further submits that both the courts below failed to see that there is no relationship between the complainant and accused, and the accused issued three cheques including the cheque in question, towards security of mortgage said to have been executed in favour of wife of the complainant by the accused. The evidence of PW.1 cannot be believed at all in view of the clear admission during his cross-examination that the accused executed a mortgage deed in favour of his wife. P.Ws.2 to 5 are interested witnesses and their testimony cannot be believed. The Courts below failed to appreciate all the contentions raised by the petitioner/accused in proper perspective and convicted the petitioner/accused erroneously.

5. Learned Counsel appearing for the respondent/complainant submits that admittedly the petitioner/accused has issued Ex.P1 cheque to discharge his liability, which was dishonoured, that the complainant issued the legal notice, the office copy of which is Ex.P3, and the petitioner/accused received the same under Ex.P4. Admittedly, no payment is made nor any reply is issued. It is further contended that the petitioner/accused did not produce any document to show that he is not liable to pay the amount, both the Courts below have properly appreciated the material on record and the same do not warrant any interference. It is further submitted that the petitioner/accused is a businessman and it is difficult to believe that he

would have issued the cheque Ex.P1 without there being any legally enforceable debt. His silence in spite of notice and during the course of trial shows that he has no defence and his contention that the cheque Ex.P1 was not issued for enforcing any legally enforceable debt is incorrect. Hence, the revision is liable to be dismissed.

6. The point for consideration is as to whether the Judgments of the Courts below is based on legally acceptable evidence or whether it needs interference?

7. The contention of the petitioner/accused is that there is no legally enforceable debt as on the date when the cheques were issued. His contention is that there was a transaction of mortgage in between the accused and the wife of PW.1 and a registered mortgage deed was executed on 06-03-2000. On the said date, PW.1 obtained three blank cheques duly signed by him as additional collateral security and subsequently filled up the contents and filed the present case.

8. PW.1 in his evidence admitted that the cheque in question on the face of it appears to have been written by two different persons. The amount both in words and figures is in one ink whereas the date and name is in different ink. However, the fact of accused signing the cheque is not denied. In support of this contention, learned Counsel appearing for the petitioner relied upon a decision of our High Court reported in **AVON ORGANICS LTD., v. PIONEER PRODUCTS LIMITED & ORS**[1], wherein it is held that a blank cheque cannot be enforced even though it is issued for legally enforceable debt. In para 10 of the said authority, the learned Judge observed that whenever blank cheques are filled up and presented, a presumption can be drawn under Section 139 of the Act, but it is a rebuttal presumption and that the question is whether the accused is able to rebut the presumption.

9. In the instant case, admittedly, the amount in words and figures is written by the accused and signed by him. The only contention is

that the date and name were not mentioned when the cheque was given to PW.1.

10. There is no dispute with regard to the legal proposition that once issuance of a cheque in question is accepted, it is for the petitioner/accused to show that the same was issued without there being the existence of any legally enforceable debt. If the petitioner/accused can discharge the said presumption by raising a probable defence, the onus shifts on the complainant to prove that the cheque in question was issued in discharge of the legally enforceable debt. Learned Counsel appearing for the petitioner/accused relies upon **M.S.NARAYANA MENOR @ MANI v. STATE OF KERALA AND ANOTHER**[2] and **KRISHNA JANARDHAN BHAT v. DATTATRAYA G.HEGDE**[3]**.** In the decision **Narayana Menon** (2 supra), the legal proposition is laid down with which there is no dispute. In the decision **Krishna Janardhan Bhat** (3 supra) the Supreme Court held at paras 34 and 35 as under:-

> "Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the material brought on record by the parties but also by reference to the circumstances upon which he relies.
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> A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration".

11. In order to successfully rebut the legally permissible presumption, the petitioner/accused should establish the fact that he has signed on the cheque in question without there being any liability.

He having failed to do so, the irresistible inference that can be drawn is that the petitioner/accused has issued the cheque in question in discharge of legally enforceable debt. Though the petitioner/accused contended that he issued three cheques, including Ex.P1 cheque towards security of the Ex.P12 mortgage deed, but he failed to examine the wife of the complainant to establish his case. Both the Courts below have appreciated the above aspects in proper perspective and held that the petitioner/accused is guilty of having issued the cheque on 15.11.2001 which was dishonoured by the bank on 26.11.2001. In that view of the matter, the findings of both the Courts below do not warrant any interference and the same is liable to be confirmed.

12. The other contention of the petitioner/accused is that the statutory notice as contemplated under the provisions of the Act has not been served. It is not disputed that the legal notice was sent by PW.1 to the shop of the accused. Learned Counsel submits that in the mortgage deed the address of the accused is residential address and the notice ought to have been sent to that address but not to the address where the accused is doing business. This submission on the face of it appears to be fallacious. There is no question of there being any registered address of the person to whom notice is required to be sent. Admittedly, the address to which the notice was sent was the place where the accused was carrying on business. As a matter of fact, that is same address which is furnished in the present proceedings through out. Therefore, the contention that the statutory notice ought not to have been sent to the place of business instead the residential address which is given in the mortgage deed cannot be sustained. In support of this contention, learned Counsel relied upon the decision of the Supreme Court reported in **M.D.THOMAS v. P.S.JALEEL**[4] wherein it is held that when the notice was served on the wife of the appellant and not on the appellant, there is no escape

from the conclusion that the complainant/respondent had not complied with the requirement of giving notice in terms of clause (b) of proviso to Section 138 of the Act.

13. The above decision was rendered by the Division Bench of the Supreme Court. However, a three-Judge Bench of the Supreme Court in **C.C.ALAVI HAJI v. PALAPETTY MUHAMMED**[5] held as under in para 17:-

> "It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the Court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit that the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in *Bhaskaran's case (1999) 7 SCC 510)* if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" is a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

In view of the above authoritative pronouncement, there is no substance in the submission of the learned Counsel appearing for the petitioner that the notice sent to the address of the shop of the accused cannot be treated as valid service and as held by the Supreme Court in three-Judge Bench decision even after receipt of summons of the case and notice, he did not make any endeavour to make the payment of the amount, therefore he cannot be heard saying that there is no proper compliance of the provisions of the N.I.Act.

14. The complainant/PW.1 has produced satisfactory and acceptable oral and documentary evidence in support of his case. Not only himself, he also examined PWs.2 and 4 – the bankers who say that the cheque was returned for want of sufficient funds. PW.3 speaks about the accused giving cheque to PW.1 in his presence on 15-11-2001. On behalf of the accused, in addition to his own self-serving statement, he examined one DW.2 who claims to be a common friend of PW.1 and DW.1. He deposed that the accused executed a mortgage deed on 06-03-2000 in favour of the wife of PW.1 and in his presence, DW.1 affixed his signature on the mortgage deed in the Office of the Sub-Registrar and at that time, the accused handed over three cheques to PW.1. It is also in the evidence of the accused and DW.2 that the cheques were handed over to the complainant in the Office of the Sub-Registrar.

15. The Courts below have sentenced the petitioner/accused to undergo simple imprisonment for a period of one year and to pay a sum of Rs.2,00,000/- towards compensation to the complainant. Taking into consideration the totality of the facts and circumstances of the case, I feel that the ends of justice will be met if the sentence of imprisonment is set aside by imposing fine. As per Section 138 of the Act, the petitioner/accused is liable to imprisonment up to two years, or with fine, which may extend to twice the amount of cheque or with both. Therefore, the petitioner/accused can be directed to pay fine of Rs.3,00,000/- (Rupees Three lakh only) which shall be deposited in the trial Court on or before 30.12.2015, in default, the petitioner/accused shall suffer rigorous imprisonment for a period of six months.

16. In the result, the Criminal Revision Case is dismissed confirming the conviction of the petitioner/accused for the offence punishable under Section 138 of the N.I.Act. However, the sentence of one year imprisonment is set aside, instead the petitioner/accused is sentenced

to pay a fine of Rs.3,00,000/- (Rupees three lakh only) which shall be deposited in the trial Court on or before 30.12.2015, in default, the petitioner/accused shall suffer rigorous imprisonment for a period of six months. It is made clear that as and when the amount is deposited, the respondent/complainant shall be entitled to withdraw the same without furnishing any security.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

October, 2015
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[1] 2004 (1) Crimes, 567

[2] (2006) 6 SCC 39

[3] (2008) 4 SCC 54

[4] 2010(2) ALT (Crl) 95 (SC)

[5] (2007) 6 SCC 555