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

Criminal Revision Case No.1552 of 2011

ORDER:-

The criminal revision case is filed against the Judgment dated 11-05-2011 in Criminal Appeal No.135 of 2010 on the file of the V-Additional Sessions Judge (III-FTC), Nalgonda at Miryalguda. The petitioner/accused was tried for an offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act') by the learned Additional Judicial Magistrate of First Class, Miryalaguda, in C.C.No.205 of 2006 and by Judgment, dated 30-07-2010, the learned Magistrate found the petitioner/accused guilty of the offence punishable under Section 138 of the Act and convicted and sentenced her to undergo simple imprisonment for a period of one year and shall also pay cheque amount towards compensation 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 respondent/*de facto* complainant filed the complaint alleging that the petitioner/accused borrowed an amount of Rs.10,000/- on 20-06-2003, Rs.30,000/- on 15-11-2003, Rs.30,000/- on 28-11-2003 and Rs.15,000/- on 01-03-2004 from the complaint for her family needs and executed demand promissory notes- Exs.P.1 to P.4 on respective dates with the promise to repay the same with interest, that inspite of several demands, the accused did not pay the amount, that the petitioner/accused issued cheque Ex.A.5 on 10-01-2006 for an amount of Rs.1,00,000/- towards part satisfaction of the amounts covered under promissory notes – Ex.A.1 to A.4, that when the cheque was presented for collection, the same returned dishonoured with an endorsement that funds insufficient, that on receiving the intimation from the bank, the respondent/complainant got issued a legal notice-Ex.A.8 on 27-01-2006, that the petitioner/accused received the same as per acknowledgment – Ex.A.10, 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 and 3 and produced Exs.A.1 to A.10. The petitioner/accused denied the evidence on record. In defence, the petitioner/accused examined herself as D.W.1 and no documents were produced.

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 due to non-examination of the attestors and scribes except PWs.2 and 3 of Exs.A.1 to A.4 and the same is fatal to the case of the respondent/complainant. Learned Counsel further submits that the order of the lower appellate Court is vitiated as the same was rendered without hearing the petitioner/accused, that the lower appellate Court failed to see the absence of the petitioner/accused at the hearing of the appeal was not wilful nor deliberate, but due to the circumstances beyond her control due to the death of her son. Learned Counsel further submitted that the ill-health of the petitioner i.e., heart ailment was another reason for the absence of the petitioner at the time of hearing of the appeal. The evidence of PW.3 cannot be believed at all in view of the clear admission during his cross-examination that he has not seen whether the cheque was issued in favour of PW.1/complainant or not. P.Ws.2 and 3 are interested witnesses and their testimony cannot be believed. The promissory-notes – Exs.A.1 to A.4 are fabricated and both the Courts below failed to appreciate this aspect in proper perspective and convicted the petitioner/accused erroneously.

5. Learned Counsel appearing for the respondent/complainant submits that admittedly the petitioner/accused has executed the promissory notes-Ex.A.1 to A.4 and to discharge her liability, she issued the cheque – Ex.A.5 which was dishonoured, that she has received the legal notice, the office copy of which is Ex.A.8, and the petitioner/accused received the same under Exs.A.9 and A.10. 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 she 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 Government servant and it is difficult to believe that she would have issued the cheque Ex.A.5 without there being any legally enforceable debt. Her silence inspite of notice and during the course of trial shows that she has no defence and her contention that the cheque Ex.A.5 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. 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**[1] and **KRISHNA JANARDHAN BHAT v. DATTATRAYA G.HEGDE**[2]**.** In the decision **Narayana Menon** (1 supra), the legal proposition is laid down with which there is no dispute. In the decision **Krishna Janardhan Bhat** (2 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".

8. In order to successfully rebut the legally permissible presumption, the petitioner/accused should establish the fact that she has signed on the promissory notes and cheque in question without there being any liability. She 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. 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 10-01-2006 which was dishonoured by the bank on 25-01-2006 on the ground of insufficiency of funds. 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.

9. The Courts below have sentenced the petitioner/accused to undergo simple imprisonment for a period of one year and to pay cheque amount towards compensation to the complainant. Admittedly, the petitioner/accused is working as a Cook in Social Welfare Girls Hostel, Islampura locality of Miryalaguda Town. Taking into consideration the totality of the facts and circumstances, 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.2,00,000/- (Rupees Two lacs 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. As and when the amount is deposited, the respondent/complainant shall be entitled to withdraw the same without furnishing any security.

10. In the result, the revision 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.2,00,000/- (Rupees two lacs 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. As and when the amount is deposited, the respondent/complainant shall be entitled to withdraw the same without furnishing any security.

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

M.S.K.Jaiswal, J

October, 2015

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[1] (2006) 6 SCC 39

[2] (2008) 4 SCC 54