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

Criminal Revision Case No.914 of 2007

Date: 9th June, 2015

Between :-

Mohd.Kamran Chouhan

.. Petitioner

And

M.Raju and another

.. Respondents

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

Criminal Revision Case No.914 of 2007

ORDER:-

The revision petitioner is the respondent/accused in C.C.No.1286 of 2003 on the file of the II-Addl.Chief Metropolitan Magistrate, Hyderabad. He was accused of an offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act'). The first respondent herein filed the private complaint alleging that in view of the friendship between himself and the petitioner/accused, a sum of Rs.2 lacs was lent by the respondent/complaint who having failed to repay the said amount, issued two cheques on 18-08-2003 each for Rs.1 lac drawn on Development Credit Bank Ltd., Hyderabad, and when the said cheques were presented in the bank, the same were returned dishonoured on the ground that there were *insufficient funds* in the account of the petitioner/accused. The complainant issued a statutory notice on 20-09-2003 which was served on the petitioner/accused on 22-09-2003 which was neither replied nor the amount due paid.

2. Cognizance of the complaint was taken and on appearance, after complying with the mandatory requirements, charge was framed under Section 138 of the Act, which

was denied by the petitioner/accused. The complainant examined himself as PW.1 and produced Exs.P.1 to P.10 and thereafter when the accused was examined under Section 313 Cr.P.C., he denied the evidence on record. In defence, Ex.D.1 which is said to be a complaint lodged by the petitioner/accused with the police on 18-09-2003 was marked. The learned trial Court by Judgment dated 19-01-2006 found the case of the complainant as proved and finding the accused guilty of the offence, convicted and sentenced the petitioner/accused to undergo simple imprisonment for six months and to pay fine of Rs.3,000/- and in default simple imprisonment for one month.

3. Aggrieved by the said conviction and sentence, the petitioner/accused preferred Crl.Appeal No.58 of 2006 on the file of the II-Additional Metropolitan Sessions Judge, Hyderabad, and by order dated 27-11-2006, the learned Appellate Court found no merits in the appeal and dismissed the same confirming the conviction and sentence.

4. The revision petitioner/accused filed this revision contending that the Judgment of both the Courts below is illegal, erroneous and improper. It is contended that the ingredients of Section 138 of the Act are not made out, that the interested and discrepant testimony of PW.1 ought not to have been relied, that there was no legally enforceable debt, that Exs.P.1 to P.3 were obtained by the complainant under threat and coercion, that the complainant who is a professional moneylender is doing business without licence, that even prior to the cheques Exs.P.2 and P.3 being presented in the bank by the complainant, the petitioner/accused filed a police report alleging that the cheques and documents were forcibly obtained from him, that the Courts below have erred in holding that the accused has not rebutted the presumption under Section 138 of the Act and hence the revision.

5. The learned Counsel appearing for the petitioner/accused submits that the lower appellate Court has disposed of the appeal in the absence of the accused and his Counsel, which is improper. Learned Counsel further submits that there was no legally enforceable debt and evidence was placed on record to show that the cheques in question were obtained by the complainant under threat and coercion. Without properly appreciating the facts and circumstances, both the Courts below erred in delivering the finding of guilt against the accused.

6. On the other hand, learned Counsel appearing for the respondent/complainant

submits that the petitioner/accused has not denied his executing the material documents viz., Exs.P.1 to P.3 and inspite of receiving a statutory notice, failed to respond to it and therefore the evidence on record clearly establishes the case of the complainant. Learned Counsel further submits that the petitioner/accused could not establish his contention that the cheques in question were obtained by the complainant under force, coercion or threats. The solitary document that is relied upon by the accused i.e., Ex.D.1 clearly shows the existence of liability of the petitioner/accused and Ex.D.1 do not say that the cheques in question were obtained by the complainant by any clandestine means.

7. The point that arise for consideration is as to whether the complainant could prove his case beyond reasonable doubt so as to sustain the conviction and sentence as imposed by both the Courts below or whether the Judgments rendered by the trial Court and the first appellate Court suffers from any material illegality or irregularity warranting interference by the revisional Court?

8 . **Point:-** Acquaintance between the petitioner/accused and the respondent/complainant is not in dispute. Similarly, the fact that the accused signed the material documents viz., Ex.P.1, Ex.P.2 and Ex.P.3 which are the promissory note and the two cheques in favour of the respondent/complainant is also not in dispute. It is also not disputed that the petitioner/accused has received the statutory notice on 22-09-2003 and that he neither replied to it nor paid the amount. Even otherwise, the complainant who examined himself has produced Exs.P.1 to P.10 which clearly show that the accused has signed the promissory notice, issued two cheques for Rs.1 lac each, the said cheques were dishonoured under Exs.P.4 to P.7, Ex.P.8 is the office copy of the legal notice dated 20-09-2003, Ex.P.9 is the postal receipt and Ex.P.10 is the postal acknowledgment which contains the signature of the accused with the date as 22-09-2003.

9. As already noticed, the contention of the accused is that there was no legally enforceable debt and that Exs.P.1 to P.3 were obtained by the complainant by exerting force and pressure on him. In support of this contention, the petitioner/accused has neither entered the witness box himself nor produced any other oral evidence and except for making Ex.D.1, absolutely no other documentary evidence was produced by him. A perusal of Ex.D.1, instead of supporting the case of the petitioner/accused strengthens the case of the respondent/complainant. Ex.D.1 is the copy of a representation said to have been made by the

petitioner/accused to the Deputy Commissioner of Police on 18-08-2003. The contents of the said complaint made by the petitioner/accused to the police are to the effect that the petitioner/accused used to borrow money from private financiers including the complainant herein. The complaint further refers to the fact that the petitioner/accused has taken loan of Rs.5 lacs from the complainant on different occasions, for which the complainant obtained his property papers, cheques, stamp papers and promissory notes. It further states that the complainant also started threatening him by visiting his work place. It further states that he paid Rs.2 lacs to the complainant in the period of three years. Since it is the specific case of the petitioner/accused that the material documents in the case viz., Exs.P.1 to P.3 which are promissory note and two cheques were obtained by the complainant by force, coercion and threats, it would be appropriate to reproduce a relevant para from Ex.D.1 which falsifies the contention of the petitioner/accused. It reads as under:-

> “Now, he (the complainant herein) and his associates are threatening me and my family members i.e., my daughter and my wife and stay in my house everyday. Raju (complainant herein) forcibly taken agreement of sale regarding the property of house site, which is 500 sq.yds., at Road No.12, Banjara Hills/Rajasthan. Even forcibly taken the signature of mine on agreement of sale, also he has not stopped his nature and he used to harass me and my family each and everyday. And he is demanding Rs.20 lakhs from me.”

10. It is manifest from the above that even in the complaint Ex.D.1 which is made by the revision petitioner/accused and which is self-exculpatory, absolutely there is no reference, whatsoever, to the promissory note Ex.P.1 or to the two cheques Exs.P.2 and P.3. What all is alleged is that the complainant has forcibly taken the agreement of sale in respect of his house site at Road No.12, Banjara Hills, Rajastghan. The ultimate prayer that is made by the petitioner/accused in Ex.D.1 is that he sought for the help of the authorities and in getting some time and protection. Significantly, even in Ex.D.1 the liability on the part of the petitioner/accused is not denied. Therefore as rightly submitted by the learned Counsel appearing for the complainant, Ex.D.1 coupled with the oral evidence of PW.1 and Exs.P.1 to P.10 conclusively establishes the case of the complainant, which is to the effect that the petitioner/accused has borrowed the amount and in discharge thereof, issued Exs.P.1 to P.3 and when the cheques Exs.P.2 and P.3 were presented in the bank,

the same were dishonoured and the revision petitioner having received the statutory notice failed to respond within the period permitted. Even during the course of trial, the petitioner/accused has not chosen to enter the witness box to deny the case of the complainant or for that matter proved the allegations contained in Ex.D.1 on whatever relevant issued they are. Once the petitioner/accused admits the existence of liability, as noticed from Ex.D.1, and he having issued the cheques Exs.P.2 and P.3 and the factum of they being dishonoured, the accused cannot absolve his liability and in the instant case, he failed to rebut the legally permissible presumption that can be drawn in favour of the complainant and against the accused.

11. Learned Counsel appearing for the petitioner/accused vehemently submits that the procedure adopted by the learned Sessions Judge in disposing the appeal in the absence of both the petitioner/accused and his Counsel by going into the merits of the matter is erroneous and therefore it cannot be sustained. It is no doubt true that a perusal of the Judgment of the learned appellate Court shows that on the date when the appeal was listed for hearing, after several adjournments, neither the petitioner/accused nor the Counsel appeared and hence the learned appellate Court proceeded to dispose of the appeal on merits. The entire evidence on record has been considered and the appeal was dismissed. The learned Counsel appearing for the petitioner/accused relied upon the decision of the Supreme Court reported in **SURYA BAKSH SINGH v. STATE OF UTTAR PRADESH (2014) 14 SCC 222)** in support of his contention that the procedure is erroneous. I have perused the entire authority cited . The said authority do not support the contention of the petitioner/accused that the Judgment of the first appellate Court suffers from any irregularity or illegality for it having been disposed of on merits in the absence of the petitioner/accused or his Counsel. In para 24 of the said decision, the Supreme Court laid down as under:-

> "It seems to us that it is necessary for the appellate Court which is confronted with the absence of the convict as well as his Counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, at this may lead to his discovery and production in Court. If even this exercise fails to locate and bring forth the convict, the appellate Court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in ***K.S.Panduranga V. State of Karnataka ((2013) 3 SCC 721)***. After a comprehensive analysis of previous decisions our

learned Brother had distilled the legal position into six propositions:

> "19.1. that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;
>
> 19.2. that the Court is not bound to adjourn the matter if both the appellant or his Counsel/lawyer are absent;
>
> 19.3. that the Court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;
>
> 19.4. that it can dispose of the appeal after perusing the record and Judgment of the trial Court.
>
> 19.5. that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the Court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the Court from doing so; and
>
> 19.6. that if the case is decided on merits in the absence of the appellant, the higher Court can remedy the situation."

12. From the above observations of the Supreme Court, it cannot be concluded that the Judgment of the Court below needs interference merely on the basis of it being disposed of in the absence of both the petitioner/accused and his Counsel, so long as the learned Sessions Judge disposed of the appeal on merits after perusing the record and Judgment of the trial Court.

13. The learned Counsel further submits that both the Courts below have erred in holding that the petitioner/accused failed to discharge his burden that is cast upon him in view of the permissible presumption under Section 139 of the Act. The learned Counsel submits that it is no doubt fact that the petitioner/accused did not enter into the witness box and gave his oral evidence nor did he produced any other oral evidence on his behalf. As already stated, except for marking Ex.D.1, absolutely no defence evidence is produced. Learned counsel submits that as per the criminal jurisprudence, it is not obligatory on the part of the petitioner/accused to rebut a presumption by himself entering into the witness box or adducing any other evidence. Suffice it if the accused could make out his defence from the material already placed on record, the presumption of innocence can be drawn and if the facts and circumstances of the case justify, the presumption against the accused can

be said to have been successfully rebutted. In support of his contention, the learned Counsel appearing for the petitioner/accused relied upon the decisions of the Supreme Court reported in **KRISHNA JANARDHAN BHAT v. DATTATRAYAG.HEGDE (2008) 4 SCC 54); VIJAY v. LAXMAN AND ANOTHER (2013) 3 SCC 86; and JOHN K.ABRAHAM v. SIMON C.ABRAHAM AND ANOTHER (2014) 2 SCC 236).**

14. There is no dispute with the legal proposition that in a criminal trial, no obligation, whatsoever, is cast upon the person in the dock to explain his stand even if from the evidence already produced by the prosecution, the accused can show his conduct of innocence, the said presumption can be said to have been discharged. If from the cross-examination of the witnesses produced by the prosecution or from the documents already produced by the prosecution, if the accused can show his non-culpability, he can be given the benefit thereof. Facts and circumstances of each case have to be appreciated independently.

15. In the instant case, the specific contention of the accused had been that there was no existence of legally enforceable debt and the cheques Ex.P.2 and Ex.P.3 so also the promissory note Ex.P.1 was obtained by the respondent/complainant by force, coercion or threats. Except for producing Ex.D.1, nothing else has been done by the petitioner/accused. Ex.D.1 instead of supporting the case of the petitioner/accused, strengthens the contention of the respondent/complainant. Ex.D.1 is the complaint lodged by the petitioner/accused with the Deputy Commissioner of Police on the date when the two cheques were issued. Ex.D.1 do not say that the promissory note and the cheques Ex.P.1 to Ex.P.3 were obtained by any threat or coercion. On the other hand, in Ex.D.1 the accused admits his liability and alleged that certain stamp papers and agreement of sale and blank papers were obtained by the respondent/complainant in discharge of the said debt. The evidence on record shows that the petitioner/accused is indebted to several persons. In Ex.D.1 itself he admits the said fact. The learned Counsel appearing for the complainant therefore submits that Ex.D.1 is nothing but a device resorted to by the petitioner/accused to escape his liability having issued the cheques in favour of the respondent/complainant. If really what is alleged in Ex.D.1 has any semblance of truth, the petitioner/accused would have pursued the same and brought on record as to what happened to his complaint made to the police. Having issued the cheques and signed the promissory note immediately thereafter a person makes a complaint

to the police that his signatures have been obtained by force or coercion, further steps need to be taken but he cannot keep silent just by lodging the complaint. That apart, even in the complaint lodged by the petitioner/accused what is all that is requested is that he need some time to pay the amounts and also the protection from the respondent/complainant and others from whom he has borrowed monies.

16. In view of the above, I see no substance in the submissions made by the learned Counsel appearing for the petitioner/accused that the petitioner/accused could rebut the presumption that the cheques Exs.P.2 and P.3 were issued in discharge of the legally enforceable debt and that they were not issued by the petitioner/accused out of free volition.

17. Both the Courts below have considered the entire material on record in proper perspective and rendered the impugned Judgments which in my considered opinion do not suffer from any irregularity or illegality warranting interference insofar as the conviction of the petitioner/accused is concerned. However, taking into consideration the totality of the facts and circumstances of the case and the plea of the accused, I feel that the ends of justice would be met if the sentence of imprisonment is modified into one of compensation. Subject to this modification, the Criminal Revision Case is liable to be dismissed.

18. 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 Act. However, the sentence of simple imprisonment for six months imposed by both the Courts below is however set aside. Instead the petitioner/accused is directed to deposit a compensation of Rs.4,00,000/- (Rupees four lacs only) in the trial Court within a period of one month from today, in default the petitioner/accused shall undergo simple imprisonment for a period of six months. As and when the amount is deposited, the respondent/complainant is permitted to withdraw the same without furnishing any security. The amount of fine is sustained.

M.S.K.Jaiswal, J

Date: 9th June, 2015

smr