THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1184 of 2008

JUDGMENT:

The appellant-complainant by name K.Rama Devi seeks to assail the judgment of acquittal dated 07.07.2008 passed by the learned IV Additional Chief Metropolitan Magistrate, Hyderabad, in a private complaint case C.C.No.1145 of 2005 filed by said complainant against the accused A.Srinivas, for an offence under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The brief facts of the case are that the accused and the complainant are family friends and in the month of March,2005, the accused borrowed an amount of Rs.20,000/- from the complainant and on demands the accused issued Ex.P.1 cheque bearing No.498046, dated 30.05.2005 to the complainant for discharge of loan and when the complainant presented the cheque for collection, the same was dishonoured for 'funds insufficient' covered by Ex.P.2-memo of return for dishonour, dated 10.06.2005. Then the complainant issued Ex.P.3-legal notice, dated 29.06.2005(Ex.P.4 is postal receipt for registered post and Ex.P.5 certificate of posting) which is served on the accused on 01.07.2005 covered by Ex.P.6 is postal acknowledgment, but the accused failed to repay the amount and from non-payment within 15 days after service of notice under Section 138(b) of the Act from the accrual of cause of action, within one month under Section 142(b) of the Act, the complainant filed a complaint against the accused. The accused appeared before the Court pursuant to the summons and after supply of case copies under Section 207 of the Code of Criminal Procedure (for brevity, "The Cr.P.C.") when questioned on substance of accusation under Section 251 of Cr.P.C., he pleaded not guilty.

3. On behalf of the complainant during the course of trial, he was

examined as PW1 and got marked Exs.P.1 to P.6 supra and on behalf of the defence, the evidence is ‘nil’.

4. After closure of evidence, the accused was examined under Section 313 of the Cr.P.C. who denied the incriminating material put to him and stated no defence.

5. Appreciating the evidence, both oral and documentary, the Court below ultimately held that the complainant could not prove guilt of the accused for the offence under Section 138 of the N.I.Act and thereby not found guilty.

6. It is attacking the said findings, the present appeal is filed with the contentions in the grounds that the acquittal judgment of trial Court is contrary to law, that the trial Court erred in acquitting the accused without any legal base but only on assumptions and presumptions. that the complainant did not choose to examine any witness in support of his claim and mechanically passed the judgment, that the trial Court not appreciated the evidence of the complainant that the accused borrowed amount and issued Ex.P.1 cheque for discharge of the loan and the complainant got issued Ex.P.3 legal notice intimating dishonour and demanding repayment which the accused received but failed to pay the amount, thereby sought for setting aside the acquittal judgment and to allow the appeal finding the accused guilty. Learned counsel for the appellant reiterated the same during the course of hearing.

7. The learned counsel appearing for the 1st respondent-accused, on the other hand, submits that for this Court while sitting in appeal there is nothing to interfere with the judgment of the trial Court, hence to dismiss.

8. Perused the material on record. The parties are hereinafter referred to as they are arrayed in trial Court for the sake of convenience.

9. Now the points that arise for consideration are:

(1). Whether the accused did not issue the cheque in favour of the complainant for discharge of legally enforceable debt to make liable for the offence under Section 138 of the NI Act and if so, the trial court's acquittal judgment is unsustainable, if so with what observations?

(2). To what result?

Point No.1:

10-(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.

10-(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].

10-(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.

10-(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.

10-(E). 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.

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

10-(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.**

11-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".

11-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].

11-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.

11-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 i n **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.

12. From above legal position, coming to decide on the facts from oral, circumstantial and documentary evidence, how far it is proved the case of the complainant and from drawing of presumptions and inferences if any, how far rebutted by accused concerned:

12-A. The evidence of P.W.1-the complainant with reference to Exs.P.1 to P.6 supra shows the Ex.P.1 cheque bearing No.498046, dated 30.05.2005 for Rs.20,000/- when presented returned dishonoured from which within 30 days Ex.P.3 legal notice covered by Ex.P.4 registered post and Ex.P.5 certificate of posting was sent and the accused acknowledged the same under Ex.P.6 dated 01.07.2005 failed to pay within 15 days after service from accrual of cause of action, that is proved and there is no oath against oath from the accused. In fact, the case of the complainant consistently is that the accused and the complainant are residents of same place with opposite houses at Thilak Nagar and with the long acquaintance and friendship for the needs of the accused when he asked the complainant lent Rs.20,000/ in March, 2005 and in discharge of which later for demands he issued Ex.P.1 cheque dated 30.05.2005 for the said amount. The accused if at all not issued the cheque and not contained of his signature and not for the amount of Rs.20,000/- borrowed and for any other purpose, he could have issued reply notice. The Ex.P.3 notice admittedly served under Ex.P.6 and non-giving of reply not only strengthens the case of the complainant as laid down in Rangappa (supra) at para-15 and also gives scope to draw adverse inference to the defence of the accused as no prudent person would keep quiet but for no defence even served with notice without reply if the version is not correct as laid down in Chapala Hanumaiah(supra)by this Court way back. In fact, once the cheque is proved routed from the account of the accused with his signature that is not in dispute and therefrom there are presumptions under Section 118 and 139 of the N.I.Act as laid down by the Apex Court in Rangappa (Supra) saying the burden is on the accused to rebut under the reverse onus clause which he could not rebut and the case of the complainant strengthened from the cheque dishonour legal notice with no reply and there is nothing even to dispute the case of the complainant from her cross-examination as P.W.1 by the accused much less no oath against oath from the accused there is nothing to say accused rebutted the presumptions available against him, the trial court missed in cryptic judgment in acquitting the accused without proper appreciation of the facts by proper application of the law. In view of the above discussion, the accused is found guilty.

13. In the result, the Criminal Appeal is allowed by setting aside

the acquittal judgment of the trial Court in C.C.No.1145 of 2005 dated 07.07.2008 on the file of the learned IV Additional Chief Metropolitan Magistrate, Hyderabad. The accused is found guilty for the offence under Section 138 of the N.I.Act.

14. For appearance and hearing of the accused on sentence, post on 30.01.2015.

Dr. B. SIVA SANKARA RAO, J

Date: 23-01-2015
Vvr

Dt:30.01.2015:

15. The matter is posted from 23.01.2015 to today by reversing the acquittal judgment of the trial Court finding the accused guilty allowing the appeal for hearing of the accused on sentence. The Apex Court in **SOMNATH SARKA VS. UTPAL BASU MALLICK**[11] held 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."*

16. Having regard to the above as the cheque amount for is for Rs.20,000/- dated 30.05.3005 and from the submission by the appellant-complainant of the endeavor 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/-. Out of which, the complainant is entitled for Rs.30,000/- and the remaining fine amount of Rs.10,000/- shall go to the State. The accused is directed to pay or deposit the same within four 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 the 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. B. SIVA SANKARA RAO, J

Date: 30.01.2015
vvr/knl.

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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