HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CRIMINAL REVISION CASE No. 1626 of 2014

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ORDER:

The present Criminal Revision is filed under Sections 397 and 401 Cr.P.C. aggrieved by the judgment dated 06.08.2014 passed in Crl.Appeal No.287 of 2012 on the file of the IV Additional Metropolitan Sessions Judge, Hyderabad, wherein and whereunder the findings of the trial court in convicting the accused in C.C. No.527 of 2011 on the file of II Special Magistrate, Hyderabad, were confirmed.

The facts as culled out from the evidence are as under :

A private complaint was filed by the respondent/complainant for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The allegations in the complaint, sworn statement and the evidence shows that the accused developed acquaintance and friendship with the complainant, who was a proprietor of M/s. Asha Electrical and Engineering Company, and due to the said acquaintance he used to take amounts from the complainant as hand loans and repay the same. It is said that the accused approached the complainant for a hand loan of Rs.15 lakhs for meeting his family and business requirements. Believing the representation made, the complainant is said to have paid an amount of Rs.5 lakhs vide cheque No.502421 dated 22.01.2008, Rs.2,50,000/- vide cheque No.506102 dated 27.05.2008, Rs.3,50,000/- by way of cash and Rs.3,50,000/- vide cheque No.617828 dated 24.09.2009 in favour of M/s. Asha Electricals and Engineering Company. All the cheques were encashed and the same is reflected in the accounts of the complainant. The complainant states that when he demanded the accused for repayment of the said amount, the accused was prolonging the same on one pretext or the other. On persistent demands, the accused is alleged to have paid an amount of Rs.2,61,000/- to the complainant towards interest and further executed a promissory note in favour of the complainant for the balance amount of Rs.16,03,000/-, undertaking to pay the same with interest thereon at 24% p.a. The evidence on record also discloses that the accused, on being demanded for payment of the amount issued four cheques viz., 1) cheque bearing No.130000 dt:27.12.2009 for Rs.2,50,000/-, 2) cheque bearing No.12998 dt:09.01.2010 for Rs.3,50,000/-, 3) cheque bearing No.148712 dt:28.12.2009 for Rs.3,50,000/-, 4) cheque bearing No.136975 dt:29.12.2009 for Rs.5,00,000/-.

As per the instructions of the accused, the complainant presented the cheques through his Banker for collection and the same were dishonoured due to insufficient funds. When the complainant intimated about the same to the accused, he requested the complainant to re-present the cheques again in the last week of January, 2010 and promised to arrange the funds to honour the same. Believing the representation made, the complainant presented the cheques and to his surprise all the cheques were dishonoured for the reason “exceeds arrangements and funds”. The same was intimated to the complainant vide cheques dishonor memo dated 01.02.2010. The complainant got issued a legal notice to the accused vide registered post with acknowledgment due on 01.03.2010 demanding for repayment of the amounts covered under the cheques. Though the accused received the said notice on 05.03.2010, there was no reply from him. Since the accused failed to pay the amount within the time stipulated, a private complaint came to be filed. After recording the sworn statements, the case was taken on file as C.C. No.527 of 2011 on the file of the II Special Magistrate, Hyderabad. On appearance of the accused, copies of the complaint and documents filed along with complaint were furnished to the accused as required under Section 207 Cr.P.C. Accused was examined under Section 251 Cr.P.C., for which he denied the allegations made and claimed to be tried.

In support of the case, the complainant got examined himself as P.W.1 and marked Exs.P-1 to P-13. The accused examined D.Ws.1 and 2 but did not produce any documentary evidence. After analyzing the evidence available on record, the trial court found the accused guilty for an offence punishable under Section 138 of the N.I. Act and sentenced him to suffer R.I. for a period of one year and to pay a fine of Rs.14,60,000/- in default to suffer simple imprisonment for six months. Out of the said amount, a sum of Rs.14,50,000/- was directed to be paid to the complainant as compensation. Challenging the same, the accused preferred Criminal Appeal No.287 of 2012 before the Court of IV Additional Metropolitan Sessions Judge, Hyderabad. Pending appeal, the accused filed Crl.M.P. No.510 of 2014 under Section 391 Cr.P.C., requesting the appellate court to receive certain documents as additional evidence to show that the petitioner has nothing to do with M/s. Asha Electrical and Engineering Company. Vide judgment, dated 06.08.2014, the learned Sessions Judge confirmed the conviction and sentence. The Sessions Judge also found that the documents to be taken as additional evidence are irrelevant and are not useful for deciding the case. Aggrieved by the same, the present Revision is filed.

The learned counsel for the petitioner mainly submits that the appellate court erred in not taking into consideration the documents filed under Section 391 Cr.P.C. and if those documents were taken into consideration, it would establish beyond reasonable doubt that the petitioner has nothing to do with M/s. Asha Electrical and Engineering Company. He further submits that the complaint itself is barred by limitation as no steps were taken for filing the complaint immediately after the issuance of first notice by way of telegram and which was marked as Ex.D-2. He further tried to impress upon the Court by contending that the complainant has not come to the court with clean hands and that he suppressed filing of the civil suit, in the affidavit-in-chief filed along with complaint. He also submits that P.W.1 misused the blank cheques and blank pronotes taken from the accused and as such the ingredients constituting an offence under Section 138 of N.I. Act are not made out.

Per contra, the learned counsel for the complainant opposed the same. According to him, the trial court as well as the appellate court have properly appreciated the evidence on record and as such the finding of the facts arrived at by both the courts below cannot be disturbed in this Revision. According to him, the plea which is sought to be taken now viz., the petitioner has nothing to do with M/s. Asha Electrical and Engineering Company was never raised at any point of time and if really the documents which are sought to be relied upon are genuine, nothing prevented the accused for filing the same at the time of trial, as they were in existence by then. In any event he submits that even if Exs.P-1 and P-4 cheques are given by Firm, it will not be of any help to the accused for the reason that the accused borrowed money for both his financial and business purpose.

In order to appreciate the rival arguments, it may be useful to refer to the oral and documentary evidence available on record. But before proceeding further it is necessary to note that the complainant herein filed O.S. No.46 of 2010 on the file of 24th Additional Chief Judge, City Civil Court, Hyderabad for recovery of an amount of Rs.16,99,680/- together with interest at 24% p.a. in respect of the four cheques which are covered in the complaint. By its judgment dated 27.06.2014 the learned Judge decreed the suit for a sum of Rs.16,99,680/-. The findings in the said suit have become final as the same are not challenged before the higher court. A perusal of the judgment in the said suit would show that the entire suit was based on the promissory note executed by defendant (accused) in favour of the plaintiff/complainant on 27.10.2009. The plaintiff therein also got marked Exs.A-2 to A-5, the four cheques issued by the accused. The accused, who is the defendant in the said suit, examined himself as D.W.1.

The complainant, who got examined himself as P.W.1, deposed about the accused requesting for a hand loan of Rs.15 lakhs for meeting his family and business purposes and believing the representation made by the accused that he is the proprietor of M/s. Asha Electrical and Engineering Company, Sindh Colony, P.G. Road, Secunderabad, the complainant lent the above amount. Out of Rs.15 lakhs, a sum of Rs.8,50,000/- was given by way of cheques to the accused, Rs.3,50,000/- by way of cash to the accused and Rs.2,50,000/- by way of cheque to M/s. Asha Electrical and Engineering Company. When the complainant demanded for repayment of the amount, the accused is alleged to have executed a promissory note dated 27.10.2009 acknowledging the debt. These four cheques when presented were returned for the reason "exceeds arrangement". After receipt of cheque return memos dated 01.02.2010, P.W.1 got issued a legal notice on 26.02.2010 which was received by the accused on 05.03.2010. Exs.P-1 to P-4 are four cheques issued by the accused, Exs.P-5 to P-8 are cheque return memos dated 01.02.2010, Ex.P-9 is the legal notice dated 26.02.2010, Exs.P-10 and P-11 are the postal receipt and acknowledgment of the legal notice and Ex.P-12 is the promissory note-cum-receipt. Though P.W.1 was subjected to lengthy cross-examination, nothing useful was elicited to discredit his testimony. In fact it was not even suggested to P.W.1 that the accused was not the proprietor of M/s. Asha Electricals and Engineering Company.

What has been elicited from the cross-examination of P.W.1 was suppression of filing of civil suit by the complainant and also obtaining attachment of property under order XXXVIII Rule 5 C.P.C. against the accused. The answers elicited from P.W.1 would show that he presented the cheque for the first time and when it was returned the accused asked him to re-present the cheque for second time. The notice was issued to the accused after return of the cheque for the second time. It is also brought on record that the present complaint came to be filed basing on Exs.P-9 and P-10. The record also reveals about the complainant filing a suit against the accused for recovery of money.

The accused got examined D.W.1, the Manager of Union Bank of India, Koti Branch, Hyderabad, and D.W.2 is the Manager of Sindh Cooperative Urban Bank Limited, P.G. Road, Secunderabad. The evidence of D.W.2 shows that the accused has two accounts, one bearing No.CC 47 and another account bearing No.SB 167. In his evidence D.W.1 deposed that the accused is the owner of Asha Electricals. According to him out of four cheques given by the accused, two cheques i.e., Exs.P-2 and P-3 relate to the personal account of the accused, whereas Exs.P-1 and P-4 relate to the account of M/s.Asha Electricals, which is a proprietary concern. Admittedly, all the four cheques were signed by the accused and the cheques were not returned due to difference in signature or that the person who signed the cheques is not competent to sign the cheques.

Basing on the evidence available on record it has to be seen "Whether an offence punishable under Section 138 of the Negotiable Instruments Act has been made out against the accused or not ?"

Relying upon the telegraphic notice alleged to have been issued on 27.01.2010 (Ex.D-2), which was earlier to Ex.P-9-legal notice issued by the complainant, the learned counsel for the petitioner/accused strenuously contends that filing of the complaint is beyond the period of limitation. P.W.1 during his cross-examination admitted that he got issued Ex.D-2-telegraphic notice through his Advocate to the accused on 27.01.2010. The said telegram was issued by A.Vanisri at 18.31 hrs. which was received by the accused at 19.55 hours on the same day. The contents of the telegram were to the effect that the four cheques issued by the accused were returned due to insufficiency of funds and about accused trying to alienate the properties with a view to avoid the payment. The averments in telegraphic notice does not anywhere indicate as to the dates when the cheques were presented and also demand for payment of the amount within the stipulated period. Later, a notice came to be issued through another Advocate vide Ex.P-9 which was received by the accused on 05.03.2010, to which no reply was given. Even accepting the facts stated above, the argument of the learned counsel for the petitioner that the complaint is barred by limitation, cannot be accepted in view of the judgment of the Apex Court in ***M/s.Leathers v. S.Palaniappan***[1]. In view of the judgment of the Apex Court referred to above, the argument that the complaint was filed beyond the period of limitation cannot be accepted. While overruling the view in ***Sadanandan Bhadran v. Madhavan Sunil Kumar***[2]***,*** the Apex Court held that the prosecution based upon second or successive dishonor of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of N.I. Act. From the judgment of the Apex court referred to above, it is clear that issuance of first notice by way of telegram, which is bereft of basic facts, even if taken as notice, still the cause of action which arose due to second presentation of the cheque and issuance of notice thereof satisfies the conditions stipulated in Section 138 of N.I. Act. Hence, it cannot be said that the complaint was filed beyond the period of limitation.

The second ground raised by the learned counsel for the petitioner is that the accused is a professional moneylender and as he has no licence to do the business under the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 F, ingredients constituting an offence under Section 138 of N.I.Act are not made out. Placing reliance on a judgment of this Court in Mrs. ***K.Sudersanam V. S.Venkata Rao***[3], he submits that a complaint under Section 138 of the Act is not maintainable. He contends that since any default in payment of money is not enforceable under law, a complaint under Section 138 of the Act is not maintainable.

Keeping in view the facts in issue, the argument of the learned counsel for the petitioner needs to be tested with the judgment relied upon by him.

A reading of the judgment of this Court referred to above (K.Sudersanam (3 Supra) would show that in order to fall within the definition of money lender it is not enough merely to show that a man had on several occasions lent money at remunerative rates of interest but there must be a certain degree of system and continuity about the transactions and that the definition of money lender in the Act does not include those who advanced money casually.

Therefore, the argument of the learned counsel for the petitioner does not stand to merit.

The third ground raised by the learned counsel for the petitioner is that the accused has not come to the Court with clean hands. According to him, the complainant has suppressed the fact of filing of the suit against the accused. It is to be noted that filing of the suit and non mentioning of the same in the affidavit filed along with the complaint does not in anyway alter the situation. Non-mentioning of filing of the suit in the affidavit filed along with the complaint does not lead to an inference that the complainant has suppressed any material fact. On the otherhand, a perusal of the averments in the complaint itself would show that P.W.1 clearly stated that he initiated civil proceedings against the accused for recovery of the amount due under the promissory note. During the cross-examination P.W.1 admitted that he filed O.S. No.46 of 2010 and also obtained an order of attachment under Order XXXIX Rule 5 of C.P.C., against the accused. Therefore, it cannot be said that the complainant suppressed material facts or that he has approached the Court with unclean hands.

The fourth ground raised by the learned counsel for the petitioner is that the blank cheques and pronotes taken by the complainant are misused. Except suggesting to P.W.1, no material is placed on record to show that the complainant took blank cheques in advance from the accused and also the circumstances which made the accused to give blank cheques.

One other argument which was advanced by the learned counsel for the accused was that if the amount was borrowed by the proprietary concern it is mandatory to show the proprietary concern as a party to the proceedings. I am afraid the said argument cannot be accepted for the reason that not making a proprietary concern as a party to the proceedings would not lead to any adverse consequences as the liability of the proprietary concern and the proprietor is joint and several. So merely because the proprietary concern is not shown as an accused, the proprietor who acts on behalf of the concern is not entitled to seek any relief. The said view of mine is fortified by judgment of this Court in ***Rohit Parushram @ Rohit Gir v. Dhiraj Rawal***[4]***.***

The last ground which was seriously contended by the learned counsel for the petitioner is that the accused is neither the proprietor of

M/s.Asha Electrical and Engineering Company nor has any connection with the said firm. He submits that though Exs.P-1 and P-4 cheques are signed and issued on behalf of M/s. Asha Electrical and Engineering but the additional material which was filed before the appellate court along with Crl.Appeal No.287 of 2012 show that he was nothing to do with the said proprietary concern. In view of the above, he submits that the petitioner cannot be convicted for an offence punishable under Section 138 of the N.I. Act. But as seen from the evidence on record, the accused issued four cheques which are marked as Exs.P-1 to P-4 and the signature on four cheques belong to the accused. The said fact is not in dispute. Out of the four cheques, two cheques were issued from the savings bank account of the petitioner and two other cheques were issued from the account of the proprietary concern. It is to be noted that no separate Revision has been filed challenging the order passed in Crl.M.P. No.510 of 2014 filed under Section 391 Cr.P.C. The finding in Crl.M.P.No.510 of 2014 have become final. Be that as it may, the evidence of P.W.1 coupled with the averments in the complaint and legal notice (Ex.P-9) show that the accused borrowed the money from the complainant for his family and business necessity. Believing the representation made that he is the proprietor of M/s. Asha Electrical and Engineering Company and due to acquaintance, the complainant advanced a sum of Rs.15 lakhs over a period time by way of cheques and cash. The said fact of advancing the amount stands established through the bank account of the complainant. Further, no reply was given to the notice received, disputing the relationship of the accused with the firm. Even during the course of cross-examination it was not even suggested to P.W.1 that the accused was neither the proprietor nor an authorized signatory of M/s. Asha Electrical and Engineering Company. However, during the course of arguments, it was urged that the petitioner has nothing to do with the M/s. Asha Electrical and Engineering Company. In the absence of any evidence on record, the trial court while accepting the evidence of D.W.2 (Branch Manager of the Bank), who deposed about the accused being the owner of M/s. Asha Electrical and Engineering Company, rejected the plea taken by the accused. The trial Court also relied upon the judgment in ***Jayantilal Shah v. Punkaj Mashruwala and another***[5] and also the judgment of this Court in ***Sadanandan Bhadran Case (2 supra),*** to negative the plea of the accused.

As stated earlier, the accused filed Crl.M.P. No.510 of 2014 requesting the lower appellate court to take certain documents as additional evidence in support of his plea. The documents which are sought to be marked/relied upon by the counsel for accused are as under:

1) Certificate of Registration No.C15/1576/98 dated 25.07.1998 issued by Labour Department.
2) Renewal Certificate of Registration No.ALO Cir 15/1576/98, issued by Labour Department from 01.01.2003 to 31.12.2003.
3) Renewal Certificate of Registration No.ALO 17/Hyd/7/98 issued by Labour Department from 01.01.2008 to 31.12.2008.
4) Renewal Certificate of Registration No.ALO 17/Hyd/7/98 issued by Labour Department 01.01.2009 to 31.12.2009.
5) Certificate of Registration issued by Central Sales Taxvide CST No.SEC/05/1/3130/98-99 dated 04.06.1998.
6) Copy of loan sanction letter of the Sind Co-op Urban Bank Ltd dated 10.10.2005.
7) Copy of memorandum of title deeds dated 09.02.2005 in favour of the Sind Co-op Urban Bank Ltd.
8) Notice issued by the Sind Co-op Urban Bank Ltd. dated 09.06.2010.
9) Letter issued by the Sind Co-op Urban Bank Ltd. dated 10.07.2014.

After referring to the contents of the documents and their relationship to the case on hand, the lower Appellate Court rejected the same holding as under:

> "Therefore, he proposed to file documents that indicate his case. As per the proposed documents accused is husband of proprietrix Smt. Bharathi Bajaj. He would have called her at trial and made her to depose these facts. He did not do that. He has no valid explanation to offer for that failure. He does not explain how he got these original certificates issued by labour department for M/s. Asha Electrical and Engineering Company. Thus his connection with the said firm is clear as he possessed those documents. More than anything even if we consider that he is not the proprietor for that firm, it is not his case that he was not an authorized signatory for bank operations of that firm. According to D.W.2 it is this accused who operates that account of that business firm also. In the case at hand the debt proved is personal debt of accused and not a business debt of the firm. Since firm's account is also maintained by accused the two cheques were drawn on such account maintained by him. They fall within Sec.138 of N.I. Act. Even, if we exclude those two cheques there remained Exs.P-2 and P-3 cheques drawn on personal account of accused as deposed by D.W.2. The proposed documents apart from not being useful they are found irrelevant in deciding any fact in this case. Therefore, Crl.M.P. No.510 of 2014 is dismissed."

From the above, it is clear that the accused did not produce any of these documents before the trial court though most of the documents were in existence by the date of presentation of cheques. These documents were issued much prior to the filing of the complaint and they were within the knowledge of the accused. No reasonable explanation is forthcoming to show as to why these documents could not be placed before the trial court at the earliest point of time and also as to why there is no reference to these documents while P.W.1 was subjected to cross-examination. A perusal of the documents which are sought to be relied upon by the counsel for the accused in appeal would show that all the documents relate to the period either prior to the issuance of cheque or after the issuance of cheque, except one certificate alleged to have been issued in the year, 2009. The counsel mainly relied upon certain documents which were issued after the cause of action in the present complaint. Hence, the appellate court has rightly rejected the request of the petitioner in taking these documents as additional evidence. Apart from that, the accused did not lead any defence evidence either by examining himself or by examining someone else to prove his relationship with M/s. Asha Electrical and Engineering Company, more so after the evidence of D.W.2, who being a witness examined by the accused himself, spoke about the accused being the proprietor of M/s. Asha Electrical and Engineering Company. Further, the promissory note which is said to have been executed by the accused in the month of October, 2009 and which is brought on record as Ex.P-12 clearly describe the accused as a proprietor of M/s. Asha Electrical and Engineering Company. In spite of the above evidence on record, the accused failed to either enter the box or examine any witness on his behalf to dispute the contents of Ex.P-12-the promissory note and also the evidence of D.W.2. Even for the sake of argument, if the two cheques i.e., Exs.P-1 and P-4 which are issued by proprietary concern are excluded from consideration, still the accused cannot escape himself from the liability/culpability insofar as the other two cheques are concerned i.e., Exs.P-2 and P-3.

Even otherwise it is to be noted that the evidence of P.W.1, the documents marked and the averments in the complaint show that the amount was taken towards his business needs and family requirements. If really the accused was not the proprietor, the cheques issued on the account of the proprietary concern should have been returned for a different reason also. But the cheques issued by the accused which were admittedly signed by him were not returned “due to signature not tallying with the account” but were returned for the reason “exceeds arrangement”. Further, the civil court has already held that the accused is liable to pay the amount covered under the four cheques, which has become final. Therefore, it cannot be said that the petitioner has nothing to do with M/s. Asha Electricals and Engineering Company and he is not liable to pay any amount. Hence, I see no reason to interfere with the findings arrived at by both the courts below.

Accordingly, the Criminal Revision Case is dismissed.

As a sequel thereto, Miscellaneous Petitions pending if any in this Revision, shall stand closed.

C. PRAVEEN KUMAR, J

Date:30.06.2015.
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HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

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CRIMINAL REVISION CASE No. 1626 of 2014

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Date: .06.2015

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[1] 2013 Crl.L.J. 1112 (SC)

[2] 1998 (6) SCC 514

[3] AIR 1963 AP. 442 (V. 50 C 139)

[4] 2005 (2) ALD Crl. 446

[5] 1996 Crl.L.J. 3099