

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.802 of 2008

JUDGMENT :

The unsuccessful complainant of the private complaint case for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'The Act'), presented the appeal, against the accused from acquittal judgment dated 01.03.2007 in C.C. No.112 of 2006 on the file of learned Special Judicial Magistrate of the First Class for Excise cases, Guntur.

2) Brief facts are that the Complainant is a merchant and doing cotton business, A-1 is cotton merchant, A-2 to A-4 are its partners and they used to purchase cotton from several persons like complainant on credit, that from 12.06.1998 onwards accused are maintaining khata with the complainant in the course of their business, that the said Khata is running and mutual. As per the khata the accused has to pay an amount of Rs.4,89,655/- to the complainant as on 05.12.2000 and the complainant demanded the accused several times to pay the said amount, that the accused gave cheque for Rs.4,76,552/- and the same was when presented returned dishonoured. The complainant issued a statutory legal notice and the accused got issued reply and did not pay the amount, for which the complainant presented the complaint.

3) After recording the sworn statement of the complainant and taken cognizance of the offence the accused who were secured on summons were examined under section 251 Cr.P.C regarding the accusation made against them in the complaint for which they denied the commission of offence and pleaded not guilty. During the course of trial, on behalf of the complainant, P.W-1 was examined and marked Exs.P-1 to P-12 viz., on behalf of the accused, D.W-1 was examined and marked Ex.D-1 deed of partnership dated 12.09.1999 and Ex.D-2 certificate issued by Deputy Commercial Tax Officer-I, dated 30.09.2003. The trial Court recorded that the case against Accused Nos.1 and 2 was abated on 05.12.2006, for death of A-2 who was representing A-1 firm and after hearing both sides and after perusal of material and evidence on record, the trial Court held the other two partners of the firm A-3 and A-4 not guilty for the offence punishable under Section 138 of the Negotiable

Instruments Act and accordingly they were acquitted for said offence.

4) Impugning the said acquittal Judgment, the complainant filed the present appeal contending that the trial Court's acquittal judgment is contrary to law, weight of evidence, probabilities of the case, that the learned Magistrate ought to have appreciated the fact that Ex.P-9 reply notice issued by the accused did not state that they are not the partners of the partnership firm and further Ex.D-1 partnership firm deed shows that A-3 the partner of the firm, hence they are liable for conviction, that the learned Judge ought to have appreciated the fact that in the complaint filed by the complainant it was stated A-1 to A-4 are the partners of the firm and they are involved in the day to day activities of the business and also for dishonour of cheques issued on behalf of the firm, that the learned Magistrate erred in holding that Ex.P-1 is issued by A-2 and it was dishonoured, and A-3 and A-4 are not liable for dishonour of Ex.P-1, this is contrary to Section 141 of the Act, that the learned Judge ought to have appreciated the fact that the Respondent Nos.3 and 4 are not disputing about the issuance of Ex.P-1, but they stated that they are not the partners of the firm and they have no way concerned with the said transaction, once the accused taken a stand that they are not liable the burden shifted upon the accused Nos.3 and 4 and they have to prove that they are not the partners of the firm that the learned Magistrate ought to have appreciated the fact that once the firm issued a cheque all the partners of the company are jointly liable to pay as per Section 141 of the Act and prayed to convict the accused by allowing the appeal. The learned counsel reiterated the same in the course of hearing.

5) Whereas it is the contention of the learned counsel for the accused that the trial Court's acquittal judgment is just having fresh in mind the facts, by proper appreciation on fact and law and for this Court while sitting in appeal there is nothing to interfere against said acquittal recorded by the trial Court and thereby sought for dismissal of the appeal.

6) Perused the material on record. The parties hereinafter are referred to as arrayed before the trial Court for the sake of convenience in the appeal.

7) Now, the points that arise for consideration are:

1. Whether the acquittal judgment of the trial Court of A-3 and A-4, the partners of A-1 firm represented by A-2 also arrayed in his

individual capacity as A-2, since A-2 died and the trial Court recorded the case against A-2 besides A-1 also as if abated on 05.12.2006 in saying A-4 is even contended as not at all partner of A-1 firm not shown as such muchless responsible for day to day affairs at the relevant period of cheque issued on behalf of A-1 by A-2 as drawer by duly signed, equally of A-3 claiming as sleeping partner to show contra, are unsustainable and requires interference by this Court while sitting in appeal, if so the cheque is issued for the amount due under the Khata dealings to say for legally enforceable debt or other liability, if so any of the accused 3 or 4 on behalf of A-1 firm are liable to be convicted and with what observations?

2. To what result?

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POINT No.1:

7-(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.

7-(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.

7-(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.

7-(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.

7-(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.

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

7-(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.**

8-A. The Apex Court in NARAYAN MENON v. STATE OF KERALA 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".

8-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.

8-C. Further, as per the expression of the Apex Court in RANGAPPA vs. MOHAN (3-Judges Bench) paras-9 to 15 referring to Goa Plast's case (supra), KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE 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 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 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 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 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.

8-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 **Chapala Hanumaiah Vs Kavuri Venkateshwarlu** that having received and acknowledged the statutory legal notice after dishonour of cheque, non-giving of reply to said legal notice, improbabilises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

9-A Coming to the liability of the legal entity and the persons in-charge of the management and those responsible for its day-today affairs personally concerned, Section 141 of the N.I. Act is an instance of specific provision that in case an offence under Section 138 of the Act is committed by a company, the criminal liability for dishonour of a cheque will extend also to the officers of the company. As a matter of fact, Section 141 contains conditions which have to be satisfied before the liability can be extended on the officers of the entity. Inasmuch as, the provision creates a criminal liability, the conditions have to be strictly complied with. In other words, the persons who had nothing to do with the matter, need not be roped in as co-accused with the entity. **An entity being a juristic person, all its deeds and functions are the result of acts of**

others. Therefore, the officers of the company, who are responsible for the acts done in its name, are sought to be made personally liable for the acts which result in criminal action being taken against the entity. In other words, it makes every person, who, at the time of commission of offence, was in-charge of and responsible for the conduct of business of the entity, as well as the entity, liable for the offence.

9-B. It is true that the proviso to sub-section of the Section 141 of the Act enables certain persons to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence. The liability under Section 141 of the N.I. Act is sought to be fastened vicariously on a person connected with the company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. Further, the apex Court, Three Judge Bench in the latest expression in **Anil Gupta V. Star India Private Limited** held on the scope of Section 138 read with Section 141 of the Act particularly reproducing as Section 138 and 141 of the Act in paras 8 and 9 and referring to the earlier propositions of law including of the two judge bench in **Anitha Hada V. India Accrelic Limited** and Three Judge bench expression in **Anitha Hada V. God Father Travels Pvt. Ltd.** (case-2) partly over ruling **Anitha Hada** supra and by affirming paras 12, 13 and 21 that when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or body corporate or even firm, prosecution can be initiated against such drawer. In this context the phrase 'as well as' used in Section 147(1) of the Act would embroil the persons mentioned in the first category viz., incharge of and responsible to the entity for conduct of its business liable to be prosecuted and the words 'shall also' under Section 141(2) of the Act are capable of bringing the third category persons (if proved that the offence has been committed with the consent or findings, or is attributable to, any neglect on the part of the, any Director, Manager, Secretary or other officer of the Company, such Director, Manager, Secretary or other Officer shall also be - - - - liable to be proceeded) additionally within the dragnet of the offence on a equal par. Hence, actual offence could have been committed by the Company and Denolem the other two categories of persons can also become liable. If the offence was committed by a Company, it can be

punished, if the Company is prosecuted. But in spite of the prosecuting the Company, if a payee opts to prosecute only the persons falling within the second or third category, the payee can succeed in the case only in showing s.o. The provisions do not contain a condition that the prosecution of a Company is sine-qua-none for prosecution all the other persons. However, an offence was committed by Company is sine-qua-none for convicting those other persons.

9-C. Thus, from the above expressions, though impleading the company or firm or entity as 1st accused is not a Sine-qua-none the proving of the offence committed by said entity is a sine-qua-none even to maintain the prosecution and punish either 2nd category of persons in-charge of and responsible to the conduct of business for the entity or even third category of persons by showing with specific pleading of they also committed with the consent or connivance of the second category persons, being concerned with the entity as Manager, Director, Secretary or other Officer of it.

9-D. From the above propositions, coming to the facts, as per the very case of the complainant, the partnership firm T.V.Thangavadivel Muruga Nadar Sons Pvt. Ltd being a cotton merchant used to purchase cotton from the complainant proprietary concern with name and style Padmavathi cotton Traders on credit basis and the accused persons 2 to 4 are its partners and maintaining Khata with complainant in the course of their credit dealings and for the amount due for more than Rs.4,76,552/-, towards part payment for said amount on 16.08.2003 issued the cheque that was when presented returned dishonored. The accused persons that is A-1 entity, A-2 to A-4 the partners acknowledged by Exs.P-5 to P-8 the P-4 legal notice issued by complainant dated 31.10.2003 on 06.11.2003 and they issued reply dated 17.11.2003 denying liability to pay or liability for prosecution among Exs.P-1 to P-12, Ex.P-1 is the cheque referred supra, Exs.P-2 and P-3 cheque return memo with dishonor intimation and Ex.P-4 legal notice with Ex.P-5 two acknowledgements and Ex.P-9 reply, Ex.P-10 is the copy of account, Ex.P-11 and P-12 Form-B and Form D-1 certificate or registration of the complainant business entity. Thus, Ex.P-1 to P-4 and P-9 are the material documents in appreciation of the facts with reference to evidence of P.W-1. At the cost of repetition from the above legal position, the complainant has to show therefrom with specific averments in the complaint of

accused 3 and 4 are among the third category, if not under second category of persons, without which, the prosecution against them won't survive for rightly or wrongly Ex.A-1 entity along with its person responsible i.e., A-2 who signed the cheque on behalf of A-1 entity proceedings closed as abated for death of A-2 and not even shown A-1 entity business survives with no dissolution of the firm by continuation of A-3 and A-4, even such abatement by itself will not absolve or closure of the prosecution but for deciding on merits from any material to survive the prosecution with sustainability against A-3 and A-4 before the trial Court and in deciding correctness of the acquittal judgment against them now impugned in the appeal. Prima facie, Ex.P-10 is the copy of account of accused entity with complainant. According to the appellant-complainant, there is no specific denial of the credit khata dealings either in Ex.P-9 reply or in P.W-1's cross-examination regarding Ex.P-10. A perusal of the complaint no way specifically with material particulars pleaded that A-3 and A-4 as partners of A-1 entity were also coming and purchasing cotton on credit even the Ex.P-1 cheque signed by A-2 on behalf of A-1, to make them liable, muchless to show, they have also committed the offence with consent or connivance of A-2, but for a bald allegation also in array of them as co-accused without such pleading required either in the statutory notice Ex.P-4 or in the complaint muchless even from filing of any day book entries or credit vouchers with signatures of A-4 and A-3 if at all partners of A-1 entity and responsible for its business affairs to link them to the crime for making liable of penal consequences. The defence of the accused persons 3 and 4 from cross-examination of P.W-1 in support of Ex.P-9 reply is that, the Ex.P-10 account copy is not correct and they have paid more amount than what was due. That is the defence of A-3 by also saying he was only a sleeping partner and never attended in day to day affairs to make him liable from mere partner of A-1 entity and the defence of A-4 is at the cost of repetition, of he was not at all a partner. In support of it, A-4 came to witness box as D.W-1 and exhibited Ex.D-1 partnership deed dated 12.09.1999 and Ex.D-2 certificate issued by Deputy Commissioner, Commercial Tax Department, dated 30.09.2003 showing he was not at all its partner and not at all arrayed as such and thereby not concerned with Ex.A-1 entity. Despite that there is no evidence positively pointing out the responsibility of A-4 even as a third category of person of consent or connivance in commission of offence by A-2 or A-3 to rope A-4. Even coming

to A-3, there is no specific allegation muchless any material of he dealt with any credit transactions for responsibility, muchless his consent or connivance is there in commission of offence for dishonor of the cheque and its non-payment by A-2 who signed the cheque since died. It is in the factual scenario, the trial Court held that in the evidence of P.W-1 for saying from 12.06.1998 the accused firm maintaining Khata with complainant in the credit purchases and fallen due more than the amount for which towards part payment Ex.P-1 cheque stated issued, he could not show specifically any role of A-3 and A-4 within the meaning of Section 14 of the Act. What D.W-1/A-4 deposed including from cross-examination by complainant was, he is not a partner and his mother is a partner in the A-1 firm. He deposed that, in Ex.P-9 reply, it was commonly issued on behalf of A-1 firm by all the partners and he was not specifically shown not responsible by separate reply. P.W-1 admitted in the cross-examination that, in the Ex.P-10 copy of account of A-1 firm, there are no any signatures of any of the partners muchless to say any purchases by A-3 and A-4 on behalf of the A-1. It is besides defence of A-3 of excess amounts than what was due. Thus, for this Court while sitting in appeal against the acquittal judgment of the trial Court so far as A-3 and A-4 concerned, there is nothing to interfere. However, the fact remains that A-1 firm including from Ex.D-1 deed of partnership showing A-2, A-3 and others including mother of A-4 partners and not A-4, not dissolved by virtue of any clause therein from death of one of the partners, particularly A-2 and the firm is represented by other partners to continue and the firm A-1 originally arrayed, further wrongly recorded the proceedings against A-1 abated as if, though nothing to say so from Ex.B-1 partnership deed for mere death of the active partner or managing partner A-2 since A-3 continuous to represent the firm as one of the partners even claimed as sleeping partner apart from other partners there, for case against the firm not abated, for the reason of no automatic dissolution of the firm for death of one of the partners.

9-E. Thus, the trial Court ought not to have recorded the proceedings against A-1 firm as abated, but for recording A-3 being one of the partners on record to represent A-1 firm and once, A-1 firm is there on record, though not liable for imprisonment of A-3 representing A-1 firm, fine can be imposed to recover for

not exceeding double the value of the cheque amount. In particular for, either from P.W-1 cross-examination or from D.W-1 evidence with reference to Exs.P-1, P-4, P-9 and P-10, there is not much in dispute of Ex.P-1 cheque issued by the firm duly signed by A-2 as its authorised partner to make the firm responsible for the dishonor as firm was also served with notice under Ex.P-4 acknowledged by A-2 in his individual capacity also under Ex.P-5 and P-6 apart from A-3 and A-4 under Exs.P-7 and P-8 acknowledgements referred supra. To that extent as act of Court shall prejudice no man not sanctioned by law, the matter requires remittance for re-trial to decide fresh, the liability of A-1 entity by setting aside the trial Courts observation of the prosecution against A-1 is abated from death of A-2 for still A-3 partner of A-1 firm continuous on record though as observed by the trial Court and uphold by this Court, A-3 personally not made liable equally A-4; A-1 if at all to be made liable being a firm to represent by other partners for the reason of A-3 as partner of the firm on record to represent A-1. Accordingly, point No.1 is answered.

POINT No.2:

10) In the result, while upholding the trial Court's acquittal judgment of A-3 and A-4, however by setting aside the recording of abatement of the prosecution against A-1 firm by remitting the matter to the trial Court for re-trial in directing to decide afresh by arraying A-3 as representing A-1 firm as one of the partners for continuation of the prosecution of A-1 firm to decide whether the firm dissolved or not with reference to the D-1 partnership deed already exhibited, from death of A-2 one of the partners and if not dissolved for nothing to abate to decide the liability of A-1 firm though not A-3 representing A-1 firm personally liable, to the liability of imposing fine against the firm in the event of the debt is proved legally enforceable.

Dr. B. SIVA SANKARA RAO, J

Date:30-01-2015

N.B: L.R copy to be marked.

(b/o) ksh

