HON'BLE SMT JUSTICE ANIS

CRIMINAL REVISION CASE No.360 OF 2007

ORDER:

This Criminal Revision Case under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') is filed by the revision petitioner herein challenging the judgment dated 26.02.2007, passed by the Judicial Magistrate of First Class-cum-Special Mobile Court, Mahabubnagar, in Crl.M.P.No.1509 of 2006 in C.C.No.52 of 2006, whereunder and whereby the learned Magistrate allowed the petition arraying the revision petitioner as accused No.2 in the said C.C.

2. The first respondent is the complainant and the second respondent is the accused in C.C.No.52 of 2006 before the trial Court. For the sake of convenience, the parties hereinafter will be referred to as they are arrayed in the C.C. before the trial Court.

3. The first respondent – *de facto* complainant filed the above C.C against the second respondent-accused, namely, R. Srinivasulu, under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') and Section 420 I.P.C, alleging that he and the accused are close friends; that with that acquaintance, on 10.09.2005, the accused came to his house and obtained a loan of Rs.85,000/- for his family necessities, promising to repay the same within two months and issued Ex.P.1 post dated cheque dated 11.11.2005 drawn at State Bank of Hyderabad (SBH), New Town Branch, Mahabubnagar; that on 14.11.2005, when the *de facto* complainant presented the said cheque with his banker at SBH, Hanwada Branch, for realisation of the loan amount, the said cheque was dishonoured with an endorsement "signature differs" and the same was intimated to the *de facto* complainant by his banker on 27.11.2005. The complainant got issued legal notice dated 22.12.2005 to the accused by Registered Post and

the same was served on him on 24.12.2005. In spite of that, the accused did not repay the amount.

4. During the course of enquiry, P.Ws.1 to 5 were examined. In the evidence of P.W.2, he stated that the original accused - R. Srinivasulu gave Ex.P.1 cheque to the *de facto* complainant. P.W.4, the Deputy Manager of SBH, New Town Branch, Mahabubnagar, stated that Ex.P.1-cheque belongs to the Account Holder of S.B A/c No.5974 and that the revision petitioner - B. Srinivasulu opened the said account in their Bank on 22.01.1986. Basing on the evidence of P.Ws.2 and 4, the *de facto* complainant filed Crl.M.P.No.1509 of 2006 in C.C.No.52 of 2006 under Section 319 Cr.P.C to array the revision petitioner-B. Srinivasulu as an accused in C.C.No.52 of 2006.

5. After hearing both sides, the learned Judicial Magistrate allowed the said Crl.M.P. through order dated 26.02.2007. Challenging the said order, the revision petitioner filed the present petition with a prayer to set aside the said order.

6. Learned counsel for the petitioner argued that the first respondent herein filed the complaint under Section 138 of the Act against the second respondent-accused, since Ex.P.1 cheque issued by the second respondent for Rs.85,000/- towards the loan amount was dishonoured, as such, there is a liability between the *de facto* complainant and the second respondent regarding the loan transaction. In that process, the *de facto* complainant issued a legal notice to the second respondent as contemplated under Section 138 of the Act. After completing the statutory requirements, he filed the complaint against the second respondent under Section 138 of the Act. It is also argued that Section 319 Cr.P.C cannot be invoked against the revision petitioner, as the complainant filed the Criminal Case against the accused under Section 138 of the Act and the trial Court also taken cognizance of the offence under Section 138 of the Act against the accused in C.C.No.52 of 2006. It is also argued that

the signature on Ex.P.1 does not belong to the revision petitioner and that no notice was issued to the revision petitioner. He further argued that the lower Court failed to see that the issuance of the cheque should be towards discharge of legally enforceable debt or liability and that the petitioner is no way connected with the transaction between the *de facto* complainant and the accused, and relied upon the judgment of the Constitution Bench of the Hon'ble Supreme Court in ***Hardeep Singh v. State of Punjab and others***[1]***,*** wherein it is held at paras 85, 86, 98 and 99 as under:

> "85. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination-in-chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.
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> Q. (iv) What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?"
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> *"86. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court.*
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> The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof."
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> "98. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner."
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> "99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of

> framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.
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> Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?"

and finally prayed this Court to allow the revision petition and set aside the impugned order.

7. On the other hand, learned counsel for the respondent- *de facto* complainant argued that as per the evidence of P.W.4, it came to notice that the revision petitioner is having an account with SBH vide S.B Account No.5974 and that Ex.P.1-cheque belongs to the revision petitioner, as such, the trial Court rightly passed the impugned order by invoking the provisions under Section 319 Cr.P.C. and arrayed the revision petitioner as accused No.2 and there is no illegality in passing the impugned order. But, he fairly conceded that the procedure prescribed under Section 138 of the Act was not followed and no notice was issued to the revision petitioner. Finally, he prayed this Court to dismiss the Criminal Revision Case as the revision petitioner and the accused are close friends and to cheat the de facto complainant, the revision petitioner has given Ex.P.1.

8. Now, the point for consideration is --

> Whether the revision petitioner herein is entitled to set aside the order passed in Crl.M.P.No.1509 of 2006 in C.C.No.52 of 2006 dated 26.02.2007, as prayed for or not?

9. **P O I N T**: A perusal of the record shows that the *de facto*

complainant filed C.C.No.52 of 2006 against the accused under Section 138 of the Act and Section 420 I.P.C. The said case was taken cognizance and the accused was examined under Section 251 Cr.P.C for the said offences. In the said examination, the accused denied about committing the said offences. During the enquiry, P.Ws.1 to 5 were examined and in the evidence of P.Ws.2 and 4, it came to light that the accused gave Ex.P.1 cheque to the *de facto* complainant. P.W.4- the Deputy Manager of the SBH, New Town Brach, Mahabubnagar, stated that the said Ex.P.1 cheque belongs to the revision petitioner, who is holding Bank Account No.5974 and that Ex.P.1 belongs to the said account. Basing on the evidence of P.Ws.2 and 4, the petition filed under Section 319 Cr.P.C was allowed.

10. A perusal of the impugned order shows that the trial Court has not given finding as to how the revision petitioner can be added as accused, when C.C.No.52 of 2006 is filed under Section 138 of the Act. Further, no notice was issued demanding the revision petitioner, by granting one-month time as contemplated under Section 138 of the Act. Though there is a *prima facie* case to show the collusion between the accused and the revision petitioner in issuing Ex.P.1 in favour of the *de facto* complainant, it not sufficient and it requires much stronger evidence than mere probability of his complicity. As the *de facto* complainant failed to follow the procedure contemplated under Section 138 of the Act, the petition filed under Section 319 Cr.P.C for adding the revision petitioner as an accused is not maintainable.

11. In the facts and circumstances of the case, the order dated 26.02.2007 passed by the Judicial Magistrate of First Class-cum-Special Mobile Court, Mahabubnagar in Crl.M.P.No.1509 of 2006 in C.C.No.52 of 2006 is set aside.

12. Accordingly, the Criminal Revision Case is allowed.

13. The miscellaneous petitions, if any, pending in the Criminal Revision Case shall stand closed.

ANIS, J

Date: 25.02.2015
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<u>HON'BLE SMT JUSTICE ANIS</u>

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[1] AIR 2014 SC 1200