HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1443 of 2010

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 30.06.2010 in C.C. No.205 of 2009 on the file of XVI Additional Judge-cum-XX Additional Chief Metropolitan Magistrate, Hyderabad.

2) Brief facts are that the Complainant and the accused are neighbours and having good acquaintance with each other. Out of such acquaintance, accused obtained a loan of Rs.2.00 lakhs from the complainant on 18.07.2008 promising to repay the same. When the complainant demanded accused to repay the amount, accused issued Ex.P-1 cheque for Rs.2.00 lakhs and requested the complainant to present the cheque and when the Complainant presented the same, it was dishonoured for the reason of 'funds insufficient' on 10.01.2009 under Ex.P-2. Thereafter, the complainant got issued statutory notice to the accused, who received the same and issued a reply dated 21.01.2009 with false allegations and hence the complaint is filed against him to punish him for the offence under Section 138 of N.I.Act.

3) After recording the sworn statement of the complainant, the accused was examined under section 251 Cr.P.C regarding the accusation made against the accused in the complaint, he denied the commission of offence and pleaded not guilty. During the course of trial, on behalf of the complainant, P.W-1, the complainant, was examined and marked Exs.P-1 to P-8 and on behalf of the accused, D.W-1, the accused, was examined and marked Exs.D-1 and D-2 the legal notice dated 20.12.2008 and the offence of reply dated 04.01.2009. On consideration of the evidence adduced on both sides, the learned Magistrate found the accused not guilty for the offence under Section 138 of the Act and acquitted him.

4) Impugning the said acquittal Judgment, the complainant filed the present appeal contending that the Judgment of the trial Court acquitting the accused is against law, weight of evidence and probabilities of the case, that the trial Court

ought to have appreciated the fact that the accused has not discharged the burden cast on him in the face of the counter allegations that had been made by him to the effect that he had given the cheque for Rs.2.00 lakhs as security, that the trial Court ought to have appreciated the fact that having made a positive allegation as to the alleged security, the Respondent ought to have lead independent evidence to prove the same, instead of making a vain effort to rely on the alleged shortcomings, if any, in the case of the appellant, that the trial Court has failed to observe that when the admitted amount borrowed by the Respondent from the appellant's wife, the question of Respondent giving a cheque in the name of the appellant, only for Rs.2.00 lakhs would never arise, that the trial Court ought to have further appreciated that had it been an instance of repaying an amount of Rs.8.00 lakhs through cheques, the Respondent would have certainly insisted on getting back his cheque that had allegedly been given as security; but, on the contrary the Respondent had not sent any notice to the appellant's demanding the return of the alleged cheque given as security, except mentioning it in the reply notice Ex.D-2, that the trial Court ought to have appreciated that even a man of ordinary prudence would have anticipated the possibility of abuse of the cheque given as security, especially after the discharge of the entire debt, and it is expected of that man, atleast, to instruct his banker not to honour the cheque, given the fact that the person who has taken the said cheque as security has failed to return it, that the trial Court ought to have appreciated that the respondent has merely tried to take advantage of the fact as to the pending civil litigation between the appellant's wife and the Respondent, that the trial Court has fallen into an error in observing that the cheque was presented on 09.01.2009 only after the receipt of Ex.D-2 by the appellant's wife, when the fact remains that the cheque was presented for collection on 07.01.2009, which in fact, was prior to the receipt of Ex.D-2, that the trial Court ought to have observed the physical impossibility of having the presentation, sending it for collection and returning of the instrument, i.e., Ex.P-1 on the same day i.e., on 09.01.2009, that the trial Court ought not to have arrived at an erroneous conclusion presumptively that Ex.P-1 was presented subsequent to Ex.D-2 notice, dated 04.01.2009 when the fact remains otherwise, that the trial Court has clearly fallen into an error in observing that the appellant would have obtained a documentary proof for his lending of Rs.2.00 lakhs, inasmuch as Ex.P-1 itself is the documentary proof and law does not mandate that a Negotiable Instrument should be supported by another document/instrument 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 first appellate 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 Ex.P-1 cheque routed from the account of the accused with his signature is not issued for not legally enforceable debt or other liability for Rs.2,00,000/- but for the blank cheque obtained by complainant at the time of arranging loan of Rs.8,00,000/- to the accused by him through his wife and misused without return the said blank cheque by cause filled latter and if not the trial Court's acquittal judgment on that line is unsustainable and requires interference by this Court while sitting in appeal and with what observations and conclusions?

2. To what result?

POINT No.1:

8-(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.

8-(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.

8-(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.

8-(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.

8-(E). <u>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.</u>

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

8-(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.**

9-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".

9-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.

9-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.

9-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, improbablises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

10) From the above legal position, coming to the further facts save those are

referred supra, Ex.P-1 cheque routed from the account of the accused with his signatures is not in dispute. It is the case of the complainant that accused issued the cheque with his hand writing. Accused denied the writing of the cheque is that of him but for only signature as it is the defence of the accused that at the time of lending Rs.8,00,000/- admittedly by complainant through his wife to the accused, according to the accused, the blank signed cheque obtained by complainant and his wife and failed to return even the said Rs.8,00,000/- latter discharged. P.W-1 in his cross-examination admitted that the house of accused and himself are opposite in the same street and they got acquaintance for past 10 years and accused who is a post graduate in engineering running foundry business asked the complainant who is a LIC development officer for lending Rs.8,00,000/- and the complainant arranged Rs.8,00,000/- through is wife to the accused and it is also admitted that the said amount was discharged by the accused within three or four weeks latter to the said borrowal. As per the complainant that Rs.8,00,000/- was arranged through his wife to the accused by him and there was no document obtained for that. If such is the case for so called lending of Rs.8,00,000/- was in April/May, 2008 even from the cross-examination of P.W-1 in his saying the same was arranged by him and it was discharged within no time latter, what made to obtain a cheque from accused by complainant for the said Rs.2,00,000/- lending within few months latter to it. In this background, P.W-1 deposed that being LIC development officer and a graduate and being income tax payee and submitting returns, he must show the said lending in his returns, admittedly he did not. It is also admitted by P.W-1 in the cross-examination that there was no record at all to show he lent under Ex.P-1 on 18.07.2008, Rs.2,00,000/- to the complainant for saying for the same accused issued the Ex.P-1 cheque. He did not even furnish any bank account of him though his means being a LIC development officer cannot be disputed, equally the means of accused of running foundry with Post Graduate in Engineering and also owning from cross-examination of accused by complainant of owning more than Rs.13,00,000/- worth of land. It is the defence of the accused that blank signed cheque was obtained as a security by complainant and his wife from the accused for the Rs.8,00,000/- lent. It is one way probabilising as nobody will lend without even obtaining a scrap of paper even out of neighbourhood long acquaintance. Even believed for arguments sake, out of confidence so lent and admittedly paid within no time later, for the further lending after all Rs.2,00,000/- which is 1/4th of the earlier lent amount that was repaid, obtaining of cheque is improbable to believe, in the absence of showing any intervening circumstances eroding the confidence that was as earlier for Rs.8,00,000/- lending without even scrap of paper. The contention in the grounds of appeal from the cross-examination of D.W-1 accused, by the complainant, that accused ought to have issued a legal notice or filed a criminal complaint or asked the bank to stop payment are not tenable from not doing so, no way enhance any value to the case of the complainant as held by the Apex Court in ***Krishna Janardhan Bhatt*** supra that was reiterated in ***Rangappa*** supra but for differing to the only observation of presumption under Section 139 of the Act not available, in confirming the findings of ***Krishna Janardhan Bhatt*** in ***Rangappa.*** Though the initial burden on the accused from the cheque issued with his signature admitted and routed from his account to rebut the presumptions available against, when accused categorically in the P.W-1 cross-examination as well as in his evidence deposed that the Ex.P-1 cheque only a signed blank cheque obtained by the complainant and his wife for the lending of Rs.8,00,000/- in April/May, 2008. That Rs.8,00,000/- lending was admitted by P.W-1 in his cross-examination of discharged within few weeks later by accused to the complainant and his wife. Then, what the accused says is the said blank cheque was stated not traced and not returned and the same is misused.

11) Whereas the case of the complainant of the so called accused issued the cheque with his own hand writing of the contents, the accused disputed in saying but for the signature of the blank cheque, the other writings are not that of him. A perusal of Ex.P-1 cheque within the power of the Court from comparison from a naked eye under Section 73 of the Evidence Act without requirement of experts' assistance also substantiates said version of accused as the signature of the cheque with other writing of the cheque Ex.P-1 are not of same person but with different ink, the pen stroke, lift, halt and the movements and the slants, and as the writings are not correlated with the signature writing even to a little. Apart from it, the complainant did not even choose to send the Ex.P-1 cheque to expert with any specimen writings to the accused with or without any standard writings for comparison of the other

writings in the cheque with the signature on the cheque with specimen writings, if at all it is the writing of the accused. It is the burden of the complainant which he failed to discharge in this regard that also enhances the defence of the accused as held in ***Krishna Janardhan Bhatt*** supra by the Apex Court that the defence of the accused need not be to disprove the entire case of the complainant, but even to a particular line and to that extent and not beyond reasonable doubt, but for by preponderance of probability to throw doubt on the credibility of the case of the complainant to enhance the defence version. Importantly even to the statutory notice issued by the complainant, the accused issued reply with that version. Apart from it is from the nose of the knowledge of the complainant of wife of complainant issued Ex.D-1 notice to the accused on 20.12.2008 and the accused issued Ex.D-2 reply on 04.01.2009 wherein he categorically stated when she set up an agreement of sale executed by accused in her favour (for which undisputedly a suit in O.S. No.14 of 2010 filed in the District Court, Nalgonda for specific performance of the contract for sale and is pending). In the said Ex.D-2 reply admitted by complainant/P.W-1 in his cross-examination, the accused mentioned Ex.P-1 cheque number stating it was obtained in blank to be returned, obtained in blank when lending Rs.8,00,000/- that was even discharged failed to return that to be returned, also by denying execution of sale agreement and its enforceability. In fact, it is also the defence of the accused in the cross-examination of P.W-1 and in support of his reply notice to the statutory notice as well as in his Ex.D-2 in reply to the notice of the wife of the complainant under Ex.D-1 that there is only one transaction of Rs.8,00,000/- borrowal at that time as security, the blank cheque obtained and the blank cheque was not returned. When that defence is probabilising with all the cumulative facts and circumstances with reference to law in showing the accused discharged the burden lies on him under reverse onus clause by preponderance of probabilities and even to recover the same, there is nothing from the complainant to show he lent the amount of Rs.2,00,000/- for alleged giving of Ex.P-1 cheque and to say it is accused with his own hand writing filled the contents of the cheque even denied by the accused but for signature and comparison by Court also substantiates the defence, by not even seeking to send to expert as referred supra. When the trial Court came to the right conclusion, for this Court while sitting in appeal, there is nothing to interfere as it is probabilising that taking advantage of the blank signed cheque obtained by the complainant and his wife from the accused at the time of lending Rs.8,00,000/- that was discharged within few weeks and the cheque leaf not returned from the differences arose after exchange of Ex.D-1 and D-2 notices the blank cheque is cause filled and misused. It is also for the reason that Ex.D-1 notice was dated 20.12.2008 and Ex.D-2 reply was dated 04.01.2009 and P.W-1 also admitted the same of his knowledge and Ex.P-1 so called cheque presented later and the cheque return memo under Ex.P-2 and P-3 were dated 10.01.2009 and it is prior to Ex.P-4 legal notice dated 15.01.2009 for which besides Ex.P-8 reply dated 21.01.2009 issued, the accused mentioned in Ex.D-2 reply for Ex.D-1, said reply dated 04.01.2009 itself of the signed blank cheque of the accused lying with the complainant and his wife in demanding to return. Accordingly, point No.1 is answered.

POINT No.2:

12) In the result, the appeal is dismissed. Miscellaneous petitions pending, if any, shall stand closed.

Dr. JUSTICE B. SIVA SANKARA RAO

30.01.2015.

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