

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

+ Criminal Appeal No.768 of 2007

%19.01.2015

Between:

Omprakash. Appellant

AND

1) L. Sunitha

2) The State of A.P,

Rep. by Public Prosecutor,

High Court of Judicature, Hyderabad. Respondents

! Counsel for Appellant : Sri A. Hari Prasad Reddy

^ Counsel for Respondent No.1 : Sri Vinod Kumar Despande

^ Counsel for Respondent No.2 : Public Prosecutor for State

< Gist:

> Head Note:

? Cases referred:

1. 2008 CrI.L.J. 1172 = (2008) 4 SCC 54
2. (2010) 11 SCC 441 = AIR 2010 SC 1898
3. 2005 (1) ALD (CrI.) 498 (AP)
4. 2005(2) ALD (CrI.) 21 (MP)
5. AIR 2005 SC 439

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CRIMINAL APPEAL No.768 of 2007

JUDGMENT:

Aggrieved by the judgment dated 09.04.2007 in C.C.No.231 of 2006 passed by the learned Special Judicial Magistrate of First Class, Mobile (PCR), Adilabad acquitting the accused for the offence under

Section 138 of Negotiable Instruments Act, 1881 (for short “N.I Act”), the complainant preferred the instant Criminal Appeal.

2) On factual side, the case of complainant is that he was doing cement business under the name and style *Meghraj Omprakash Cement Dealer*, Adilabad and one Damodar who is none other than his nephew, is his authorised GPA holder. The accused—L.Sunitha used to purchase cement on credit from the said Damodar as proprietor of Uma Maheshwari Trading Company. She purchased cement worth Rs.1,26,070/- from the complainant on credit from 02.02.2002 to 05.04.2002, but failed to pay the amount and hence on demand issued 9 cheques for Rs.99,420/-. The further case of complainant is that when the cheques were presented in Andhra Bank, Adilabad for encashment, they were returned bounced for *insufficient funds* in the account of accused in Union Bank of India, Adilabad. The same was intimated to the accused through legal notice on 11.12.2004 and demanded her to pay the amount within 15 days which was served on 17.12.2004, but she neither gave reply nor paid. Hence, the complainant filed the complaint under Section 142 of Negotiable Instruments Act (for short “N.I Act”).

3) During trial, PWs.1 to 3 were examined and Exs.P1 to P43 were marked on behalf of complainant. DWs.1 and 2 were examined.

4) The trial Court on appreciation of oral and documentary evidence on record held that complainant failed to fulfil the conditions required under Section 138 of N.I Act and accordingly the trial Court acquitted the accused.

Hence, the appeal by complainant.

5) The parties in this appeal are referred as they stood before the Tribunal.

6) Heard arguments of Sri A.Hari Prasad Reddy, learned counsel for appellant/complainant and Sri Vinod Kumar Deshpande, learned counsel for respondent No.1/accused and learned Public Prosecutor for R2/State.

7 a) Impugning the judgment, learned counsel for appellant/complainant firstly argued that trial Court grossly erred in placing burden of proof on complainant and holding that he failed to prove there existed legally enforceable debt. The trial Court committed another error in disbelieving the bills and ledger bills produced by the complainant. Learned counsel argued, when the complainant could establish that Exs.P2 to P10—cheques were issued by the accused, the presumption under Section 139 of NI Act comes into play not only to the effect that the cheques were issued by the accused for discharge of legally enforceable debt but also the existence of legally enforceable debt. Therefore, no burden casts on the complainant to further prove the existence of legally enforceable debt. In spite of the same, the complainant produced bills and ledger accounts maintained by him in due course of business transactions which would show that accused used to purchase cement from complainant on credit basis. He argued, the trial Court was not correct in rejecting the aforesaid documentary evidence on the ground that the complainant has not produced the indents, invoices and the signatures of accused on credit bills in support of his accounts and hence the accounts produced by him are only self-serving documents. Learned counsel vehemently argued that it is the case of the complainant that he used to supply cement on telephonic requests of the accused and not on formal indents. Learned counsel further argued that trial Court erred in holding that since some of the intermediate cheques were encashed by the complainant in the year 2002-2003, Exs.P2 to P10 cheques should also be deemed to be issued by the accused prior to 2002 only and that the complainant at his convenience filled up the contents on those blank signed cheques issued by the accused and pressed them into service. He argued that if really accused issued Exs.P2 to P10 and some other cheques as blank-signed cheques as a security and if really complainant pressed some of the cheques into service and encashed them during 2002-2003 itself, the accused ought to have protested then itself. The supine indifference of accused infers that the subject cheques and other cheques were issued in due course

but not as blank signed cheques as a security.

b) Next, learned counsel argued that trial Court faltered in holding that non-examination of the complainant is a legal defect. He argued that trial Court has permitted the complainant to file the complaint through his Special Power of Attorney (SPA) and further the SPA is also having personal knowledge of all the case facts and there are no facts which are to the exclusive knowledge of the complainant so as to hold that his non-examination is fatal to the prosecution. He thus prayed to allow the appeal.

8) In opposition, learned counsel for 1st respondent/accused while supporting the judgment argued that accused issued 10 to 15 cheques in 1998 purely as a security for payment of amounts covered by credit purchases but the complainant misused those cheques and pressed them into service in 2004 and that was why he could not establish the existence of legally enforceable debt during the relevant period covered by cheques. The trial Court rightly held that bill books and ledgers produced by the complainant are self-serving documents and dismissed the complaint.

9) In the light of above rival arguments, the point for determination in this appeal is:

“Whether the judgment of the trial Court is factually and legally sustainable?”

10) **POINT:** As can be seen from the judgment, the trial Court dismissed the complaint on the following main observations:

(i) That the preliminary burden is on the complainant to establish the existence of legally enforceable debt so as to draw presumption under Section 139 of NI Act and complainant failed to prove the existence of such legally enforceable debt. The bills and ledger extracts produced under Exs.P15 to P40 are the self-serving documents of the complainant as he did not produce the invoices/indents and signed credit bills in support of his account. Some intermediate cheque leaves of Exs.P2 to P10 issued to

complainant were containing subsequent serial numbers and prior dates to Exs.P2 to P10 which infer that all the cheques covered under Exs.P2 to P10 were given as security by accused in blank by signing prior to the year 2002 which were used by the complainant to suit his convenience and hence they were not issued in discharge of legally enforceable debt.

(ii) The complainant has not examined himself to prove his case but only examined his SPA and thus there is a legal defect in the case of complainant.

Now, it has to be seen how far the findings of the trial Court are factually and legally sustainable.

a) As per complainant, there were business dealings between the complainant and accused. The accused used to purchase cement on credit basis and used to pay the amount through cheques. In that process, the accused was indebted to a tune of Rs.1,26,070/- for the transactions that took place between 02.02.2002 and 05.04.2002 and so in October, 2004 the accused gave nine post dated cheques under Exs.P2 to P10 for a sum of Rs.99,420/-. The defence plea of the accused was that there were business transactions between both the parties and at the time of entering into sale transactions in the year 1998 the accused issued the complainant some 10 to 15 blank signed cheques only for security purpose and later the complainant misutilised them and pressed them into service for extracting amounts from the accused. According to her, she closed her shop in the year 2002 itself and subsequently there were no business transactions between them and hence issuing cheques in October, 2004 does not arise. The above are the respective versions of each party.

b) As can be seen, the trial Court fixed liability on complainant to establish the legally enforceable debt. I am afraid, the finding of the trial Court is not correct. There is a dichotomy of opinion on the aspect of burden of proof with reference to Section 139 of NI Act.

c) At first in **Krishna Janardhan Bhat vs. Datatraya G.Hegde** a Division Bench of Honourable Apex Court has observed thus:

“Section 138 of the Act has three ingredients, viz.:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

21. The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter.

Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

(Emphasis supplied)

Thus, it was held that presumption under Section 139 will not extend to the existence of legally enforceable debt but it will extend only to the effect that cheque was issued for discharge of any debt or liability. In other words, proof of existence of legally enforceable debt was rested on the complainant.

However, in a subsequent decision reported in **Rangappa vs. Sri Mohan** a Full Bench of Apex Court did not agree with the above view. On consideration of several decisions the Full Bench observed thus:

*“14. In light of these extracts, we are in agreement with the respondent-claimant that the **presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability.** To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct.”* (Emphasis supplied)

Thus, from the above latest judgment of the Apex Court it is clear that when the holder of the cheque establishes that he legally received the cheque from the drawer, the presumption under Section 139

follows to the effect that there existed a legally enforceable debt between the parties and cheque was issued for discharge of said debt. Consequently “reverse burden” will be on the accused to establish that there existed no legally enforceable debt and cheque was not issued in due discharge of the same.

d) In the light of latest interpretation on presumptive jurisprudence, the trial Court’s placing burden on complainant cannot be countenanced. Therefore, the facts and evidence have to be scrutinized to know whether the accused, as contended, could discharge her burden to establish the absence of legally enforceable debt and non-issuance of the subject cheques for discharge of the debt.

11) In the evidence of DW1 she deposed about issuance of cheques as follows:

“In order to provide the cement on credit, he used to obtain blank cheques from me towards security. In the year 1998, I issued 10 to 15 cheques signed by me to the complainant at a time. Those cheques are of Union Bank of India, which are under Exs.P2 to P10. Those are some of the cheques given by me. I did not write any contents in any of the cheques except signing the same. All the cheques under Exs.P2 to P10 were issued in the year 1998.”

X X X X

“After April, 2002 there were no transactions between me and the complainant. I did not issue any cheques in October, 2004 for any amounts. Exs.P2 to P10 that were issued in the year 1998 were converted into the filled up cheques by the complainant in the year 2004. I am not indebted to complainant any amount under the cheques.”

DW2—the father of accused who started Uma Maheswari Traders through the accused also deposed in similar lines as follows:

“It was started 1998 and it was closed in April, 2002. I know the complainant named Om Prakash. As I know the complainant, I made my daughter for business dealings with him in supplying the cement by him on credit. In the beginning of their business transactions, as per the demand made by complainant, my daughter issued blank cheques signed by her towards security.”

So, it is the case of accused and her father that Exs.P2 to P10—cheques and some other cheques totalling about 10 to 15 were given to complainant only as security in the year 1998 and they were not given to complainant in the year 2004 and there did not exist any legally enforceable debt between them.

12) In the light of above defence, the burden is on the accused to establish the aforesaid facts. Admittedly, Exs.P2 to P10—cheques were drawn by the accused from her account maintained with UBI, Adilabad. Complainant examined the Assistant Manager of UBI, Adilabad as PW3 to prove the factum that Exs.P2 to P10 cheque leaves were allotted by their bank to the account holder i.e. Uma Maheswari Trading Company and Ex.P11—cheques bouncing memo was issued by their bank. If it is the case of the accused that Exs.P2 to P10 and some other cheques were issued by her as security in the year 1998 but not in 2004, she could have elicited the originating year of those cheques through PW3. Surprisingly, no suggestion was given to PW3 nor the accused took steps to refer the cheque numbers of Exs.P2 to P10 to UBI, Adilabad to find out the year of issuance of those cheques. Such exercise would have strengthened her version. As the matter stands, there is no proof that Exs.P2 to P10 were of the year 1998 and they were issued during that year. On the other hand, Exs.P43 would show two of the cheques bearing Nos.199269 and 199271 which are intermediate to Exs.P2 to P10 were issued by accused to M/s.Durga Sanitary on 25.02.2002 and 22.03.2002 respectively. It gives a strong inference that the cheque leaves covered by Exs.P2 to P10 and other connecting cheque leaves were not originated in the year 1998 but originated subsequently and accused issued them to complainant and others as per her convenience. So, merely because some intermediate cheques bearing Nos.199258 and 199259 issued to complainant contained subsequent date i.e. 12.04.2003 and subsequent cheque numbers i.e. 199269 and 199271 contained prior dates i.e. 25.02.2002 and 22.03.2002, it is not apt to jump into conclusion that Exs.P2 to P10 cheques and other cheques issued to

complainant were blank cheques and they were pressed into service by the complainant as per his convenience. It is not the case of the accused that she issued intermediate cheques to M/s.Durga Sanitary also as blank signed cheques. Therefore, trial Court's conclusion cannot be appreciated. Assuming for a moment, intermediate cheques i.e. 199258, 199259 and 199265 were also issued as blank signed cheques along with Exs.P2 to P10, when the complainant presented those three cheques for encashment, the accused did not raise any objection that those cheques were issued as blank signed cheques for security only. On the other hand, she allowed him to encash them. This conduct on the part of accused further strengthens the view that Exs.P2 to P10 were not issued as blank cheques in the year 1998 but they were issued in due course for discharge of legally enforceable debt. Thus the defence plea of issuing cheques as security was only after thought. Having regard to all the above, it must be held that accused failed to discharge the reverse burden. On the other hand, the complainant though not burdened but placed Exs.P15 to P40—bills and ledger extracts in proof of supplying cement on credit basis. Nothing is brought on record to show that those bills and accounts are fabricated. The trial Court disbelieved the account books on the main ground that the invoices/indents and credit bills signed by the accused were not produced. In the cross-examination of DW1 it is suggested that cement was supplied some times by telephonic calls. Though the said suggestion was denied but having regard to the fact that both complainant and accused belong to same place, and admittedly there existed credit business between them, complainant's version that sometimes cement was supplied on oral requisition of accused appears to be true. So, on a conspectus of facts and evidence, I hold that Exs.P2 to P10 cheques were issued by the accused for discharge of legally enforceable debt and since she failed to pay the amount within due time after their bouncing back, committed an offence under Section 138 of NI Act.

13) Then, the observation of trial Court that non-examination of

complainant is a legal defect in this case is concerned, I am afraid, this view is not correct in the light of the facts involved in this case. The trial Court, it appears, considered the following two decisions.

1. ***K.S.Ramachander Rao v. State of A.P. and another***

2. ***Mahendra Kumar v. Armstrong and another***

a) In ***K.S.Ramachander Rao***'s case (3 supra) the question referred to Full Bench was "whether a power of attorney of a payee or holder in due course of a dishonoured cheque can file a complaint under Section 138 of NI Act on behalf of payee or holder in due course?"

While answering the reference in affirmative the Full Bench observed thus:

"In Ram Chandra case (supra) it is clearly held that complaint filed through the power of attorney of a person aggrieved, tantamounts to filing of the complaint by the person aggrieved. For that reason, and since the right accrued to the payee or the holder in due course of a dishonoured cheque does not fall within the three exceptions to the rule Qui Facit Per Alium Facit Per Se recognized by Section 183 of the Contract Act i.e., since the act to be performed (i) is not personal in its character, or (ii) is not annexed to any public office, and (iii) does not involve any fiduciary obligations, we hold that the power of attorney of a payee or a holder in due course of a dishonoured cheque can file a complaint for an offence under Section 138 of the Act after obtaining permission from the Court, either before or after filing of the complaint."

b) Thus, the Full Bench maintained that since the right accrued to payee or holder in due course of a dishonoured cheque does not fall within any of the exceptions mentioned above, the power of attorney of a payee or a holder in due course of a dishonoured cheque can file complaint under Section 138 of NI Act after obtaining permission from the Court.

c) In ***Mahendra Kumar***'s case (4 supra) learned single Judge having considered the judgment of Apex Court in ***Janki Vashdeo Bhojwani and another v. Indusind Bank Limited and others*** has

opined as follows:

“In the instant petitions, the filing of the complaint on behalf of the complainant by holder of general power of attorney and special power of attorney are valid in view of the definition of “power of attorney” and provision of Section 2 of the Power of Attorney Act but examination of the attorney as witness in the capacity of the complainant would not be permissible. The holder of power of attorney can appear as a witness in his own capacity, but only by non-examination of the complainant under Section 200 of Criminal Procedure Code, the cognizance taken by the Magistrates on the complaints cannot be held illegal or without jurisdiction. For prosecuting the complaint the complainant can examine himself in further proceeding of the case and because of some reason if the complainant is not able to appear before the Court, he can file an appropriate application for his examination on commission. At the stage of taking cognizance, if the holder of power of attorney has appeared as a witness, his testimony can be considered for the purposes of registration of the complaint/issuances of process under Section 204 of Criminal Procedure Code but for further proceeding, examination of the complainant would be must and if the complainant is a juristic person, then on his behalf, the managing partner/working partner if it is a partnership firm and if it is a company or any other juristic person than the person authorised in this behalf would be competent to enter into witness box.”

Thus, the learned single Judge opined that though the power of attorney holder can file the complaint on behalf of complainant but for further proceedings, the examination of complainant would be must and the complainant can either examine himself or file a petition for his examination on commission.

14) The trial Court considering the above decisions observed that complaint can be filed by the power of attorney but during trial, evidence must be given by the complainant either on affidavit or on his appearance or by commission and since the complainant had not filed a petition for examination through a Commissioner, his non-examination amounts to legal defect inasmuch as the accused and his father deposed as if they have acquaintance with only Omprakash—the complainant and not his SPA holder and further, Ex.P1—SPA was given to PW1 only to file complaint and to

prosecute the same. The trial Court observed that as if non-examination of complainant is fatal to his case.

15) On a careful perusal of facts and evidence and also the legal position on the issue in controversy, I am constrained to hold the trial Court's finding is not correct.

a) In this context, it is pertinent to note the observation of the Honourable Apex Court in ***Janki Vashdeo Bhojwaní's*** case (5 supra) which was relied upon by the Madhya Pradesh High Court. In that case, the Apex Court remitted the appeal to the Debt Recovery Tribunal (DRT) to record a finding whether or not the appellants were co-owners of a particular property as on the date of decree and forward its decision to Apex Court for final disposal. Before DRT, the appellants were not examined but their power of attorney holder who had a clash of interest with them was examined. In that context, the Apex Court observed that the question whether the appellants have independent source of income to purchase the property can be answered only by the appellants themselves and not their power of attorney holder as he had no personal knowledge of the matter of the appellants. The Apex Court has made further important observation as follows:

“Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.”(Emphasis supplied)

b) From the above, it is clear that a power of attorney holder is not a total substitute for his principal. He may depose about the acts which he has done and the facts which are to his knowledge. However, he cannot depose for the principal in support of the facts which are to

the personal knowledge of principal alone. In such an instance the principal alone has to be examined.

c) Now, in the instant case, the complaint was filed by the complainant represented by his SPA and complaint was signed by the complainant. Both the complainant and his SPA gave their sworn statements. The trial Court in its docket order dated 02.02.2005 permitted SPA to proceed with the case on behalf of complainant. Then, Ex.P1 would show that complainant authorised his SPA holder to prosecute the complaint and also to make statements on oath before any Court. Thus, PW1 authorised to give evidence also on behalf of complainant. The evidence of PW1 would show that he is none other than the son of complainant's brother and he is having personal knowledge regarding business transactions with accused. He deposed that he sent cement bags on different occasions to the accused and he deposited the cheques issued by the accused in bank. Thus, when the evidence of PW1 is perused, besides being SPA, he is having personal knowledge on the facts concerning to this case. Accused has not brought on record any facts which are said to be in the exclusive knowledge of the complainant to draw an adverse inference for his non-examination. Therefore, the trial Court's observation in this regard cannot be approved. This point is answered accordingly.

16) In the result, accused is found guilty of the offence punishable under Section 138 of NI Act. Having regard to the nature of offence and the circumstances under which it was committed and considering that accused is a lady, it is ordered as follows:

1. Criminal Appeal No.768 of 2007 is allowed by setting aside the judgment in C.C.No.231 of 2006 passed by the Special Judicial Magistrate of First Class, Mobile (PCR), Adilabad.
2. The accused is convicted for the offence under Section 138 of NI Act and she is sentenced to undergo simple imprisonment for one (1) day till raising of the trial Court. The accused is directed to surrender before the trial Court

on or before **09.02.2015** at 10.30 A.M. on a Court working day and on such surrender, the trial Court shall implement the sentence in the Court hall.

3. Further, the accused is directed to pay a compensation of Rs.1,27,000/- (Rupees One Lakh Twenty Seven Thousand only) to the complainant in terms of Section 357 (3) Cr.P.C. and the said amount shall be deposited by the accused before the trial Court within one month from the date of this judgment, failing which trial Court shall resort to the steps permitted by law to realise it from the accused.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date 19.01.2015

Note: L.R Copy to be marked: Yes / No

Murthy