HON'BLE SMT JUSTICE ANIS

CRIMINAL REVISION CASE No.112 OF 2008

O R D E R:

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 petitioners herein challenging the judgment dated 25-01-2008, passed by the IX Additional Sessions Judge (F.T.C.) Guntur, whereunder and whereby the conviction of the accused was confirmed for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. (for short, 'the Act')

2. The revision petitioners herein are accused in C.C.No.407 of 2007, whereas respondent No.1 is the complainant and respondent No.2 is the State. 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 case of the prosecution in brief is that complainant/ respondent No.1 herein filed a complaint against the accused/petitioners for the offence punishable under Section 138 of the Act stating that the accused, who are doing tobacco business, borrowed a sum of Rs.3,00,000/- on 17.06.1999 by way of cheque drawn on Tamilnadu Mercantile Bank Ltd and discharged the same on 30.06.1999 by way of a cheque drawn on Andhra Bank. Later on, the accused, who were in need of money approached the complainant to lend money by agreeing to pay the same with interest @ Rs.1.20 p.m. per Rs.100/- and thus on 07.07.1999 and 16.06.2001, the accused borrowed the sums of Rs.3,00,000/- and Rs.25,000/- respectively, totalling to Rs.3,25,000/- by way of cheques agreeing to repay the same with the agreed rate of interest. Subsequently, the accused paid

Rs.33,840/- and Rs.43,800/- on 31.03.2000 and 28.03.2001 respectively by way of cheques towards interest. Thereafter, they failed to pay both the interest as well as the principal amount in spite of repeated demands by the complainant. After calculating the interest on yearly rests, the accused fell due to a tune of Rs.4,22,645 towards principal and interest by 31.03.2003. On 31.10.2003, A2 approached the complainant and issued a cheque on behalf of A1 for Rs.3,00,000/- drawn on Andhra bank towards part payment and requested time for payment of the balance amount. The complainant presented the said cheque on the same day in Tamilnadu Mercantile Bank Ltd., Guntur but on the same day, it was returned with a memo stating 'payment stopped by the drawer'. After receiving the information by way of memo, the complainant got issued a legal notice to the accused calling upon the accused to pay the cheque amount on 27.11.2003. The accused received the same on 01.12.2003 but neither the amount was paid nor the reply was given. As such, the complainant filed the case.

4. The learned Judicial Magistrate of First Class took cognizance of the case and framed charge for the offence punishable under Section 138 of the Act against the accused. During the trial, on behalf of the prosecution, PWs.1 to 3 were examined and Exs.P1 to P8 were marked.

5. After closure of the prosecution evidence, accused were examined under Section 313 Cr.P.C by putting the incriminatory material deposed against them. The Accused denied the incriminatory material and reported no oral evidence and marked Exs D1 to D6.

6. The trial Court, after considering the oral and documentary

evidence, held that on the one hand A2 gave Ex.P1-cheque for Rs.3,00,000/- to the complainant/P.W.1 and instructed the bank to stop the payment; the accused failed to prove that there was no debt or liability and thereby rebut the presumption under Section 139 of the Act; on the other hand, the complainant/P.W.1 proved the existing liability of the accused under Ex.P1, which was bounced due to insufficient funds. However, having found the accused guilty of the offence under Section 138 of the Act and the trial Court sentenced A1 to pay a fine of Rs.5,000/- in default Simple Imprisonment for three months and A2 to suffer Simple Imprisonment for one year and a fine of Rs.2,000/- in default Simple Imprisonment for two months.

7. Aggrieved by the judgment of the trial Court, the accused preferred Criminal Appeal No.120 of 2005 on the file of IX Additional Sessions Judge (F.T.C.) Guntur.

8. The appellate Court after considering the evidence on record held that the accused issued Ex.P1, cheque to discharge the legal and enforceable debt; the *defacto complainant* established that the accused committed the offence punishable under Section 138 of the Act and confirmed the conviction and sentence imposed by the trial Court on the accused and dismissed the appeal vide its judgment dated 25-01-2008.

9. Aggrieved by the judgment of the appellate Court, the accused preferred the present revision.

10. The learned counsel appearing for the accused argued that there is no legal and enforceable debt/liability between the parties; that the trial Court ought to have seen that A2 has not borrowed the amount from complainant; that and the cheque was given to

the firm of the complainant, for which C.Srikishanam is the proprietor; that the provisions of Section 138 of the Act do not attract as the debt was taken by the proprietory concern; and that there is no evidence on record to show that the accused is liable to pay the amount under Ex.P1, that A2 is not a partner to the partnership firm; that A1 took the plea that he did not borrow Rs.3,00,000/- on 17.06.1999 in the name of M/s.Rasmi Tobaco Exports, Guntur, that the said cheque is given to the proprietory concern and that as A2 is no way concerned with the proprietory concern; he prayed the Court to allow the revision.

11. On the other hand, the learned counsel for the respondent/complainant firm argued that the evidence of P.Ws 1 and 2 shows that A1/1st petitioner got an account in Andhra Bank, Guntur and the said account shows M/s.Rasmi Tobaco Exports is a proprietory concern. Subsequently, it was converted into partnership firm on 21.06.1999 and A2 is acting as a managing partner.

12. Now, the point for determination is --

> "Whether the petitioners are entitled for setting aside the concurrent judgment of the Courts below for the offence punishable under Section 132 of the Negotiable Instruments Act?"

13. **<u>P O I N T</u>**:

The documentary evidence Exs.D3 to D6 and P7 proves that M/s.Rasmi Tobaco Exports received a cheque from P.W.1 on 17.06.1999 for Rs.3,00,000/- and encashed the same on 17.06.1999 itself through its account which is said to be a proprietory concern. P.W.1 also stated that he gave a cheque to A2 only but not to proprietor of M/s.Rasmi Tobaco Exports by name, C.Srikishanam. P.W.1 in his evidence denied that the accused issued instructions to'stop payment', that the accused was having sufficient funds to honour the cheque when they have issued such instructions. The trial Court also gave finding that the petitioners failed to rebut the presumption under Section 139 of the Act particularly by leading cogent evidence to prove that there was no debt or liability. Further, P.W.1 clearly stated that after issuing notice, the accused failed to pay the amount within the statutory period. Thus, the trial Court, after considering the oral and documentary evidence, held that the accused committed the offence punishable under Section 138 of the Act, Hence, the concurrent findings of the trial Court as well as appellate Court that the accused committed the offence under Section 138 of the Act, needs no interference.

14. Accordingly, the Criminal Revision Case is dismissed.

15.Miscellaneous petitions pending, if any, in this Criminal Revision Case shall stand closed.

ANIS,
J

20-02-2015
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