HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.507 of 2007

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 05.10.2006 in Criminal Appeal No.8 of 2005 on the file of III Additional Sessions Judge, Khammam which was allowed by setting aside the conviction and sentence dated 10.01.2005 in C.C. No.181 of 1999 on the file of I Additional Judicial Magistrate of the First Class, Khammam.

2) Brief facts are that the Complainant are that the accused is dealing in the pesticides business, whereas the Complainant is the wholesale dealer, that the accused used to purchase the stocks from the Complainant, on credit basis, that on verification of accounts, an amount of Rs.4,50,000/- was found due to the Complainant from the accused, that the accused had executed four promissory notes for Rs.1,00,000/- each and 5th promissory note for Rs.50,000/-, accepting his liability under the Katha. He agreed to clear off the dues with interest, to clear the dues the accused gave a cheque on 17.12.1998 for Rs.4,50,000/- and the same was dishonoured. Basing on which the complainant issued statutory legal notice on 11.01.1999, which was returned unserved and hence the Complainant filed the complaint under Section 138 of the Act.

3) After recording the sworn statement of the complainant and taken cognizance of the offence, the accused was secured on summons and examined under section 251 Cr.P.C regarding the accusation made against him for which he pleaded not guilty. During the course of trial, on behalf of the complainant, P.Ws-1 to 3 were examined and marked Exs.P-1 to P-13. On behalf of the accused,

D.W-1 was examined and marked Exs.D-1 to D-32. On consideration of the evidence adduced on both sides, the learned trial Magistrate found the accused guilty for the offence under Section 138 of the Act and convicted him and sentenced to undergo rigorous imprisonment for two years. Aggrieved by the said conviction and sentence, the accused preferred an appeal before the Sessions Division, Khammam and the learned III Additional Sessions Judge, Khammam, after hearing both sides and after examining the material on record, by allowing the appeal acquitted the accused by setting aside the conviction and sentence passed by the trial Court.

4) Impugning the said reversal and acquittal judgment of lower appellate Court, the complainant filed the present (second) appeal contending that the Judgment of the learned Sessions Judge is contrary to law, weight of evidence and probabilities of the case, that the learned Judge erred in rejecting cogent evidence of P.Ws 1 to 3, that the learned Judge should have seen the ingredients to constitute an offence under Section 138 of the Act are made out, that the learned Judge should have seen that issuing a cheque and its dishonour for not maintaining the balance attracts Section 138 of the Act, that the learned Judge erred in reversing the well considered conviction judgment of the trial Court, that the learned Judge should have seen that the accused did not dispute the signature on the cheque, that the learned Judge having held that the issuance of the cheque under Ex.P-1 by the accused on 17.12.1998 is not doubtful, but erred in acquitting the accused and sought for restoring the trial Court's conviction judgment by setting aside the lower appellate Courts acquittal judgment. 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 reappreciated the facts and by proper appreciation on fact and law with experience of men and matters and thus for this Court while sitting in appeal there is nothing to interfere against said acquittal recorded by the lower appellate 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:

i) Whether the accused did not issue the cheque by routed from his account in favour of the complainant entity for the amount due under the khata dealings accounts covered by pronotes executed earlier as a legally enforceable debt or other liability and if issued whether the lower appellate Court's acquittal judgment reversing the conviction judgment is unsustainable and requires interference by this Court while sitting in appeal against it and if so with what observations and consequences?

ii) To what result?

<u>POINT No.1:</u>

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.<u>01-04-1989</u> 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[1].

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). 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.

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[2] 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[3].

9-C. Further, as per the expression of the Apex Court in RANGAPPA vs. MOHAN[4] (3-Judges Bench) paras-9 to 15 referring to Goa Plast's case (supra), KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE[5] 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[6] 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[7] 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[8] 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[9] 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 of 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**[10] 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, the closure of account and non-maintaining of balance no way absolve the accused from liability for the offence under Section 138 of the Act once the cheque was routed from the account of the accused and proved from the material on record of the same for legally enforceable debt or other liability. The trial Court also in para No.8 of the judgment held rightly that closure of account will not absolve from criminal prosecution for the offence under Section 138 of the Act. Coming to the evidence on record in the cross-examination of P.W-1/complainant by accused, it is suggested that the cheques issued by accused were as security and complainant filed the false case by misusing the blank cheques given as security. The accused as D.W-1 in his evidence also deposed that in the year 1992 complainant obtained two blank cheques and one of the cheques misused by cause filling covered by Ex.P-1 in filing the false claim. Ex.P-1 cheque was dated 17.12.1998. Ex.P-11 to P-13 are the ledger extracts of the years 1993-94 to 1997-98. Exs.P-6 to

P-10 are the pronotes, Ex.P-1 cheque dated 17.12.1998 from said evidence of complainant P.W-1. Further, in the cross-examination of P.W-1 as well as accused as D.W-1, he disputed the signatures on Ex.P-6 to P-9, five pronotes saying he did not issue and he did not execute so called printed pronotes and Ex.P-10, the earlier cheques that were said to have been signed by accused covered by standard signatures S-1 to S-4 and the signatures on the recipts for payments made covered by S-5 to S-9 and the credit invoice signatures covered by S-10 to 15 disputed by accused, those were sent to the State Forensic Science Laboratory of Government of Andhra Pradesh in the civil suit between the parties in O.S. No.181 of 1999 and the expert opinion received was dated 22.03.2002 in saying the questioned signatures on the so called pronotes Q-1 to Q-5 and the standard signatures on the cheque receipts and credit invoices respectively S-1 to S-15 when compared not agree of some person in writing habits detailed design of letters and pattern in saying standard signatures written freely with some natural variations have been among them with good line quality, superior skill, rapid speed, wrist movement, horizontal alignment and vertical slant, whereas questioned signatures on the so called pronotes Exs.P-6 to P-10 supra executed in the criminal case are written with defective line quality, slow and conscious and differ with standards in the preparation of letters and size of signature also including in formation of letter 'B' different and also in initial 'V' type stroke and in the questioned documents when compared to standards, the letter 'B' is absent and capital 'B' exhibits circular stroke in Q-1 to Q-5; whereas in standard S-1 to S-15 stroke are angular connecting stroke 'B' and 'H' that differs from standards etc., Those are no doubt not of much material in this case, but for to decide Ex.P-1 cheque issued by accused for legally enforceable debt or other liability. Even the complainant placed reliance on Ex.P-6 to P-10 so called pronotes said to have been executed by accused in the credit khata dealings amounts due, from the material on record supra, the credit 'khata' and issuing of cheques earlier even and taking back the cheques there the S-1 to S-4 cheques were issued by accused with his signatures as S.V.Bhaskar, whereas in Ex.P-1 cheque the initials 'S' 'V' not there but Bhaskara Rao. However, those are even by comparison of by Court within its power under Section 73 of Evidence Act muchless the signature of Ex.P-1 cheque with S-1 to S-4 cheques signatures equally S-6 to S-15 other standard signatures and not tallying with P-6 to P-10 pronote signatures and even though the Court is not an expert for comparison but for this comparing to a naked eye glaringly to point out in its power of comparison when there is an expert opinion available on record even obtained in some other case, since exhibited and born by record that expert opinion taken in it by this Court as per the settled law for its comparison under Section 73 of the Evidence Act as laid down in ***Paliram*** and ***Saghir Ahmad*** supra from that and also from the version of the accused that Ex.P-1 cheque was issued by him with his signature routed from his account. However, in his saying it was given in the year 1992 as security and the same is subsequently filled and misused. Even that is the positive case of the accused the complainant could not examine any witness in support of the contents of the Ex.P-1 cheque who filled and there was no explanation cogently for the different in writings of pens used viz., so far as the date of Ex.P-1 cheque concerned, it is with dark blue ink ball pen used and that pen used is different from the name of the payee and the amount in words and figures filled and those two different pens with different type of ball pen ink used not even tallying with for any of them to the signature of the accused with another ball pen refill ink to say three types of pens with three types of inks used might be in three occasions in cause filling the cheque and that is one of the circumstances against the case of the complainant to enhance the defence of the accused as also laid down by the Apex Court in ***C.Anthony V. K.G.Raghavan Nair***[11]

11) Though there are several aspects pointed out by the learned senior counsel for the complainant-appellant from the lower appellate Court's judgment, the above material when show that the accused mere stating of credit dealings with complainant or some of the transactions covered by Ex.P-11 to P-13 born by proof for nothing to show the debt is legally in subsistence to enforce and the so called pronotes for the debts covered by Khata dealings is as pointed out are not those executed by accused and are forged outcome and complainant himself having not come to Court with clean hands by suppressed material facts and created Exs.P-6 to P-10 pronotes as can be seen from what is discussed supra as also pointed out by the lower appellate Court in page No.5, para No.8 of the Judgment in this regard, the accused from the above material cannot found guilty from nothing to show Ex.P-1 cheque issued for any amount due muchless for any legally enforceable debt or other liability that too as discussed supra, the date of Ex.P-1 cheque with different persons writings and with different ball pen and the other contents with different persons' writing and what the accused contends of in the year 1991-92, the blank cheque was issued as a security for commencing the transactions and the same was misused is substantiating from the above and also lending support to the conclusion from the expression in ***C.Anthony*** supra.

12) Having regard to the above from the material on record when the lower appellate Court came to the right conclusion in acquitting the accused holding that the complainant could not establish in discharge of the burden by rebutting said evidence of

accused and to explain the adverse circumstances, to show that the cheque was issued for legally enforceable debt or other liability, the accused cannot be held guilty for the offence under Section 138 of the Act. It is also for the reason that, there is nothing to show from mere filing of Ex.P-11, 12 and 13 of so called transactions, where there are no any signatures of the accused, muchless acknowledgements, and no invoices or receipts filed to correlate the entries, no day book filed, no original account produced despite dispute of the liability to the complainant by accused also from cross-examination of P.W-1 and evidence of accused as D.W-1. Thus, for this Court while sitting in appeal, there is nothing to interfere against the acquittal judgment of the lower appellate Court which rightly set aside the trial Court's conviction judgment by acquitting the accused. Accordingly point No.1 is answered.

POINT No.2:

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

Dr. B. SIVA SANKARA RAO, J

Date:30-01-2015

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[1] AIR 2003 SC 2035

[2] (2006)3 SCC 30

[3] (2009) 2 SCC 513

[4] AIR 2010 SC 1898

[5] AIR 2008 SC 1325

[6] AIR 2001 SC 3897

[7] AIR 1999 SC 1008

[8] AIR 2002 SC 182

[9] AIR 2008 SC 2898

[10] 1971 (1) An.W.R. 65

[11] AIR 2003 SC 182