HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1424 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 27.08.2010 in C.C. No.140 of 2009 on the file of learned XIV Additional Chief Metropolitan Magistrate, Hyderabad.

2) Brief facts are that the accused borrowed an amount of Rs.3,50,000/- on 07.01.2007 from the complainant for sending her husband abroad on employment purpose and executed promissory note and agreed to repay the same within a period of six months with interest at 24% p.a., that after several demands the accused issued a cheque for Rs.5,00,000/- and the same was dishonoured for insufficient funds. The complainant got issued statutory legal notice to the accused, who failed to pay the cheque amount and thus the complainant filed the complaint.

3) After recording the sworn statement of the complainant and taken cognizance of the offence, the accused who was secured on summons was examined under section 251 Cr.P.C regarding the accusation for which she pleaded not guilty. During the course of trial, on behalf of the complainant, P.W-1 was examined and marked Exs.P-1 to P-7 viz., promissory note, cheque, cheque return memo, office copy of legal notice, postal receipt, UCP receipt and acknowledgement. On behalf of the accused, D.W-1 was examined and marked Exs.D-1 to D-6 viz., Statement of account, Certificate, Circular, T.A. Bill, Pay slip and reply notice. After hearing both sides and after perusal of material and evidence on record, the trial Court held the accused not guilty for the offence punishable under Section

138 of the Negotiable Instruments Act and accordingly he was acquitted for said offence.

4) Impugning the said acquittal Judgment, the complainant filed the present appeal contending that the trial Court's acquittal judgment is contrary to law, weight of evidence, probabilities of the case, that the learned Magistrate failed to appreciate the legal principles of law in respect of the offence under Section 138 of the Act, that the Court below erred in coming to the conclusion that Ex.P-2 cheque was handed over by the accused either to the father of P.W-1 or P.W-1 in the year 2004 itself, that the observation and conclusion of the learned Magistrate that blank promissory note and blank signed cheque were given towards security and without giving consent to fill up the amount, date, name, it cannot be enforced under Section 138 of the Act is unsustainable and therefrom 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 trial Court's acquittal judgment is just having fresh in mind the facts, by proper appreciation of evidence on facts 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 in the appeal are:

i) Whether the accused did not issue Ex.P-2 cheque in favour of the complainant for discharge of any legally enforceable debt or other liability and if so issued whether the trial Court's acquittal judgment is unsustainable and requires interference by this Court while sitting in appeal and if so, with what observations and conclusions?

ii) 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[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). <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[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 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**[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 stated supra, the signature on Ex.P-1 pronote and Ex.P-2 cheque is that of the accused and the cheque routed from the account of the accused are not in dispute.

The case of the complainant at the cost of repetition was that on 07.01.2007 (Sunday) the accused employee of Singareni Collaries, Kothagudem (came to him at Kukatpally, near Hyderabad, Ranga Reddy District) and he lent Rs.3,50,000/- to her and she executed Ex.P-1 pronote and it is in discharge of the same with interest at 24% p.a. for several demands, she issued Ex.P-2 cheque by come over to Hyderabad and not paid despite notice but for with false reply he maintained the complaint in seeking to punish her.

11) It is also his evidence as sole witness with reference to Exs.P-1 to P-7 that he did not file Ex.D-6 reply notice given by accused to his Ex.P-4 legal notice. The defence of the accused at the cost of the repetition is that she has no acquaintance with the complainat, but for with father of the complainant by name China Venkayya, who worked in the Singareni Collaries, that while he was working at Kothagudem he was lending during that period amounts to employees, that one Ganesh, a co-employee of the collaries where father of the complainant and accused were working, borrowed from father of the complainant for which the accused herein stood as guarantor and in that connection father of complainant obtained in the year, 2004 blank signed cheque and blank signed pronote and the same were misused as Ex.P-2 and P-1 respectively. The defence of the accused further was that, she never borrowed any amount from the complainant but for to give the blank pronote and blank cheque to father of complainant from her standing as guanrantor to one Ganesh who borrowed from father of the complainant and even said Ganesh discharged the debt later to father of the complainant, the blank cheque and blank pronote signed by accused available with him instead to return, misused through his son who is the complainant. As per the evidence of complainant-P.W-1, one Srinath filled the blanks of Ex.P-1 pronote and his brother Naga Srinivasulu

filled the blank cheque. The version of the accused as stated supra was that, her giving of pronote in January, 2007 and cheque in November, 2008 are also false, but for those of blank given in the year, 2004. Importantly despite the said defence of the accused, in requiring by reply notice Ex.D-6, also to send copy of the cheque and pronote to give a detailed reply further, there is nothing to show sending of the same by complainant. The complainant did not choose to cause examine his father who is a material witness to say if the blank cheques were not given by the accused to the father of the complainant, said fact he has to depose by coming to witness box on oath, rather contesting in saying the accused ought to have examined said Ganesh as complainant could examine his father. Thus, non-examination of father of complainant is also fatal to the case of the complainant as laid down by the Apex Court in ***C.Anthony*** supra. Importantly the reply given by the accused to the Ex.P-4 notice covered by Ex.D-6 is also saying she never saw the complainant's face and not acquainted and never borrowed muchless for the purpose of sending her husband to abroad to secure employment, though not mentioned she subscribed her signatures on signed blank pronote and blank cheque by standing as guarantor to one Ganesh for the amount borrowed by Ganesh from the father of the complainant herein. Importantly though it can be said if at all accused borrowed from the complainant by come over to Hyderabad on 07.01.2007 all the way from Kothagudem by taken the ordeal of journey of more than 7 hours for more than 300 kms to Kukatpally to take money and to execute pronote, it is unbelievable that without even exchange of notices demanding for payment of the amount, if true of the borrowal on 09.11.2008 accused herself all the way again came from Kothagudem to Kukatpally with such ordeal of journey and handed over the Ex.P-2 cheque. Besides that, the defence of the accused to substantiate, she filed Ex.D-1 statement of account of her with her banker showing not only Ex.P-2 cheque bearing No.348786 alleged by complainant as issued by accused on 09.11.2008, but also the other cheques with subsequent Nos.348792, 348974 and 348975 were even used in October to December, 2004 i.e., reflected in Ex.A-1 statement of joint S.B. Account of accused and her husband with State Bank of Hyderabad, Kothagudem branch. That also substantiates the defence of the accused that the cheque issued was in the year, 2004 in blank with her signature. A perusal of Ex.P-1 also show only the signature of the drawer the accused with one ink and other contents with other ink. It is even admittedly in the cross-examination of P.W-1. P.W-1 stated that the cheque was filled after the accused brought and hand over the signed cheque. P.W-1 stated that his brother Naga Srinivasulu filled the blanks of Ex.P-2 cheque. It is also to say it is not after filling of the cheque, the accused as drawer signed. She brought the signed blank cheque as per version of P.W-1 supra and there from brother of complainant filled. This is also one of the circumstances against the case of the complainant as also observed in ***C.Anthony*** supra by the Apex Court. Equally regarding pronote by saying Rs.3,50,000/- borrowed under Ex.P-1 pronote on 07.01.2007 Sunday by accused from the complainant by came over to the house at Kukatpally all the way from Kothagudem, what P.W-1 deposed was that, one Srinath was its scribe, filled the Ex.P-1. That Srinath was not even examined, despite denial of the execution of the pronote and borrowal of amount from complainant by accused.

12) A perusal of the pronote also show the ball pen used by the scribe and the attestors is one and the same, whereas signatures of accused is of different pen. A perusal of Exs.P-1 and P-2 pronote and cheque signatures of the accused show that were with one and the same ball pen. Apart from it, if any little effort made by the

complainant by sending the adhesive revenue stamp affixed on the pronote to ascertain the year of release of the stamp, if it was in the year, 2007 January, the pronote executed, if not of the year, 2004 or before for the version of the accused given in the year 2004 blank signed pronote, if released in the year 2005 or 2006, that defence could be belied, but nothing before this Court in that line from complainant to enhance the case of the complainant. This aspect is also enhances the defence of the accused with reference to the proposition in ***C.Anthony*** supra. Apart from it, importantly, the complainant in his private complaint cause title referred as private employee only. He did not file any scrap of paper as to his means and source of income and what is his salary and what are the amounts if he hold in any bank account to his credit and how he secured as on 08.10.2007 for the so called lending of Rs.3,50,000/- such a huge amount out of any of his means to the accused at his house. It is as observed by the Apex Court in ***Krishna Janardhan Bhatt*** though every transaction beyond Rs.20,000/- must be routed through cheque as per the income tax and not by cash though it is prone to penal consequences there from and by that it no way invalidates the transaction of lending for recover legally, however that is one of the circumstance in the absence of showing means of complainant to believe such huge lending, that can be taken to enhance the value of defence, as to in what circumstances the cheque was issued without consideration was also the pronote, if any to rebut the presumptions under Section 118 of the Act.

13) The trial Court referred the expressions of ***Krishna Janardhan Bhatt*** and ***Sarma Carpets*** in this regard to the conclusion against the case of the complainant. Apart from it, in the further defence of the accused, she filed a certificate Ex.D-2 issued by the Deputy General Manager, Personal of Singareni Collaries

stating that the accused herein as Sports Supervisor of Singareni Collaries was on duty to conduct company level and regional level tournaments at Bellampally from 06.01.2007 to 08.01.2007. No doubt, even from Bellampally to Kukatpally, it is more than 300 kms and may be equal in distance. However, the journey required to be taken more than 7 hours and the alleged lending and execution of Ex.P-1 pronote at Kukatpally on 07.01.2007 when she was on duty at Bellampally, it is highly improbable to believe. There is nothing to infer, she avoided the duty and unauthorisedly come over from Bellampally or Kothagudem to Kukatpally near Hyderabad. As had she be on duty, it is impossible to come during those duty hours, for saying the alleged pronote executed in the cross-examination of P.W-1 it was executed at 7.0 P.M. on that day. As rightly observed by the trial Court in para Nos.9 and 10 of the Judgment in this regard, said complaint version is unbelievable.

14) Further, to substantiate the said defence, even coming to the complainant's version of the alleged cheque issued under Ex.P-2 on 09.11.2008, in fact she was on duty on that day at Manuguru which is nearly 60 kms away to Kothagudem towards Warangal area on 09.11.2008 and 10.11.2008 to conduct regional level basket ball meet that is also proved from Ex.D-2 supra and to substantiate Ex.D-2, Ex.D-3 is also shows the T.A and D.A eligibility for her attending the meet on 9th and 10th November, 2008 on duty at Manuguru and Ex.D-4 shows she has drawn T.A and D.A not only on 07.01.2007 as on duty at the time of alleged execution of Ex.P-1 pronote, but also that belies the so called execution of Ex.P-1 pronote and borrowal of Rs.3,50,000/- from complainant by accused on 07.01.2007 at Kukatpally at about 7.00 P.M. Further, she has also drawn T.A and D.A on 09.11.2008 and 10.11.2008 for attending the meet at Manuguru as per Ex.D-5. The proceedings are also

substantiates her defence. It belies the complainant's case of on 08.11.2008 she came and has given the Ex.P-2 cheque at about 7.00 P.M at the residence of Kukatpally of complainant since those belies the case of the complainant. Even from the cross-examination of accused with reference to Exs.D-1 to D-6 supra, there could be nothing favourable to the complainant elicited. When the trial Court having scanned the factual matrix with reference to law in arriving a right conclusion in this regard; while sitting in appeal, even the said expression of ***Krishna Janardhan Bhatt*** supra referred by the trial Court explained later by the Apex Court in ***Rangappa*** supra in saying the finding in ***Krishna Janardhan Bhatt*** is correct but for observation of no presumption available to complainant under Section 139 of the Act, as such presumption is even available to complainant that no way improves for the purpose of considering the appeal by sitting against the acquittal judgment of the trial Court muchless to reverse the same and to convict the accused. Accordingly point No.1 is answered.

POINT No.2:

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

Dr. B. SIVA SANKARA RAO, J

Date:05-02-2015

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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