

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL PETITION No.5454 of 2010

ORDER:

1 This petition is filed under Section 482 Cr.P.C. to set aside the order dated 09.03.2010 passed in CrI.R.P.No.111 of 2007 on the file of the Court of the V Additional & Sessions Judge, Visakhapatnam, wherein and whereby the conviction and sentence dated 21.11.2007, imposed by the learned III Metropolitan Magistrate, Visakhapatnam on the petitioner to undergo simple imprisonment for three months and to pay compensation of Rs.60,000/- to the complainant, for the offence punishable under Section 138 of Negotiable Instrument Act in C.C.No.1616 of 2006 was confirmed.

2 For the sake convenience, the parties to this petition will hereinafter be referred to as they are arrayed before the trial Court.

3 The contention of the learned counsel for the petitioner/accused is three fold. 1) The Courts below failed to appreciate that the complainant is a stranger to the accused, in such circumstances, the possibility of issuance of Ex.P.1 cheque is highly improbable and unbelievable, 2) The Courts below failed to appreciate that the alleged debt is not legally enforceable; and 3) If the impugned order is allowed to stand, it would, certainly, amount to miscarriage of justice.

4 *Per contra*, the learned counsel for the complainant submitted that this Court shall not lightly interfere with the concurrent finding of fact recorded by the Courts below. He further submitted that the findings recorded by the Courts below are based on sound appreciation of fact and law and hence it is not a fit case to quash the proceedings.

5 The factual matrix germane to filing of the present petition is as follows:

6 As per the allegations made in the complaint, on 16.04.2004 the accused borrowed Rs1.00 lakh from the complainant and executed a promissory note in favour of the complainant. On 27.5.2006 at request of

the complainant, the accused issued a cheque for Rs.1.00 lakh in favour of the complainant drawn on Andhra Bank. The complainant presented the said cheque in Lakshmi Vilas Bank Limited for collection and the same was returned on 08.06.2006 with an endorsement "funds insufficient". The complainant got issued a notice directing the accused to pay the amount within 15 days. However, the said notice was returned as unserved. Having no other alternative, the complainant filed the complaint before the trial Court.

7 To prove his case, the complainant examined himself as P.W.1 and got marked Exs.P.1 to P.7. To demolish the case of the complainant, the accused examined himself as D.W.1, but no documents were marked.

8 After having a thoughtful consideration to oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the accused was guilty of the offence punishable under Section 138 of Negotiable Instruments Act and accordingly convicted and sentenced him to undergo simple imprisonment for three months and also to pay compensation of Rs.60,000/- to the complainant. Feeling aggrieved by the conviction and sentenced imposed by the trial Court in C.C.No.1616 of 2006, the accused preferred Criminal Revision Petition No.111 of 2007 on the file of the Court of the V Additional & Sessions Judge, Visakhapatnam. The learned Additional Sessions Judge after re-appreciating the material available on record dismissed the Revision Petition. Hence the present petition.

9 The points that arise for determination in this petition are:

- i. Whether the findings recorded by the Courts below are perverse?
- ii. Whether there is legal flaw in the orders passed by the Courts below, warranting interference of this Court?

10 Both the points are intertwined with each other and hence I am inclined to answer these two points simultaneously in order to avoid recapitulation of facts.

11 It is the case of the complainant that the accused borrowed an amount of Rs.1.00 lakh from him and executed a promissory note. Ex.P.5 is the copy of the promissory note. As the accused was not repaying the money, he got issued a legal notice directing the accused to pay the amount covered under the said promissory note. Ex.P.6 is the office copy of the legal notice and Ex.P.7 is the postal acknowledgement. In the cross examination D.W.1 in unequivocal terms admitted that Ex.P.5 bears his signature. He further admitted that Ex.P.7 also bears his signature. At one stage, D.W.1 admitted that the promissory note is in his own handwriting. If really the accused has not borrowed the amount under the original of Ex.P.5, what prevented him to issue a reply? A careful scrutiny of cross examination of D.W.1 clearly indicates that he himself executed the promissory note in favour of the complainant.

12 As per the findings recorded by the Courts below, Ex.P.1 cheque issued by the accused was dishonoured with an endorsement 'funds insufficient'. Ex.P.2 is the cheque return memo. The complainant got issued a legal notice demanding the accused to pay the amount covered under Ex.P.1 cheque within 15 days. Ex.P.3 is the office copy of the legal notice. However, the said notice was returned unserved. Ex.P.4 is the unserved postal cover. The complainant has meticulously followed the procedure contemplated under Section 138 of N.I. Act before filing of the complaint. The accused admitted his signature on Ex.P.1 cheque. It is needless to say that once the complainant proves issuance of cheque by the accused, the Court can draw a presumption under Section 139 of N.I. Act that the cheque in question was issued in discharge of a legally enforceable debt. The presumption drawn under Section 139 of the Act is rebuttable one.

13 Let me consider whether the accused has adduced any direct or indirect evidence or at least circumstantial evidence to rebut the presumption drawn by the court below as provided under Section 139 of N.I. Act. Except by putting formal suggestions, nothing is elicited in the Cross examination of P.W.1 to substantiate his stand that one Nookaraju

was instrumental for filing of the present complaint against him. It is not elicited in the cross examination of P.W.1 that the accused has no acquaintance with the complainant prior to the filing of the complaint. If the version put forth by the accused is presumed to be true, what prevented him to issue a reply to the statutory notice issued by the complainant or befitting reply to Ex.P.6 legal notice? All this go to show that the accused miserably failed to rebut the presumption. On the other hand, the complainant has successfully established that the cheque issued by the accused was dishonoured for want of sufficient funds.

14 The material available on record clinchingly establishes that the accused committed offence punishable under Section 138 of N.I. Act.

The findings recorded by the courts below are supported by oral and documentary evidence much less legally admissible evidence. There is no legal flaw in the orders passed by the Courts below warranting interference of this Court. Even if the conviction and sentence passed by the Courts below are allowed to stand, it would not amount to miscarriage of justice. Hence I am fully endorsing the findings recorded by the Courts below.

15 For the foregoing discussion, I see no ground much less valid ground to set aside the orders passed by the courts below by exercising the inherent jurisdiction under Section 482 Cr.P.C. Accordingly, this petition is devoid of merit and is thus dismissed. As a sequel, miscellaneous petitions if any pending in this Criminal Petition shall stand dismissed.

T. SUNIL CHOWDARY, J.

Date:29-03-2016

Kvsn