

HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CrI.R.C. No.235 of 2005

JUDGMENT:

This criminal revision case is filed under Sections 397 and 401 of Cr.P.C., challenging the judgment dated 07.02.2005 passed in CrI.A.No.136 of 2003 on the file of the Metropolitan Sessions Judge, Vijayawada, confirming the conviction and sentence passed by the V Metropolitan Magistrate, Vijayawada in CC No.759 of 2000 dated 16.04.2003.

2. For the sake of convenience, the parties to this revision will be referred as complainant and accused, as arrayed in the lower court.

3. The contention of the learned counsel for the petitioner/ accused is three fold. (1) The trial court failed to consider that the debt in question is not legally enforceable. (2) The complainant/respondent filed the complaint without serving the notice on the petitioner as contemplated under Section 138 of the Negotiable Instruments Act (for short 'the Act'); and (3) The findings recorded by the courts below are perverse; therefore, it is a fit case to set aside the judgments of the courts below.

4. The case of the complainant/respondent is that the petitioner/ accused borrowed a sum of Rs.1,50,000/- from him on 15.03.1999 by executing a pronote. On 09.08.2000, the accused issued a cheque bearing No.049924 drawn on Vysya Bank Ltd., in

favour of the complainant towards discharge of the pronote amount. On 19.08.2000, the complainant presented the said cheque for collection in Andhra Bank, Seetharampuram branch and the same was returned on 21.08.2000 with endorsement '*insufficient funds*'. The complainant got issued a notice on 05.09.2000, under registered post and certificate of posting, directing the accused to pay the amount covered under the cheque. The notice sent to the accused returned with an endorsement 'intimation sent' on 08.09.2000. Having no other alternative, the complainant filed the complaint against the accused for the offence under Section 138 of the Act before the V Metropolitan Magistrate, Vijayawada. The learned Magistrate had taken the case on file against the accused for the offence under Section 138 of the Act and numbered as CC No.759 of 2000.

5. To prove the guilt of the accused, on behalf of the complainant, PWs.1 and 2 were examined and Exs.P.1 to P.7 were marked. On behalf of the accused, no oral or documentary evidence was adduced.

6. Having thoughtful consideration of the oral and documentary evidence on record, the trial court arrived at a conclusion that the accused has committed an offence punishable under Section 138 of the Act and sentenced him to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1000/- , in default of payment of fine, to undergo simple imprisonment for one month.

7. Feeling aggrieved of the conviction and sentence imposed against the accused, he preferred criminal appeal i.e., CrI.A.No.136

of 2003 before the Metropolitan Sessions Judge, Vijayawada. The first appellate court upon considering the material available on record arrived at a conclusion that the accused has committed the offence punishable under Section 138 of the Act and dismissed the appeal by confirming the conviction and sentence passed by the trial court against the accused. Hence, the present revision.

8. It is the case of the complainant that the accused borrowed an amount of Rs.1,50,000/- from him on 15.03.1999 and executed a promissory note (Ex.P.1) in his favour. It is not the case of the accused that he did not execute any promissory note in favour of the complainant. In the cross-examination of PW.1, nothing is elicited to contradict his testimony so far as the execution of Ex.P.1 promissory note is concerned. By examining PW.2 and marking Exs.P.1 and P.2, the complainant clearly established that the accused executed promissory note in his favour. A perusal of the record clearly reveals that the cheque (Ex.P.2) was returned with an endorsement 'funds insufficient'. The oral testimony of PW.2 coupled with Ex.P.3 memo and Ex.P.4 debit advice clearly demonstrates that the cheque issued by the accused was not honoured for want of sufficient funds. The material placed before the court clinchingly establishes that the cheque issued by the accused was not honoured for want of sufficient funds in his account as on the date of issuance of the cheque. The fact remains that the accused issued cheque knowing fully well that he is not having sufficient funds to the credit of his account. By examining PWs.1 and 2 and marking Exs.P.1 to P.7, the complainant

clearly establishes that the cheque issued by the accused was not honoured.

9. The predominant contention of the learned counsel for the revision petitioner/accused is that the cheque in question is not legally enforceable. Once the execution of the promissory note and issuance of cheque is proved, the court can draw the presumption under Section 118 of the Act is that the cheque was issued in discharge of legally enforceable debt. If really the cheque was not issued to discharge the legally enforceable debt, what prevented the accused to elicit the same in the cross-examination of PW.1? As observed by the courts below, nothing is elicited in the cross-examination of PW.1 with regard to legality of debt in question. The courts below have given a specific finding that the accused issued the cheque in discharge of the promissory note amount and hence, I am unable to accept the contention of the learned counsel for the petitioner/accused that the cheque in question was not issued in discharge of legally enforceable debt.

10. The other point urged by the learned counsel for the petitioner/accused is that the complainant filed the complaint without issuing notice as contemplated under Section 138 of the Act. As seen from the testimony of PW.1, he got issued Ex.P.5 notice before filing of the complaint. Ex.P.6 is the receipt under UCP and Ex.P.7 is the postal returned registered cover. Ex.P.7 postal cover was returned with an endorsement 'intimation sent'. It is not the case of the accused that he was not residing in the address

mentioned on the postal cover as on the date of issuance of notice or filing of the complaint. It is a settled principle of law that once notice was sent to the correct address of the accused, the court can draw presumption that the same was served on him. Further, in the cross-examination of PW.1, nothing is elicited to establish that as on the date of issuance of the notice, the accused was not residing in the premises to which the registered letter was sent. In view of Section 27 of the General Clauses Act, the court can presume that the notice sent was served on the accused. Having regard to the facts and circumstances of the case, I am unable to accept the contention of the learned counsel for the petitioner/accused that the complainant filed the complaint without strictly adhering to the procedure as contemplated under Section 138 of the Act. The trial court as well as the first appellate court gave specific findings that the notice was served on the accused. I am fully endorsing the finding recorded by the trial court insofar as the service of notice on the accused is concerned.

11. The oral and documentary evidence available on record clinchingly established that the accused has committed the offence punishable under Section 138 of the Act. Having regard to the facts and circumstances of the case, I am unable to accept the contention of the learned counsel for the petitioner/accused that the findings recorded by the courts below are perverse and not sustainable either in law or on facts.

12. Learned counsel for the petitioner/ accused submitted that the quantum of sentence imposed against the accused is on higher side. The cheque amount is Rs.90000/- . During the pendency of the appeal also, the accused did not appear before the first appellate court. It is a settled principle of law that the sentence imposed shall commensurate with the gravity of the offence committed by the accused. Viewed from any angle, imposing sentence of imprisonment for six months against the accused is not on higher side. Therefore, I am unable to accept the contention of the learned counsel for the petitioner/ accused that the quantum of sentence imposed against the petitioner/ accused is on higher side. There is no illegality, irregularity or impropriety in the judgments of the courts below, which warrants interference of this court while exercising the jurisdiction under Section 397 Cr.P.C.

13. In the result, the criminal revision case is dismissed. The trial court is directed to issue non-bailable warrant against the petitioner/ accused to undergo remaining period of sentence if any. Miscellaneous petitions, if any pending in this case, shall stand closed.

Date: 09.11.2016.

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T.SUNIL CHOWDARY, J

HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

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