THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL REVISION CASE No.1095 of 2013

ORDER:

1 Assailing the order dated 22.04.2013 passed in Crl.M.P.No.1417 of 2013 in C.C.No.107 of 2011 by the learned III Additional Judicial Magistrate of I Class, Kakinada, wherein and whereby the petition filed by the petitioner/accused under Section 45 of the Indian Evidence Act was dismissed, the petitioner / accused filed the present Criminal Revision Case under Section 397 and 401 Cr.P.C.

2 The factual matrix that led to the filing of the present Criminal Revision Case, in brief, is as follows:

3 As per the case of the respondent / complainant, the petitioner borrowed an amount of Rs.2.00 lakhs from him and in discharge of the said debt, the petitioner issued a cheque bearing No.053199 dated 01.05.2010 for an amount of Rs.2.00 lakhs drawn on Axis Bank Limited, Chinnamiram Branch. On 05.06.2010 the respondent presented the said cheque for collection in Andhra Bank, G.Mamidada branch. However, on 01.07.2010 the Andhra Bank, G.Mamidada branch issued a memo to the respondent stating that the said cheque was dishonoured due to insufficient funds. The respondent got issued a legal notice to the petitioner demanding him to pay the amount covered under the said cheque within 15 days from the date of receipt of the said notice, failing which he will be constrained to approach the Court for redressal. On 04.08.2010 the petitioner got issued a reply to the respondent. Having no other alternative, the respondent filed the complaint against the petitioner under Section 138 of Negotiable Instruments Act on the file of the III Additional Judicial Magistrate of I Class, Kakinada.

5 The learned III Additional Judicial Magistrate of I Class,

Kakinada, after satisfying himself with the material placed before him, has taken cognizance of the offence against the petitioner for the offence punishable under Section 138 of N.I. Act, numbered it as C.C.No.107 of 2011 and issued process.

6 After completion of complainant's side evidence, the petitioner filed Crl.M.P.No.1417 of 2013 under Section 45 of the Indian Evidence Act requesting the Court to send the cheque in question to the Forensic Science Laboratory, Red Hills, Hyderabad to determine the age of the ink as the same was issued by him to one Madhu in connection with a loan transaction of his brother-in-law by name Alluri Ramesh in the year 2008 and that taking advantage of the death of said Madhu, the respondent came into possession of the cheque in question and filed the present complaint as if the petitioner has issued the cheque on 01.05.2010 in discharge of legally enforceable debt.

7 The respondent/complainant filed counter inter alia contending that the petitioner, having admitted his signature on the cheque, is not legally entitled to file the present petition.

8 The trial Court, after affording reasonable opportunity to both parties, dismissed the petition. Hence the present Criminal Revision Case.

9 The contention of Sri A.S.C.Bose, the learned counsel for the petitioner is three fold. **1)** the order passed by the trial Court is not sustainable either on fact or in law as the respondent himself admitted in the cross-examination that there is variation between the signature of the petitioner and the other writings on the cheque in question, **2)** dismissal of the petition would amount to preventing the petitioner to rebut the presumption to be drawn under Section 139 of the N.I. Act, which is contrary to the cardinal principle of fair trial, and **3)** dismissal of the petition would certainly cause prejudice to the

legal rights of the petitioner.

10 *Per* contra, Sri. N.Siva Reddy, the learned counsel for the respondent / complainant submitted that the petitioner, having admitted his signature on the cheque, is not legally entitled to file the petition under Section 45 of the Indian Evidence Act. He further submitted that the opinion of the expert is not substantial piece of evidence, therefore, dismissal of the petition filed by the petitioner would not prevent the petitioner to substantiate his stand by adducing evidence in other mode. He further submitted that this Court can interfere with the order passed by the trial Court if there is any illegality, irregularity or impropriety.

11 Heard the learned Additional Public Prosecutor representing the State.

12 Now the point for determination in this Criminal Revision Case is **"Whether the petitioner has made out any ground much less valid ground to send the cheque in question to the expert for determination of the age of the ink?**"

13 At this juncture, I feel it apposite to refer to the case law relied upon by the learned counsel for the parties. The learned counsel for the petitioner has drawn my attention to the ratio laid down in the following decisions:

Uppu Jhansi Lakshmi Bai v. J. Venkateswara Rao[1]

wherein this Court held at Para No.8 as follows:

> 8. I am not inclined to agree with the submissions of the learned counsel. The opinion of an expert is relevant under Section 45 of the Indian Evidence Act. It is an accepted principle of law that the science of handwriting is not an accurate one and there is likelihood of errors creeping in, when a handwriting expert gives his evidence and therefore, such evidence should be received with caution. What is the evidentiary value of a handwriting expert and whether or not in conjunction with the other evidence available, the

evidence of the expert supports the case of the plaintiff, are matters for decision by the trial judge. The passage from the decision of the Supreme Court extracted supra is not an authority for the proposition that the evidence of the handwriting expert should not be brought on record for the purpose of determining the age of the disputed hand-writing. The opinion of 'Albert S. Osborn', quoted with approval by the Supreme Court, was expressed by the learned author in the following context:

"There are those also who pretend to say how old a writing is by merely examining it with a hand magnifier or a microscope. This always is an exhibition, either of ignorance or of dishonest presumption. The chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no reliable data upon which a definite opinion can be based as can easily be demonstrated by fair tests on documents of known age."

The learned author also expressed the view that:

".....By recording the color as first seen, any observer with good eyesight can on second view answer the question whether an ink is still undergoing a change in color. This kind of an ink examination often furnishes conclusive evidence that a document is not as old as it purports to be.

. . . . . .

It is important to know that the color of the ink on a suspected document, if it is promptly examined, may thus be the means of showing that the document is not genuine. If a writing of this kind purports to have been written long before and it can be shown that the ink has not yet reached its final depth of color, and it actually goes through those changes that are characteristic of ink during the first months or year of its history, it is only necessary to prove this fact to invalidate the document."

T.Nagappa Vs. Y.R. Muralidhar[2] wherein the Hon'ble apex Court held at para Nos.12 and 14 as under:

12. However, it is not necessary to have any expert opinion on the question other than the following:

"Whether the writings appearing in the said cheque on the front page is written on the same day and time when the said cheque was signed as "T.Nagappa" on the front page as well as on the reverse, or in other words, whether the age of the writing on Ex.P2 on the front page is

> the same as that of the signature "T.Nagappa" appearing on the front as well as on the reverse of the Cheque Ex.P2?"
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> 14. For the aforementioned reasons, the impugned judgment cannot be sustained. It is set aside accordingly with the aforementioned directions. Appeal is allowed.

A.Sivagnana Pandian Vs. M. Ravichandran[3] wherein the High Court of Madras held at para No.19 as under:

> 19. This Court has waded through various authorities specifically on this subject and found out that the procedures of investigation and demonstrations are very much at hand for ascertaining the age of the ink, which should have been adopted by the experts in our country contained in upto date treatise.

14 On the other hand, the learned counsel for the respondent / complainant has drawn my attention to the ratio laid down in **Kambala Nageswara Rao *v.* Kesana Balakrishna**[4]

> 4. The application, no doubt, is filed under Section 45 of the Act, and it is not uncommon that such applications are filed in the suits for recovery of money on the strength of promissory notes. However, the prayer in the I.A. is some-what peculiar. Even while not disputing his signature on the promissory note, the petitioner wanted the age thereof to be determined. Several complications arise in this regard. The mere determination of the age, even if there exists any facility for that purpose; cannot, by itself, determine the age of the signature. In a given case, the ink, or for that matter, the pen, may have been manufactured several years ago, before it was used, to put a signature. If there was a gap of 10 years between the date of manufacture of ink or pen, and the date on which, the signature was put or document was written, the document cannot be said to have been executed or signed on the date of manufacture of ink or pen. It is only in certain forensic cases, that such questions may become relevant. The trial Court has taken correct view of the matter and dismissed the application.

15 As per the ratio laid down in the cases 1 to 3 cited supra, the Court can send the document in question to expert in order to determine the age of the ink. However, the learned counsel for the petitioner pointed out that the leaned single Judge of this Court has not considered the ratio laid down in **Uppu Jhansi Lakshmi Bai** (1

supra) and **T.Nagappa** (2 supra).

16 Let me consider the facts of the case on hand in the light of the above legal principle. Suffice it to say, the facts of two cases may not be identical in all aspects, therefore, the Court has to meticulously consider the facts of the case on hand in order to apply the principle enunciated in the cases cited by both the counsel. Law cannot be applied in a vacuum.

17 It is needless to say that in criminal cases the Court has to afford reasonable opportunity to the accused to prove his innocence / defence at every stage of the proceedings thereby the accused may feel that the court has conducted the trial in a fair and transparent manner. But that does not mean that the Court has to glibly swallow and allow the petitions filed by the accused in a routine manner. The Court has to see the intention of the party in filing a particular petition and whether that petition withstands the judicial scrutiny as the possibility of filing of petitions one after another by the accused with an ulterior motive to protract the litigation as long as possible, more particularly, in cases filed under Section 138 of N.I. Act cannot be ruled out. The Court has to keep in mind all these aspects while deciding the miscellaneous petitions.

18 One of the contentions raised by the petitioner is that the respondent himself has admitted about the variations in writings on the cheque, which is the genesis for filing of the present petition. It is not out of place to extract hereunder the relevant portion of the cross-examination of the respondent/complainant.

> "Witness voluntarily says that the accused had got filled the contents of the cheque and gave it to him.
>
> The hand writings in signature on the body of the cheque are same."

19 The very purpose of the cross examination of a prosecution witness is to elicit something positively, which ultimately

substantiates the stand taken by the accused. In fact, the answers given by P.W.1 to the suggestions put by the counsel for the accused negates the very contention of the petitioner.

20 I have carefully scanned the testimony of P.W.1 (respondent). No where in the deposition, the respondent had admitted that the signature on the cheque is tallying with the other writings on the cheque. Therefore, the contention of the learned counsel for the petitioner that the respondent himself admitted about the variations of writings on the cheque is factually incorrect. On the other hand, the respondent has taken a specific stand in the chief examination and cross examination that the signature is tallying with the other writings on the cheque.

21 It is a settled principle of law that the parties to the proceedings have to take their specific stand at the earliest point of time. Section 138 of N.I. Act mandates that the drawee of the cheque has to issue notice to the drawer by giving a reasonable opportunity to pay the amount, covered under the cheque, within 15 days from the date of receipt of the notice. To put it in a different way, Section 138 of N.I.Act facilitates the drawer of the cheque either to pay the amount or to deny the factum of issuance of the cheque or legally enforceability of the debt. The underlying object of Section 138 of the N.I Act is to give a reasonable opportunity to the drawer of the cheque to disclose his stand at the earliest point of time i.e. at the time of issuance of reply notice. The drawer of the cheque ought to have taken whatever the defences available to him in his reply notice so far as material facts are concerned.

22 In the instant case, the petitioner got issued a reply notice to the legal notice dated 17.7.2010 issued by the respondent. In order to appreciate the rival contentions, it is apposite to extract some relevant portions in the reply notice got issued by the accused for

better appreciation of the rival contentions.

> "….. The cheque bearing No.053199 dt.1.5.2010 is a forged and fabricated false document basing on which your client not entitled to initiate any legal action against our client either under Section 138 of N.I. Act or otherwise."

> "In fact, our client's brother-in-law by name Alluri Ramesh in respect of some loan transaction for Rs.20,000/- with one Madhusudhana Reddy alias Madhu on tender basis (Daily interest basis) during first week of April 2008 i.e. on 5.4.2008 requested our client to give a blank signed cheque bearing No.053199 towards collateral security stating that the said Madhusudhana Reddy is insisting for collateral security of a Government Servant towards the said loan transaction. As the said Ramesh happened to be the husband of our client's own sister, our client was compelled to issue a blank unfilled signed cheque at his request as collateral security thereof."

23 If an ordinary prudent person reads the unnumbered Para No.1 in isolation with the unnumbered para No.2, it gives an impression that the cheque in question was forged by the complainant and filed a false complaint. If any person reads the unnumbered para No.2 in isolation of un numbered para No.1, it gives an impression that the petitioner himself has issued the cheque bearing No.503199 dated 01.05.2010 to one Madhu in connection with the liability of his brother-in-law by name Ramesh. If both the paras are read separately, it gives some sort of confusion. If both paras are read together, they clearly demonstrate that the petitioner has taken diametrically opposite pleas in the legal notice. On one hand the petitioner, as rightly pointed out by the learned counsel for the respondent, is admitting his signature on the cheque. The petitioner has not taken any plea in the legal notice that his signature is not tallying with the other writings on the cheque. As observed earlier, no specific suggestion was put to P.W.1 that the cheque in question does not bear his signature. Likewise, no suggestion was put to P.W.1 that he (respondent) himself forged his (petitioner's) signature on the cheque in question and filed a false complaint as pleaded in the legal notice. Petitioner has not taken a specific stand in the reply notice, which is the earliest point of time that the signature is not tallying with the other writings on the cheque. The petitioner having

admitted his signature on the cheque, having failed to take a specific plea that his signature is not tallying with the other writings on the cheque, is not entitled either on facts or on law to ask the trial Court to send the cheque in question to determine the age of the ink. Without proper foundation in the reply notice or without positively eliciting from the prosecution witness, filing this type of petitions, that too, at the fag end of the trial, is not justifiable.

24 It is needless to say that the opinion expressed by an expert under section 45 of the Indian Evidence Act is not a substantial piece of evidence. On the other hand, the opinion expressed by the expert is weak piece of evidence. While disposing of the applications of this nature, the trial Court has to take into consideration whether the accused has taken a specific stand at the earliest point of time enabling himself to file petition to send the document in question to an expert for opinion. The trial Court has to meticulously scrutinize the material available on record in order to ascertain the intention of the party in filing this type of petitions. If the trial Court comes to a conclusion that the accused has taken a specific stand at the earliest point of time and the intention of filing of an application of this nature is in consonance with the principles of fair trial, certainly the Court has to allow the petitions. In the instant case, there is no material on record to attach such type of genuineness to the petitioner. Therefore, the intention of the petitioner to protract the litigation for some more time, cannot be ruled out.

25 For the foregoing reasons, this Criminal Revision Case is devoid of any merit and is dismissed accordingly. The trial Court is hereby directed to dispose of the case in accordance with law without being influenced by any of the observations made by this Court while disposing of this Criminal Revision Case. As a sequel,

miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand dismissed.

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T. SUNIL CHOWDARY, J.

Date:13-04-2016

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[1] AIR 1994 Andhra Pradesh 90

[2] (2008) 5 SCC 633

[3] 2011 (1) MWN (Cr.) DCC 173

[4] 2004 (1) ALT 636