THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY
CRIMINAL REVISION CASE No.1959 of 2016

ORDER:

1 This Criminal Revision Case is filed under Sections 397 and 401 Cr.P.C. assailing the judgment dated 27.01.2009 passed in Criminal Appeal No.121 of 2006 by the learned Sessions Judge, Vizianagaram, confirming the judgment dated 28.08.2006 in C.C.No.248 of 2005 on the file of the Court of the Special Judicial Magistrate of I Class (Excise), Vizianagaram wherein and whereby the petitioner was found guilty of the offence punishable under Section 138 of N.I. Act, convicted and sentenced to undergo rigorous imprisonment for a period of three months and also to pay a fine of Rs.300/-, in default, to suffer simple imprisonment for one month.

2 The contention of the learned counsel for the petitioner is that the petitioner was in jail for 22 days i.e. from 02.07.2009 to 24.07.2009. She further submitted that the findings recorded by the Courts below that the petitioner is found guilty of the offence punishable under Section 138 of N.I. Act is not sustainable either on facts or in law. She further submitted that the findings recorded by the Courts below are perverse and hence it is a fit case to set aside the judgments by allowing this revision case.

3 *Per* contra, the learned counsel for the second respondent submitted that the findings recorded by the trail Court are based on material much less legally admissible material and that the appellate Court, after re-appreciating the entire material available on record, confirmed the findings of the trail Court, therefore, it is not a fit case to interfere with the findings recorded by the Courts below.

4 The facts leading to filing of the present revision case are briefly as follows:

5 The petitioner issued a cheque bearing No.0764029 dated 07.07.2004 for an amount of Rs.1,860/- drawn on Andhra Bank,

Vizianagaram Branch in favour of the second respondent, who in turn presented the said cheque in State Bank Of India, Bazaar Branch, Vizianagaram for collection on 19.07.2004. But the said cheque was returned with an endorsement 'funds insufficient' vide banker memo dated 22.07.2004. The second respondent got issued a legal notice dated 12.08.2004 directing the petitioner to pay the amount covered under the said cheque within 15 days from the date of receipt of the notice. The petitioner neither issued reply to the said notice nor has paid the amount covered under the said cheque. Having no other alternative, the second respondent filed complaint on the file of the Court of the Special Judicial Magistrate of I Class (Excise), Vizianagaram, who in turn has taken the case on file under Section 138 of N.I. Act and numbered it as C.C.No.248 of 2005. During the course of trial, on behalf of the second respondent P.W.1 was examined and Exs.P.1 to P.8 were marked. On behalf of the petitioner no oral or documentary evidence was adduced. Basing on oral, documentary evidence and other material available on record, the trail Court arrived at a conclusion that the petitioner committed the offence punishable under Section 138 of N.I.Act, convicted and sentenced him to undergo rigorous imprisonment for a period of three months and also to pay a fine of Rs.300/-, in default, to suffer simple imprisonment for one month. Feeling aggrieved by the judgment of the trail Court, the petitioner preferred Criminal Appeal No.121 of 2006 on the file of the Sessions Judge, Vizianagaram. The appellate Court after reappraising the oral and documentary evidence available on record, arrived at a conclusion that the petitioner was found guilty of the offence punishable under Section 138 of N.I. Act and accordingly confirmed the conviction and sentence imposed against the petitioner by the trail Court. Hence the present revision case.

6 Now the point for determination in the Criminal Revision Case is "Whether the concurrent finding of fact recorded by the Courts below is perverse and not sustainable in law?"

POINT:

7 In order to appreciate the rival contentions, I feel it apposite to refer the case law on this aspect.

In ***Amar Chand Agarwalla Vs. Shanti Bose and Anr., etc.***[1] at para No.20 the Hon'ble apex Court held as follows:

> "Even assuming that the High Court was exercising jurisdiction under Section 439, in our opinion, the present was not a case for interference by the High Court. The jurisdiction of the High Court is to be exercised normally under Section 439, Criminal Procedure Code, only in exceptional cases, when there is a glaring defect in the procedure or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice. The High Court has not found any of these circumstances to exist in the case before us for quashing the charge and the further proceedings."

The same principle was reiterated in ***State of Haryana Vs. Rajmal and Another***[2].

8 As per the principle enunciated in the cases cited supra, it has not been open for the High Court to interfere with the concurrent findings of the courts below specially by re-appreciating the evidence in its revisional jurisdiction.

9 Let me consider the facts of the case in the light of the above legal principle.

10 It is not the case of the petitioner that he did not issue the cheque in favour of the second respondent. The predominant contention of the learned counsel for the petitioner is that the cheque in question was not issued in discharge of any legally enforceable debt. However, the cheque issued by the petitioner was dishonoured for want of sufficient funds. The second respondent got issued a legal notice directing the petitioner to pay the amount covered under the cheque within 15 days from the date of receipt of the notice. If really the petitioner has not issued the cheque in discharge of any legally enforceable debt, what prevented the petitioner to give a suitable reply? No doubt, non-issuance of reply by itself is not a sufficient ground to draw a presumption against the

petitioner. A perusal of the record clinchingly establishes that the second respondent proved issuance of cheque by the petitioner. Once the second respondent proves the issuance of the cheque and dishonour of the same for want of sufficient funds, the Court can draw a presumption under Section 139 of the Negotiable Instruments Act that the cheque in question was issued for discharge of legally enforceable debt, unless contrary is proved. The petitioner did not choose either to give reply to the notice got issued by the second respondent or to enter into the witness box to rebut the presumption. A careful perusal of the record establishes that the second respondent filed the complaint after following the procedure contemplated under Section 138 of N.I.Act.

11 The learned Magistrate, after satisfying himself with the material placed before him, has taken the case on file under Section 138 of N.I.Act against the petitioner. A perusal of the record reveals that in the cross examination of P.W.1 nothing is elicited to shake his testimony so far as the issuance of the cheque by the petitioner for discharge of legally enforceable debt. The trail Court, after considering the oral and documentary evidence, has arrived at a conclusion that the petitioner committed the offence punishable under Section 138 of N.I.Act. The appellate Court also confirmed the findings recorded by the trail Court. The material placed before the Court clinchingly establishes that the petitioner committed the offence punishable under Section 138 of N.I.Act. The findings recorded by the Court below are based on material much less legally admissible evidence. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that it is not a fit case to interfere with the findings recorded by the Courts below.

12 A perusal of the record reveals that the appellate Court passed the judgment on 27.01.2009 and issued N.B.W against the petitioner. The petitioner was arrested by the police on 02.07.2009 in execution of N.B.W and was enlarged on bail 24.07.2009 in pursuance of the orders of this Court dated 22.07.2009. The fact remains that the petitioner was

in jail from 02.07.2009 to 24.07.2009 i.e. for a period of 22 days. The cheque amount is only Rs.1,860/-. The record further reveals that the petitioner paid the fine amount of Rs.300/-. The petitioner is aged about 61 years. The petitioner has been attending the Courts since 2005. Therefore, the petitioner might have undergone mental agony for all these years. Taking into consideration the facts and circumstances of the case, this Court takes a lenient view and accordingly reduces the said sentence of three months imprisonment to that of the period, which the petitioner had already undergone.

13 Excepting the above modification, this revision, in all other aspects is dismissed. Consequently, miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand dismissed.

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T. SUNIL CHOWDARY, J

Date: 14th July, 2016

Kvsn

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[1] (1973) 4 SCC 10

[2] (2011) 14 SCC 326