THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL PETITION No.12402 of 2016

ORDER:

The criminal petition is filed under Section 482 Cr.P.C. to quash the proceedings in C.C.No.630 of 2016 on the file of the II Additional Judicial Magistrate of First Class, Bhimavaram, registered for the offences punishable under Sections 406 and 420 IPC.

Heard the learned counsel appearing for the petitioner/accused and the learned Additional Public Prosecutor, representing the State.

A private complaint is filed by the 2nd respondent/*de facto* complainant against the petitioner/accused before the court below alleging the offences punishable under Sections 406 & 420 IPC. The learned Magistrate forwarded the same to the jurisdictional police under Section 156(3) Cr.P.C. After investigation, the concerned police filed charge sheet alleging that the petitioner took loan of Rs.25 lakhs from the 2nd respondent promising to pay the same with interest within 6 months and executed a promissory note to that effect in favour of the 2nd respondent, but he failed to repay the same in time. On demand, the petitioner/accused issued a cheque bearing No.863507 for Rs.37,01.650/- drawn on ING Vysya Bank. The 2nd respondent on 19.02.2016 presented the said cheque with his Banker Axis Bank, China-Amiram Branch and the same was returned dishonoured with an endorsement that the Account was closed. On 03.03.2016 the 2nd respondent issued a legal notice to the petitioner/accused. On 12.03.2016 the petitioner/accused sent reply stating that the signatures on the promissory note and cheque do not belong to him. Thereupon, the 2nd respondent consulted the ING Vysya Bank and the Axis Bank authorities who verified the signature on the cheque and acknowledgment cards and found both are matched. The petitioner/accused dishonestly induced the 2nd respondent to entrust the cash of Rs.25 lakhs and issued cheque relating to a closed account and thereby cheated the 2nd respondent.

The contention of the petitioner/accused is that for the same set of facts, the 2nd respondent earlier filed a private complaint under Section 138 of Negotiable Instruments Act before the same court, which was numbed as CC.No.413/2016 and the same is pending adjudication. It is further contended that no person shall be convicted twice for the same offence, and therefore, the present complaint is hit by double jeopardy as per provisions under Sections 300 and 302 Cr.P.C.

The point for consideration is as to whether the complaint alleging offences punishable under Sections 406 and 420 I.P.C., is liable to be quashed on the ground that it is hit by the doctrine of *double jeopardy,* inasmuchas, for the same transaction a case under Section 138 of the Negotiable Instruments Act has been lodged, which is pending trial?

In C.C.No.413 of 2016, which is filed under Section 138 of the N.I.Act, the cause of action is stated as under:-

> "The cause of action arose to file this complaint in July, 2013, when the accused herein approached and inducted the complainant for an amount of Rs.25 lakhs as hand loan and on 11.08.2013, when the accused executed a promissory note in favour of the complainant while taking the amount of Rs.25 lakhs, and on 18.12.2015, when the accused person issued a cheque No.863507 in favour of the complainant towards discharge of his liability and on 14.01.2016 when the complainant shown the amount paid to the accused in his Income Tax Returns and on 20.02.2016, the said cheque was unpaid/dishonoured by the accused bank for the reason "Account Closed" and on 03.03.2016, when the complainant issued statutory notice to the accused herein under Section 138 of Negotiable Instruments Act and on 07.03.2016, when the accused personally received and

acknowledged the said notice and on 12.03.2016 when the accused sent reply notice and failed to make the legitimate payments to the complainant and all subsequent dates till date."

The prayer therein is to punish the petitioner/accused for the mischief, fraud and cheating thereby causing wrongful loss by inducing the complainant and having taken an amount of Rs.25 lakhs, issued a cheque on account which is already been closed.

As against the above, in the present complaint filed for the offences punishable under Sections 406 and 420 I.P.C., the cause of action is similar to the one in C.C.No.413 of 2016 but whereas the prayer of the respondent/complainant is to punish the accused under the provisions of Penal Code for the mischief and cheating caused by the petitioner/accused.

Learned Counsel appearing for the petitioner/accused submits that since both the cases are in respect of the same transaction, the same cannot be sustained inasmuch as it amounts to trying the accused for the same offence twice. In support of his contention, learned Counsel relied upon a decision of the learned single Judge of our High Court reported in **RAMBHA LAKSHMANA RAO AND ANOTEHR v. STATE OF ANDHRA PRADESH**[1]. Learned single Judge made the following observations in paras 11 and 12 as under:-

> "Thereby from the above proposition, particularly from the observation in paras 237 to 239 supra (*State v. Nalini (1999 (2) ALD (Crl) 24 (SC)* particularly with reference to *Manipur Administration V. Thokchom Bira Singh (AIR 1965 SC 87)* debarring that Section 300 Cr.P.C., has further widened the protective means by debarring second trial against some accused on the same facts even for a different offence and the contours are so widely enlarged and that it cannot be contended that the second trial can escape therefrom on the ground premise that some more allegations were not made in the first trial. Same is the proposition referring to the above, laid down by this Court in Crl.P.No.7868 of 2015 dated 12.11.2015.
>
> Having regard to the above, from the bar under Section

> 300 Cr.P.C., and also for no offence is made out under Section 420 I.P.C., and the crime proceedings against the petitioners/A.1 and A.2 are liable to be quashed to subserve the ends of justice."

On the other hand, learned Counsel appearing for the respondent/complainant submits that the ingredients constituting the offences punishable under Section 138 of N.I.Act and 420 I.P.C., are quite distinct and different and even if it is out of same transaction, the same cannot be said to be hit by the provisions of the doctrine of *double jeopardy.* It is further submitted that may be some facts overlapped in the two complaints, but the very relief sought for in both the cases is quite distinct. In support of his contention, learned Counsel appearing for the respondent/complainant has relied upon two decisions which are direct bearing to the facts of the present case. The first decision is a Full Bench decision of our High Court reported in **M/S.OPTS MARKETING PVT.LTD., v. STATE OF A.P.**[2] wherein the Full Bench in para 27 laid down as under:-

> "In the result, we hold that (i) even after introduction of Section 138 of the Negotiable Instruments Act, prosecution under Section 420 I.P.C., is maintainable in case of dishonour of cheques or postdated cheques issued towards payment of price of the goods purchased or hand loan taken, or in discharge of an antecedent debt or towards payment of goods supplied earlier, if the charge-sheet contains an allegation that the accused had dishonest intention not to pay even at the time of issuance of the cheque, and the accused of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation, (ii) private complaint or FIR alleging offence under Section 420 I.P.C., for dishonour of cheques or post-dated cheques cannot be quashed under Section 482 Cr.P.C., if the averments in the complaint show that the accused had, with a dishonest intention and to cause damage to his mind, body or reputation, issued the cheque which was not honoured. "

The other decision that is relied upon by the learned Counsel appearing for the respondent/complainant is of the Supreme Court reported in **SANGEETABEN MAHENDRABHAI PATEL v. STATE OF GUJARAT**[3] wherein the Supreme Court laid down the law on the subject on hand in paras 15, 24 and 27 which read as under:-

> "This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court in a previous trial on a factual issue. (Vide *Pritam Singh and another v. The State of Punjab (12)2005 (1) SCJ 243 = AIR 1956 SC 415; Manipur Administration, Manipur V. Thokchom Bira Singh (13)AIR 1965 SC 87); Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda (14) AIR 1970 SC 87; and Bhanu Kumar Jain v. Archana Kumar and another (15) AIR 2005 SC 626).*
>
> In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e., doctrine of *autrefois acquit* or Section 300 Cr.P.C., or Section 71 I.P.C., or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of *autrefois acquit* is not proved unless it is shown that the Judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge.
>
> Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I.Act

> and the case is *sub judice* before the High Court. In the instant case, he is involved under Section 406/420 read with Section 114 I.P.C. In the prosecution under Section 138 N.I.Act, the *mens rea* i.e., fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of *mens rea* may be relevant. The offence punishable under Section 420 I.P.C. is a serious one as the sentence of 7 years can be imposed. In the case under N.I.Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under I.P.C. In the case under N.I.Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under I.P.C. The case under N.I.Act can only be initiated by filing a complaint. However, in a case under the I.P.C., such a condition is not necessary.

The Supreme Court in the Judgment referred to above has referred to various authorities in coming to the above conclusion. The facts before the Apex Court are similar to the one in the case on hand. The Full Bench of our High Court and the Supreme Court has categorically laid down that the complainant can lay a complaint against the accused for an offence punishable under Section 138 of the N.I.Act and if the ingredients are satisfied, he can as well prosecute the accused for the offence punishable under Section 420/406 I.P.C. In view of the specific dicta as laid down by the Full Bench and the Supreme Court, I have no hesitation in holding that the present complaint filed alleging offences punishable under Section 420 and 406 I.P.C., is maintainable and the same cannot be quashed. As noticed above, in the present complaint alleging offences under the Penal Code, the specific allegations are that the petitioner/accused has cheated him and induced him to part with a sum of Rs.25 lakhs and thereby attracted the penal provisions under Sections 406 and 420 I.P.C. In the process of above transaction, the petitioner/accused is said to have issued a cheque drawn on an account which is already closed and thereby committed the offence punishable under Section 138 of N.I.Act. Therefore, the ingredients of the offence punishable under Section 138 of N.I.Act are *prima facie* made out in the complaint in C.C.No.413 of 2016 and thereby *prima facie* allegations which constitute offences punishable under Sections 406 and 420 I.P.C., in C.C.No.630 of 2016.

In view of the foregoing discussion, it is held that the petitioner is not entitled to the relief as prayed for and the petition to quash further proceedings in C.C.No.630 of 2016 is liable to be dismissed. Needless to say that the Court trying both the cases should dispose of both the case on merits uninfluenced by any of the observatgions made herein.

In the result, the Criminal Petition is dismissed. Miscellaneous petitions, if any, pending in this petition shall stand closed.

M.S.K.Jaiswal, J

August, 2016

Dsr/smr

[1] 2016 (1) ALD (Crl) 525

[2] 2001 (1) ALT (Crl) 205 (A.P.) (FB)

[3] 2012 (2) ALT (Crl) 479 (SC)