

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

CRL.A.NO.1003 OF 2016

JUDGMENT

Aggrieved by the judgment dated 6.1.2015 passed by the court of V special Magistrate at Hastinapur, Rangareddy District in C.C.No.140/2014 in acquitting the accused for the offences punishable under Section 138 and 142 of the Negotiable Instruments Act, 1881 (for short 'the Act'), the complainant filed the present appeal.

2. The appellant is the complainant and the 1st respondent is the accused. The parties shall be referred to as per their array before the trial court.

3. Heard the counsel for the petitioner and the learned Additional Public Prosecutor for the State at the stage of admission.

4. The case of the complainant is that he and the accused are known to each other. The accused is the absolute owner-cum-possessor of H.No.2-18-27, Plot Nos.38 part, 39 and 40 in Sy.No.789/2 and 789/3 admeasuring 625 sq. meters situated at Zahid Nagar, Uppal, Rangareddy District. The accused offered to sell the said property to the complainant for an amount of Rs.1,15,62,500/- and complainant agreed to purchase the same and paid an amount of Rs.45,00,000/- as advance and entered into agreement on 18.4.2012, in the presence of elders. It is agreed that the balance amount of Rs.75,62,500/- would be paid on or before 30.6.2012. The accused also agreed to clear the title defect, if any, of the said property and deliver possession to the complainant. The accused also agreed to return the

advance amount of Rs.45,00,000/- to the complainant if the property is in litigation. After entering into agreement and on payment of advance amount, the complainant came to know that the property was under litigation. The same was informed to the accused, but the accused did not respond properly and cleared the title. Accordingly the complainant demanded the accused to return the advance amount of Rs.45,00,000/-. The accused paid an amount of Rs.10,00,000/- immediately and issued two cheques bearing Nos. 240512 dated 14.11.2013 for Rs.15,00,000/- and 240512 dated 21.12.2013 for Rs.20,00,000/-, drawn on State Bank of Habsiguda Branch, Hyderabad for the balance amount. When the complainant presented the said cheques on 12.2.2014, both of them were returned with the endorsement "account closed". The complainant got issued legal notice to the accused on 18.2.2014 and the same was returned with the postal endorsement "unclaimed". As the accused failed to pay the amount under the cheques in question, the complainant filed the case for punishing the accused under Sections 138 and 142 of the Act.

5. The court below after framing appropriate issues and considering the oral and documentary evidence on record, held that the complainant failed to prove the guilt of the accused beyond all reasonable doubt that the cheques Exs.P-2 and P-3 were issued for legally enforceable debt or liability and therefore, the accused has not committed any offence punishable under Section 138 of the Act and accordingly acquitted him by the impugned judgment. Challenging the same, the complainant filed the present appeal.

6. The learned counsel for the appellant/complainant argued that the trial court has not appreciated the evidence on record in proper perspective. While reiterating the above averments made in the complaint, he stated that there is statutory presumption under Sections 118 and 139 of Act that the cheques were issued for discharging legally enforceable debt or liability. In the present case, the admitted fact is that the accused issued the cheques Exs.P-2 and P-3. Therefore, unless he rebuts the said presumption, the burden will not shift on the complainant to prove that the cheques were issued for legally enforceable debt.

7. However, in the present case, the accused has not discharged his burden, by leading any evidence.

8. Learned counsel further submits that accused sought to contend that he sold the house to the complainant and to one Ramulu, who was doing real estate business along with the complainant. The house was registered in the name of the said Ramulu and that the accused issue one blank signed stamp paper and two signed blank cheques to the complainant for mutation of the said property and not for discharge of any legally enforceable debt or liability. But the complainant misused the same and filed the complaint.

9. Moreover the complainant has specifically denied the said suggestion in his cross-examination and to prove the same, the accused has not examined any witness. Therefore, learned counsel submits that, this shows that the conclusion arrived by the trial court that the cheques were

issued by the accused for another transaction and that the complainant misused the same and filed the case, is not based on any evidence. With these averments, he sought to set aside the impugned judgment and to convict the accused.

10. The learned Additional Public appearing for the 2nd respondent – State supporting the above arguments of the learned counsel for the complainant sought to set aside the impugned judgment.

11. In view of the above contentions, the issue that falls for my consideration is whether the impugned judgment warrants any interference?

12. The case of the complainant, as noted above, is that the accused is the owner of the house in question and offered to sell the same at Rs.1,15,62,500/- and also agreed to clear defects of title if any. The complainant accordingly agreed for the same and paid an amount of Rs.45,00,000/- as advance and entered into an agreement of sale dated 18.4.2012, which is marked as Ex.P-1 and agreed to pay the remaining balance on or before 30.6.2012. That after execution of the agreement of sale, he came to know that the house property was under litigation and though he brought the same to the notice of the accused, he failed to respond. However the accused immediately returned an amount of Rs.10,00,000/- and for the balance advance payment, issued two cheques, which are marked as Exs.P-2 and P-3 and on presentation of the same, were returned with the endorsement “account closed”. The notice sent requiring the accused to pay the cheque amounts within 15 days, was returned with the postal endorsement “unclaimed”.

13. There is no dispute that the cheques under Exs.P-2 and P-3 were issued by the accused. Therefore, under Section 118(a) and 139 of the Act, the statutory presumption arises in favour of the complainant that the said cheques were issued for discharging legally enforceable debt or liability. But the said presumption is rebuttable. So, based on the evidence on record, it has to be seen whether the accused has rebutted the said presumption.

14. The Apex Court in the *KRISHNA JANARDHAN BHAT vs D.G. HEDGE*¹, held that presumption under Section 139 of Act is a rebuttable presumption and the accused need not examine himself personally to prove that the cheques are not issued for legally enforceable debt and that the presumption may be drawn by framing material placed on record and also the circumstances of the case. In the said decision, the Apex Court had taken into consideration its earlier decision in *BHARAT BARREL AND DRUM MANUFACTURING COMPANY vs. AMIL CHAND PYARELAL*², wherein it was held that the burden up on the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relied . The Apex Court further held that the court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence, as the existence of negative evidence is neither possible, nor contemplated and even if lead, it is to be seen with a doubt. The relevant portion is as under:

¹ (2008)2 SCC (CrL.) 166

² (1999)3 SCC 35

“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. *The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, it is to be seen with a doubt.*”

(Emphasis supplied by Apex Court)

15. As per the judgments of the Apex Court, cited 1 and 2 supra, the defendant is entitled to prove the non-existence of consideration by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relied.

16. The defence of the accused is that the complainant is doing real estate business along with Ramulu and that he sold the house to the said Ramulu and for mutation of the property, he issued blank stamp paper and Exs.P-2 and P-3 cheques. As per the law laid down by Apex Court, the accused may not lead any direct evidence and can rely on the circumstances in the case of the complainant to disprove his case. The complainant, to prove his case, mainly relied on Ex.P-1 agreement of sale, which is alleged to have entered into in the presence of elders. To prove the same, except the self serving statement, no witness either oral or documentary has been lead by the complainant. Further to prove that he advanced Rs.45,00,000/-, the complainant failed to establish his source, as no bank statements were filed. Though the complainant filed the income tax returns of the relevant period of

2013-14, marked as Exs.P-8 , the amount of Rs.45,00,000/- is not reflected in the said returns. Thus, he failed to prove that he kept the said amount to pay as advance to the accused. Considering similar circumstances, this court in *K.KRISHNA REDDY VS. K.RAJENDER*³, held as under:

“In view of the inconsistent versions of P.W.1 about the subject transaction and execution of Exs.P-1 and P-4, the non-mentioning of the loan in the income tax returns of P.W.1, the non-production of any bank statement, the non filing of any books or statements of accounts and the absence of any oral or documentary corroboration for the claims of P.W.1 about availability of such a huge sum and advancing money on 08.09.1999 assumes significance, more so, in the face of total denial of any acquaintance between them by the accused. The total variance between the contents of Ex.P-5 and the evidence before the criminal court makes the claims more doubtful and the existence of any legally enforceable debt or liability itself becomes suspect.”

17. In view of the decision of this court, it is clear that non-production of any bank statements and also as there is no mention of this amount in the income tax returns filed by the complainant under Exs.P-8, makes the claim of the complainant doubtful and existence of any legally enforceable debt or liability on the part of the accused.

18. The further case of the complainant is that the accused refunded an amount of Rs.10,00,000/- from the advance amount. For this also, the complainant did not lead any evidence. These circumstances create any amount of doubt that the accused issued Exs.P-2 and P-3 cheques for return of the amount.

19. The circumstances of not proving Ex.P-1 agreement of sale and source for making advance payment of Rs.45,00,000/- to the accused and also not producing any receipt for refund of Rs.10,00,000/-, probablises the defence of the accused that the cheques were issued not for legally

³ 2012(1) ALD (CRL.) 934

enforceable debt or liability. Considering these circumstances, the court below has rightly held that the cheques were issued by the accused for another transaction and the complainant misused the same and filed the case.

20. For the foregoing reasons, as the complainant failed to prove the guilty of the accused beyond all reasons doubt for the offence punishable under Section 138 of the Act, the trial court acquitted him. I do not find any reason to interfere with the said findings recorded by the trial court and the issue framed is answered in the negative.

21. The appeal is devoid of any merit and the same is accordingly dismissed at the stage of admission.

22. Miscellaneous petitions pending if any, shall stand closed.



SURESH KUMAR KAIT,J

DATE:23—12—2016

AVS

Note:

L.R. copy to be marked.

B/O