THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.2398 OF 2017

ORDER:

This criminal revision case is filed under Sections 397 & 401 of Cr.P.C, questioning the propriety and legality of the order in Crl.A.No.117 of 2015 dated 24.08.2017 passed by the XV Additional District & Sessions Judge, Nuzvid, whereby, the Appellate Court, without altering the substantive sentence of imprisonment, awarded by the Trial Court i.e. simple imprisonment of one year, modified the fine amount of Rs.10,10,000/- to Rs.10,000/- only.

The petitioner was the accused and the first respondent was the complainant before the Trial Court and they will hereinafter be referred as accused and complainant, for the sake of convenience.

The complainant filed a private complaint against the accused for the offence punishable under Sections 138 & 142 of Negotiable Instruments Act (for short 'Act'), alleging that, on 18.01.2010, the accused borrowed an amount of Rs.10,00,000/- from the complainant for his necessities and expenses, executed a promissory note on the even date, undertaking to repay the same together with interest at 24% per annum on demand either to the complainant or to his order as and when demanded. On 18.12.2011, on demand, the accused issued a cheque bearing No.629296 for Rs.10,00,000/- in favour of the complainant, drawn on State Bank of India, Satyanarayanapuram Branch towards part payment. On 20.12.2011, the complainant presented the cheque in Andhra Bank, Tiruvur for collection into his account. The said cheque was returned on 22.12.2011 along with a memo stating that the said cheque was dishonoured as “Funds Insufficient to the credit of account” of the accused. After receiving the said memo, complainant sent a registered notice on 04.01.2012 demanding the accused for payment of money covered by dishonoured cheque within 15 days from the date of receipt of notice. Though, notice was served on the accused on 07.01.2012, the accused neither choose to give reply to the said notice nor paid the amount covered by the dishonoured cheuqe. Hence, the complainant filed complaint against the accused for the offences punishable under Section 138 of the Act.

The case was taken on file against the accused for the offence punishable under Section 138 of the Act by the Trial Court. After securing the presence of the accused, the Magistrate examined the accused under Section 251 Cr.P.C after following necessary procedure, explaining the gist of accusations to the accused in Telugu, for the offence punishable under Section 138 of the Act, the accused pleaded not guilty and claimed to be tried.

During Trial, on behalf of the complainant, the complainant himself was examined as P.W.1 and marked Exs.P-1 to P-6. After closure of complainant’s evidence, the accused was examined under Section 313 Cr.P.C, explaining the incriminating material that appeared against him, he denied and proposed to examine the witnesses and accordingly examined one Ch. Sambasiva Rao as D.W-1 and marked Exs.D-1 to D-4.

Upon hearing arguments of both the counsel, the Trial Court found the accused guilty for the offence punishable under Section 138 of the Act, and sentenced him to undergo Simple

Imprisonment for a period of one year and fine of Rs.10,10,000/-, out of the fine amount Rs.10,00,000/- to be paid to complainant, with default sentence. Aggrieved by the conviction and sentence passed by the Trial Court, Crl.A.No.117 of 2015 was preferred before the XV Additional District & Sessions Judge, Nuzvid, wherein, the Sessions Court without altering the substantive sentence of imprisonment i.e. simple imprisonment for one year awarded by the Trial Court, modified the fine amount of Rs.10,10,000/- to Rs.10,000/- only. Challenging the concurrent fact findings recorded by both the Courts below, the present criminal revision case is preferred on various grounds.

The main contention of the learned counsel for the petitioner is that, the Exs.P-1 & P-2 were not issued by the accused to the complainant, as he had no acquaintance with the complainant and thereby, question of borrowing amount under Ex.P-1-promissory note does not arise. It is further contended that there were transactions between the accused and one R. Anuradha. In connection with those transactions, issued two blank cheques and two promissory notes, in lieu of settlement for Rs.2,75,000/- and that the petitioner paid Rs.1,75,000/- and for the balance amount of Rs.1,00,000/-, he issued two signed blank cheques and two signed blank promissory notes. Therefore, R. Anuradha, being a government employee, got filled the columns of the cheuqe and filed O.S.No.327/2012 through one J. Kalyani by misusing the promissory note and filed the present complaint, based on Exs.P-1 & P-2 with an intention to cause wrongful loss to the accused. But, both the Trial Court and the Appellate Court did not consider the defense set up by the accused/petitioner and committed an error in finding the accused guilty for the offence punishable under Section 138 of the Act, which is confirmed by the Appellate Court, though the petitioner failed to establish the ingredients to constitute an offence punishable under Section 138 of the Act. Apart from that, the complainant miserably failed to establish that the cheque was issued to discharge the legally enforceable debt or liability and requested this Court to set-aside the conviction and sentence imposed against the petitioner by the Trial Court and confirmed by the Appellate Court in C.C.No.1467 of 2012 and Crl.A.No.117 of 2015 respectively.

Learned counsel for the petitioner Smt. S.V. Indira, would contend that the petitioner never issued any cheque to constitute an offence punishable under Section 138 of the Act and that the burden heavily lies on the petitioner to prove that the cheque was issued towards discharge of legally enforceable debt or liability. But, when he failed to establish that, the complainant had no means to pay such huge amount, the complaint is liable to be dismissed. But, both the Courts below did not consider the legal aspects and committed an error in finding the accused guilty for the offence punishable under Section 138 of the Act. Finally, it is contended that the petitioner/accused is a patient who underwent heart surgery and requested this Court to take lenient view, while allowing the criminal revision case.

Considering rival contentions and perusing the material available on record, the point that arises for consideration is:

"whether there was any relationship of debtor and creditor between the accused and the complainant. If so, whether the cheque marked as Ex.P-2 which was dishonoured, was issued to discharge legally enforceable liability or debt?"

P O I N T:

Before deciding the real controversy between the parties, it is apposite to discuss about the scope of revision under Sections 397 & 401 Cr.P.C, for better appreciation of facts.

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though section 401 of Cr.P.C. confers a kind of paternal and supervisory jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity or procedure, neglect or proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of Cr.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. Therefore, keeping in mind the scope of revision, I would like to decide the present issue before this Court. This Court normally cannot interfere with concurrent fact findings recorded by the Courts below, only in exceptional circumstances when findings are manifestly perverse or apparently erroneous.

Keeping the powers of this Court under Section 397 and 401 of Cr.P.C, I would like to advert to the disputed questions before this Court.

The petitioner/accused did not deny the signature both on Exs.P-1 & P-2 i.e. promissory note and cheque, to contend that those documents wee issued in favour of R. Anuradha in connection with different transactions, as he became due for an amount of Rs.1,00,000/- as security. Therefore, issue of signed blank cheques and promissory notes by the petitioner allegedly in favour of R. Anuradha is admitted by the accused/petitioner.

When two blank cheques were allegedly issued in favour of R. Anuradha along with two signed promissory notes, the said R. Anuradha, being the holder of the documents is competent to fill the columns of the promissory note and cheque and utilized those documents for recovery of amount, since it is a stamped incohate document, in view of Section 20 of the Act.

In **Duggineni Seshagiri Rao Vs. Kothapalli Venkateswara Rao**[1] the Division Bench of this Court, in para 6 as follows:

> "Four things are necessary for an instrument to be a promissory note: 1) It should be in writing; 2) It should have an unconditional undertaking; 3) It should be signed by the maker; and 4) it should be in favour of ceratin person or to a bearer.

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1 2001(6) ALT 95 (D.B.)

> Section 20 makes inchoate stamped instruments legal instruments. The dictionary meaning of 'inchoate' is 'incomplete'. So, incomplete stamped instruments are as good as the instruments mentioned in Section 4 of the Act. Even if one looks to the definition of the 'promissory note' under Section 4, one would find that the requirements for making an instrument a promissory note do not contain the requirement of naming a person, it can be given in favour of a certain person or to bearer of the instrument. That makes it clear that, one who is holding the document is the person who derives rights out of that instrument. In other words, it would mean that the document with first three requirements as stated above, should be delivered to the payee, once it is delivered it becomes a promissory note. Name and other particulars can be filled up even at a later stage. When one reads Section 4 in conjunction with Sections 20 and 42 that is the only interpretation that can be placed on the meaning of 'promissory note' under Section 4 of the Act. Section 20 lays down that when a person signs and delivers to another person a paper stamped in accordance with law relating to negotiable instrument it becomes a negotiable instrument even if it is wholly blank or written with incomplete particulars. Similarly, Section 42 even recognizes instrument issued in the name of fictitious person to be a valid instrument. Although Section 42 relates to bills but it also accepts that an acceptor of a bill of exchange even if it was in drawn in a fictitious name it would create a genuine claim in favour of the holder. Therefore, even if a negotiable instrument is incomplete it would be a legal instrument provided it satisfies the first three conditions.
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> Holder of the instrument becomes a bearer of the instrument."
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> Their Lordships further held as follows:
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> "The plaintiff had been able to prove the execution of the document. On the other had, if the document was disputed or doubted the onus was on the defendant to show that the document was a forgery because a presumption is in favour of plaintiff under Section 118 of the Negotiable Instruments Act."

In **Sukhminder Singh Vs. Nirbhai Singh**[2], the High Court of Punjab & Haryana also laid down the same principle as held in **Duggineni Seshagiri Rao**[1] case.

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[2] AIR 2013 Punjab and Haryana page 77

In this regard, I am persuaded by the judgment of the High Court of Karnataka in **H.Maregowda and etc. Vs. Thippamma and others**[3], wherein it was held as follows:

> *"A reading of Section 20 of the Negotiable Instruments Act which is extracted above will reveal that the words used are either wholly blank or having written thereon an incomplete negotiable instrument. Thus, even if a blank promissory note is given, it cannot be taken as a defence to avoid a decree based on such instrument, once it is found that the document produced before the Court satisfies the requirements of a promissory note within the meaning of the Negotiable Instruments Act. The instrument may be wholly blank or incomplete in particular; in either case, the holder has the authority to make or complete the instrument as a negotiable one."*

Assuming for a moment that the said cheque and promissory note were issued in favour of R. Anuradha, who is a government employee, in view of the law declared by the Division Bench of this High Court and persuaded by the law declared by the High Courts of Karnataka and Punjab & Haryana, the complainant became the holder of Exs.P-1 & P-2 and entitled to file complaint for the offence punishable under Section 138 of the Act. However, in the present case, the petitioner failed to establish that Exs.P-1 & P-2 were issued to R. Anuradha in connection with different transactions.

In the examination in chief, P.W.1 reiterated the allegations made in the complaint. But, in the cross-examination, the learned counsel for the defense could elicit that the complainant owd and possessed Ac.25.00 of mango garden and recently he purchased Ac.15.00 of mango garden at different places and his annual turn over was around Rs.70 to 80 lakhs and he is also cultivating the lands on lease, but he is not an income tax assessee. A vague

[3] AIR 2000 Kant 169

suggestion was put to witness to elicit that there was a contract between R. Anuradha and P.W.1 and admitted that he came to know that one P. Satyanarayana along with R. Anuradha purchased an extent of 333 sq.yds at New Rajarajeswaripeta, Vijayawada from the accused under registered sale deed. But, eliciting this fact is of no avail, so also auction of the said extent. He pleaded ignorance about the difference between accused, P. Satyanarayana and R. Anuradha with regard to sale of 333 sq.yds an settlement of disputes between them, issue of Exs.P-1 & P-2 in connection with the settlement with regard to sale of 333 sq.yds at New Rajarajeswaripeta, Vijayawada. In the entire cross-examination of P.W.1, except suggesting that the cheques were issued to R. Anuradha and denied by the witness P.W.1, nothing could be elicited to substantiate the contention of the accused that Exs.P-1 & P-2 were issued to R. Anuradha and utilized those documents and got filed this complaint. The accused was examined as D.W-1 and according to him, he had no acquaintance with the complainant and he never borrowed any amount from the complainant and did not receive any notice from the complainant regarding dishonour of the cheque and there were no financial transactions between them. But, gave G.P.A to R. Anuradha in respect of his property, in the presence of elders a settlement was made for payment of Rs.2,75,000/-, she obtained two blank signed cheques and two blank signed promissory notes. R. Anuradha being a government employee, got filled these documents and got filed the complaint. But conveniently, learned counsel for the petitioner did not produce the cross-examination part of D.W.1 for different reasons. Therefore, based on the examination in chief of D.W.1, it is difficult to hold that Exs.P-1 & P-2 were not issued to P.W.1.

The Trial Court concluded that Exs.P-1 & P-2 were issued in favour of the complainant to discharge legally enforceable debt or liability, based on the presumption under Section 139 of the Act. The Appellate Court also relied on the presumption under Section 139 of the Act and confirmed the conviction and sentence.

During hearing, learned counsel for the petitioner at the stage of admission, contended that the burden is upon the plaintiff to establish that the cheque was issued in lieu of discharge of legally enforceable debt or liability and placed reliance on the judgment of the Apex Court in **John K. Abraham v. Simon C. Abraham and another[4],** wherein, the Apex Court while deciding a criminal appeal filed against conviction and sentence for the offence punishable under Section 138 of the Act, considered the scope of Sections 138 & 139 of the Act that when substantial amount was advanced by the complainant to the accused and in turn, the accused issued cheque, but not sure whether as to who issued the cheque and not aware when exactly and where exactly transaction took place for which cheque came to be issued by the accused, the Apex Court held that the conviction of the accused is liable to be set-aside, since the evidence of complainant was diametrically opposite to the stand taken by him. But, in the present case, the evidence of P.W.1 is consistent with regard to lending amount having Ac.40.00 of mango garden and earning Rs.70 to 80 lakhs per annum, which was not denied in the cross-

[4] 2014 (2) ALD (Crl.) 61 (SC)

examination by the learned counsel for the petitioner, atleast by putting a suggestion to the witness that he was not earning Rs.70 to 80 lakhs per annum or atleast that he was an income assessee, when he contended that he was not an income tax assessee, as the income was from agriculture.

Curiously, the suggestion was put to P.W.1 that he has no capacity to lend such amount and got denial of it. He consistently stated that the cheque was issued on 18.01.2010, but did not disclose the cheque number. In fact, on 18.01.2010, the accused borrowed amount and executed Ex.P-1-promissory note, but the cheque was issued on later date and this discrepancy is an incidental or circumstantial discrepancy which can be overlooked, since the complainant, instead of stating the date of promissory note, he stated that the cheque was issued on the date of execution of promissory note. Thus, it can be ignored. Therefore, the inconsistency he pointed out during hearing relying on **John K. Abraham**[2] case, is not sufficient to interfere with the concurrent fact findings recorded by the Trial Court and confirmed by the Appellate Court.

Yet, learned counsel for the petitioner contended that, when the complainant failed to establish that he possessed such huge amount, the complainant's case has to be thrown out and placed on the judgment of this Court in **Kanakamedala Venkata Krishna Prasad v. Peram Sai Swarupa, State of A.P., rep by its Public Prosecutor**[5]**,** while deciding a revision filed against conviction for the offence punishable under Section 138 of the Act. Based on the facts, disbelieved the case of the complainant as the source of

[5] 2017 (1) ALT (Cri) 259

income stated by the complainant is false and he did not disclose and did not file even a scrap of paper to establish that he was not earning any amount as salary after deductions. Therefore, based on the facts of the said case, the Court disbelieved the complainant's case. In the instant case on hand, the consistent evidence of P.W.1 is that, he owned and possessed Ac.40 of mango garden earning Rs.70 to 80 lakhs per annum, but he was not an income tax assessee, since the income earned from agriculture is exempted from income tax. More curiously, in the entire cross-examination, learned defense counsel did not suggest to the witness that P.W.1 did not possess mango garden of an extent of Ac.40.00, as contended by him, except suggesting that he has no capacity to lend the amount. If the accused by putting any suggestion denied owning and possessing of mango garden, there is possibility of producing documentary evidence in support of his contention to establish the source of income. When there was no denial, the Trial Court and the Appellate Court are not expected to disbelieve the case of the complainant on the sole basis of suggestion put to the witness, that he has no capacity to lend the amount. Therefore, the principle laid down in **Kanakamedala Venkata Krishna Prasad**[3] case, is of no assistance to the prosecution, in view of the cross-examination of P.W.1. Apart from that, in the examination-in-chief of D.W.1, he did not deny his capacity to lend the amount and possessing of Ac.40.00 mango garden. In the absence of any evidence, it is difficult to apply the principle laid down in the above judgment.

Learned counsel for the petitioner mainly contended that, when the cheque was not issued towards legally enforceable debt, the initial onus of proof is on the complainant to prove that the cheque was issued in lieu of discharge of legally enforceable debt or liability and if the complainant discharged initial onus of proof, the burden will shift on to the accused to rebut the evidence of the complainant. In the absence of discharging initial onus of proof by the complainant, the burden of proof cannot be shifted to the accused. But the Trial Court and the Appellate Court failed to consider the initial onus of proof that rests on complainant in proper perspective and committed an error in finding the accused guilty for the offence punishable under Section 138 of the Act.

Learned counsel for the petitioner relied on judgment of this Court in **K. Ashok Kumar Goud v. Sree Ramulu and another[6],** wherein, in similar circumstances, this Court held that, non-production of any bank statements coupled with non-disclosure of his income in the income tax returns, makes the claim of the complainant as doubtful. Apart from that, it is the case of the complainant that the amount was withdraw from the bank and advanced to the accused/petitioner. If, it was his case that he had withdrawn the amount from the bank and advanced the same to the petitioner, then the principle laid down in the above judgment is relevant and necessary to believe the case of the petitioner. When it is not the case of the complainant, the principle laid down in the above judgment cannot be applied.

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[6] 2017 (1) ALT (Crl.) 320 (A.P)

Similarly in **Shaik Ayaz v. Abdul Khader and another[7],** a single Judge of this Court discussed the scope of Sections 138 & 139 of the Act, where this Court held that the very fact that the borrowal was more than a year prior to the issuance of cheques would show that the cheques were not in discharge of the borrowals made by the accused as nexus between the borrowal and issued cheques has not been established. But, I am unable to accept this principle, for the reason that, when the accused/petitioner borrowed the amount and executed a promissory note while agreeing to repay the same either to the complainant or to his order, as and when demanded, but when the complainant demanded, instead of discharging the debt or paying cash, the petitioner issued a cheque and issue of cheque is subsequent to borrowing. Therefore, there is a direct nexus between the issue of cheque and borrowing of amount from the complainant established that the cheque was issued in lieu of discharge of legally enforceable debt. Apart from that, a legal notice marked as Ex.P-5 dated 04.01.2012 was issued, and receipt of the same was acknowledged on 07.01.2012 which is marked as Ex.P-6. No reply was issued, suitably, to the legal notice Ex.P-5. If, really, the accused/petitioner did not borrow the amount, and execute promissory note Ex.P-1 and issued cheque Ex.P-2, atleast the petitioner would have denied the transaction itself, including execution of promissory note and issue of cheque by issuing a suitable reply to the notice. Having maintained silence till receipt of summons in C.C.No.1467 of 2012, the accused set up a peculiar defense that he never borrowed amount from the complainant and

[7] 2012 (1) ALD (Crl.) 399 (A.P.)

never executed Ex.P-1 and Ex.P-2, which is not substantiated by any material.

In **Sanjay Mishra v. Ms. Kanishka Kapoor @ Nikki and another**[8], the Bombay High Court while dealing with Sections 138 & 139 of the Act held that, if in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, failure to disclose the amount in Income Tax Return or Books of Accounts of the complainant may be sufficient to rebut the presumption under Section 139 of the Act. It was also held by the Bombay High Court with regard to dishonour of cheque that presumption as to issuance of cheque in discharge of legally enforceable debt, amount advanced by complainant to accused was unaccounted cash amount and when it is not disclosed in Income Tax Return, liability to repay unaccounted cash amount cannot be said to be legally enforceable liability.

The same view was expressed by this Court in **Nagisetty Nagaiah v. State of Andhra Pradesh and another**[9].

Finally, learned counsel for the petitioner contended that when there is a possibility of false implication, the Court shall not raise presumption under Section 139 of the Act, based on the principle of **Krishna Janardhan Bhat v. Dattatraya G. Hegde**[10]. In the facts of the above judgment, a complaint was filed for the offence punishable under Section 138 of the Act, and the accused was found guilty alleging that the complainant advanced a sum of Rs.1.5 lakhs to the appellant and the latter, on his own went to the

[8] 2009 Cri.L.J. 3777
[9] 2004 Cri.L.J. 4107
[10] (2008) 4 Supreme Court Cases 54

house of the complainant to return the loan by an account payee cheque which got dishonoured when presented. The plea of appellant was that his power of attorney holder misutilised his signed blank cheques through his relative the complainant and by raising a presumption under Section 139 of the Act, the complainant's case was primarily accepted for the reason that the appellant did not step into the witness box. The Trial Court did not draw any inference as to the probability of the complainant advancing a sum of Rs.1.5 lakhs on mere asking and that too without keeping any documentary proof or requiring presence of any witness, purported story that the appellant would himself come forward to return the amount by a cheque knowing fully well that he did not have any sufficient funds was difficult to believe. Further, the complainant did not say that he had friendship with appellant and there was no indication as to any business transactions were there between them. The complainant failed to produce any books of accounts or any other proof to show that he got so much money from bank. The High Court found that the Courts below failed to notice that ordinarily in terms of Section 269-SS of Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- had to be made by an account payee cheque only and by considering the peculiar facts and circumstance of the case, the Supreme Court held that the Trial Court and the Appellate Court approached the matter on wrong application of the legal principles to the fact situation of the case and set-aside the conviction and sentence passed by the Courts below.

On the strength of this principle, learned counsel for the petitioner contended that the presumption under Section 139 of the Act is not rebutted. But, the principle in **Krishna Janardhan Bhat**[8] case is overruled in later judgment of the Supreme Court in **Rangappa**[11] case, to the extent that the presumption about existence of legally enforceable debt or liability is not available to the holder of the instrument is overruled while agreeing with the law laid down in **M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd**[12], wherein, it was made clear that to that extent, the impugned observations in **Krishna Janardhan Bhat**[8] case may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. In view of the law declared in the above judgment by the Full Bench of Apex Court, the presumption not available to the holder of the instrument by placing reliance and the judgment of the Apex Court in **Krishna Janardhan Bhat**[8] case is not sustainable, since it is not good law.

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[11] (2010) 11 SCC 441
[12] (2002) 1 SCC 234

In **Shaik Ayaz vs. Abdul Khader and The State of A.P. rep.by P.P., High Court of A.P., Hyderabad**[13], this Court had an occasion to decide the similar question and concluded that, it is primarily for the drawee to show that the cheque was issued in connection with a subsisting debt. The onus on the part of the drawer is in the nature of proof in a civil case, viz., establishing a fact by preponderance of evidence, whereas the complainant shall have to establish his case beyond reasonable doubt.

In **Sanjay Mishra**[6] case, the Bombay High Court held that the presumption under Section 139 Cr.P.C as to issue of cheque towards legally enforceable debt is rebuttable presumption. But, such presumption can be dispelled by adducing satisfactory evidence. Therefore, in view of the law declared by the Courts consistently, the initial onus of proof is on accused/drawer, if issue of cheque is admitted or issue of cheque is proved by the complainant adducing satisfactory evidence and the accused/drawer may rebut such presumption by eliciting something in the cross-examination of complainant or by examining independent witness. But the Court has to take into consideration of totality of the circumstances and if those circumstances by preponderance of probabilities, dispelled the presumption, the burden is on the complainant to prove the existence of legally enforceable debt, thereby, the principle laid down in **Krishna Janardhan Bhat**[8] case to the extent that the presumption is not available to the accused is not good law, in

[13] Crl. R.C. No. 1469 of 2005 Decided On: 20.10.2011

view of the Full Bench Judgment of the Supreme Court in **Rangappa[9]** case.

Learned counsel for the petitioner mainly contended that the first respondent/complainant advanced allegedly huge amount and the amount allegedly advanced was not shown in the income tax returns of the complainant and it is hit by Section 269-SS of Income Tax Act and in such case, when the accused is able to establish that the complainant did not possess such huge amount, the presumption is deemed to have been dispelled or rebutted by adducing evidence.

Learned counsel for the petitioner placed reliance on **Krishna Janardhan Bhat[8]** case, where the Supreme Court considered the scope of Section 269-SS of Income Tax Act and held that, raising of presumption under Section 139 Cr.P.C when the accused disputed the capacity of the complainant to lend such huge amount of Rs.1.5 lakhs and the accused was not able to prove that the amount allegedly advanced was not shown in the income tax returns, the presumption is deemed to have been dispelled. When the complainant failed to produce any books of accounts that he got so much money from the bank, Courts ordinarily take into consideration Section 269-SS of Income Tax Act, where, any advance taken by way of loan of more than Rs.20,000/- had to be made by an account payee cheque only. When such compliance is not shown, the presumption, based on preponderance of probabilities shall not be drawn in favour of the complainant that the cheque was issued towards discharge of legally enforceable debt or liability.

The same view was expressed in **Sanjay Mishra**[6] case and the Bombay High Court was of the view that, merely because the amount advanced is not shown in income tax return, in every case, one cannot jump to the conclusion that the presumption under Section 139 of the Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in cash by way of loan which may be repayable within few days or within few months. A complaint may not show the said amount in the income tax return as it is repayable within few days or few months in the same financial year. In such a case, the failure to show the amount in the income tax return may not by itself amount to rebuttal of presumption under Section 139 of the Act. If, in a given case, the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in income tax return or books of accounts of the complainant may be sufficient to rebut the presumption under Section 139 of the Act. Similar view was expressed by this Court in **Kanakamedala Venkata Krishna Prasad**[3], **K. Ashok Kumar Goud**[4] and **Nagisetty Nagaiah**[7] cases.

Taking advantage of the principles laid down in the above judgments, learned counsel for the petitioner Smt. S.V. Indira would contend that, in the absence of entries in the accounts maintained by the complainant, the presumption is deemed to have been rebutted and the amount allegedly advanced to the petitioner/accused is unaccounted money, thereby, not entitled to recover the amount. Consequently, issue of cheque towards discharge of such debt is not towards legally enforceable debt and thereby, the petitioner is not liable to be convicted for the said offence. But, this contention of the learned counsel for the petitioner cannot be accepted, since Section 269-SS of Income Tax Act obligates the person to take or accept any loan of more than Rs.20,000/- by way of account payee cheque only.

The advancement of loan in cash may entail negative consequences for a party especially an Income Tax assessee as his having acted in breach of Section 269SS of Income Tax Act, 1961. Chapter XXB provides for the requirement as to the mode of acceptance, payment or repayment in certain cases to counteract evasion of tax. Section 269SS mandates that no person, after the cut off date shall take or accept from any other person any loan or deposit otherwise than by an account payee cheque or an account payee bank draft if the amount is more than Rs. 10,000/-. Breach of Section 269SS of the Income Tax Act provides penalty to which a person would be subjected to under Section 271D. However, Section 271D does not provide that such transaction would be null and void. The payer of money in cash, in violation of Section 269SS of the Income Tax Act can always have the money recovered. (vide **Dilip Chawla vs. Ravinder Kumar and Ors.**[14])

The Apex Court in **Assistant Director of Inspection Investigation v. Kum. A.B. Shanthi**[15] had an occasion to deal with the consequences of breach of Section 269-SS r/w Section 271-D of the Income Tax Act and held that the object of introducing Section 269-SS is to ensure that a tax payer is not

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[14] Crl. Rev. P. 607/2016 dated 10.08.2017 (Delhi High Court)
[15] AIR 2002 SC 2188

allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizures, unaccounted money is unearthed and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of Section 269-SS was to curb this menace.

In the light of the observations of the Apex Court in **Assistant Director of Inspection Investigation**[13] case, it cannot but be said that Section 269-SS only provided for the mode of acceptance payment or repayment in certain cases so as to counteract evasion of tax. Section 269-SS does not declare all transactions of loan, by cash in excess of Rs. 20,000/- as invalid, illegal or null and void, as observed by the Apex Court, the main object of introducing the provision was to curb and unearth black money. To construe Section 269-SS as a competent enactment declaring as illegal and unenforceable all transactions of loan, by cash, beyond Rs. 20,000/-, in my opinion, cannot be countenanced. (vide **Dilip Chawla**[12] case). The same view was expressed by the Bombay High Court in **Krishna P. Morajkar vs. Joe Ferrao and Another**[16], wherein, the Court held that Section 269-SS of the Income-tax Act, in fact, does not cast any burden upon a person making advance in cash to record it in his returns and does not prevent any such cash advance from being made. Further, the Apex Court held that the object of enacting Section

[16] 2014(2)BomCR(Cri)738

138 of Negotiable Instruments Act, namely to enhance the acceptability of cheques, Courts have been accepting virtually any argument advanced to nullify the liability created, like ignoring or misreading presumption under Section 139 of the Act, misreading provisions of Sections 269-SS and 271D of the Income-tax Act, unmindful of the consequence that unscrupulous individuals go on signing cheques irresponsibly. When a person signs a cheque and delivers it, even if it is a blank cheque or a post dated cheque, presumptions under Sections 118(b) and 139 of the Negotiable Instruments Act would have to be raised and would have to be rebutted by the aced. albeit by raising a probability. Unless the Courts start discouraging flimsy defences, acceptability of cheques would not increase. The problem of unaccounted money would be reduced if transactions take place by cheques. Even a cash advance when repaid by cheque gets accounted. Making it unrecoverable, would only push the persons to extra judicial methods of recovery. The Courts would thus not only be defeating the object of the provision but also indirectly be party to increase lawlessness. This, in my humble view, cannot be allowed by Courts.

In view of the law laid down by the Apex Court in **Assistant Director of Inspection Investigation**[13], Delhi High Court in **Dilip Chawla**[12] case and Bombay High Court in **Krishna P. Morajkar**[14] case, the view expressed by the Apex Court in **Krishna Janardhan Bhat**[8] case appears to be contrary to the earlier judgment of the Supreme Court. Even if, the amount allegedly advanced was not advanced in compliance of Section 269-SS of Income Tax Act, the person who contravened the provision is liable for punishment under Section 271-D of the Income Tax Act. But, the Income Tax law did not declare such transaction as void and illegal. Curiously, in the present case, the complainant was not an income tax assessee and he owned and possessed agricultural land and receiving income on agriculture. If, really, he is an income tax assessee and the amount advanced by him was not shown in the books of accounts maintained in the regular course of business, or failed to show the same in income tax returns, and the same was established by the accused/drawer by adducing evidence, then the presumption can be said to be dispelled or rebutted. In the present case, the complainant/drawee was not an income tax assessee, thereby, question of making entries in accounts pertaining to amount lent to the accused/drawer and disclosing the same in the income tax returns does not arise. If the complainant is an income tax assessee, there is any amount of justification to conclude that the presumption under Section 139 of the Act is rebutted. Moreover, in view of the law discussed in the earlier paragraphs, including the judgments of Apex Court in **Assistant Director of Inspection Investigation**[13], Delhi High Court in **Dilip Chawla**[12] case and Bombay High Court in **Krishna P. Morajkar**[14] case, I am of the considered view that, failure to file accounts and disclose the amount in income tax returns of the complainant/drawee is inconsequential, for the simple reason that the complainant/drawee was not an income tax assessee and his source of income is from agriculture. Apart from that, failure to comply with Section 269-SS of Income Tax Act is also not a ground to disbelieve the entire transaction. Therefore, I find no substance in the contention raised before this Court by the learned counsel for the petitioner.

Turning to the evidence on record, the complainant proved that the petitioner/accused borrowed amount and issued cheque in lieu of discharge of legally enforceable debt. In view of the presumption under Section 139 and 118 of the Act, at best, the petitioner/accused is entitled to rebut the presumption by adducing or eliciting something in the evidence of the complainant. But here, the complainant by examining himself as P.W.1, and producing documents established that the petitioner/accused borrowed amount and issued cheque and on its presentation, it was dishonoured on the ground of insufficiency of funds to the credit of the petitioner/accused account. The petitioner/accused also did not issue any reply disputing the transaction, but maintained silence for one reason or the other, but produced Ex.D-1 plaint, Ex.D-2 I.A.No.549 of 2013, Ex.D-3-Counter in the said I.A. and Ex.D-4 written statement, filed by him in the suit for recovery of the amount based on the promissory note. These documents are of no use to disbelieve the transaction. Therefore, both the Trial Court and the Appellate Court recorded concurrent fact findings that the complainant established the ingredients of offence punishable under Section 138 of the Act and recorded conviction of the petitioner/accused. Even otherwise, the jurisdiction of this Court is limited and unless this Court finds that the concurrent fact findings recorded by the Trial Court and the Appellate Court are manifestly perverse or apparently erroneous, normally, this Court would not interfere with such concurrent fact findings.

In the present facts of the case, learned counsel for the petitioner miserably failed to show apparent error or manifest perversity in the concurrent fact findings recorded by both the Courts below and the learned counsel for the petitioner though drawn the attention of this Court to certain sentences in the cross-examination of P.W.1, with regard to non-compliance of Section 269-SS of Income Tax Act and failed to produce any accounts containing the entry of advancement of Rs.10 lakhs to the petitioner/accused, in view of my discussion referred supra, the facts whatever elicited in the cross-examination with regard to the income tax laws are insignificant, in view of the law declared by the Apex Court in the judgments referred supra.

Even otherwise, Section 269-SS of Income Tax Act, obligates any person not to receive any deposit or loan in excess of Rs.20,000/- in cash and if any person violates such condition, he is liable for punishment under Section 271-D of Income Tax Act. But, a person who advanced amount in excess of Rs.20,000/- contravening Section 269-SS of Income Tax Act is not liable for punishment under Section 271-D of Income Tax Act and none of these provisions declared that such transactions are void and the amount covered by those transactions is to discharge of legally enforceable debt.

In view of my foregoing discussion, I have no merit in the contention urged before this Court in the criminal revision case, in view of the limited jurisdiction, this Court cannot interfere with the concurrent fact findings, as I find no manifest perversity or apparent error in the concurrent fact findings. Hence, the judgment of the Appellate Court in Crl.A.No.117 of 2012, confirming the conviction passed by the Trial Court in C.C.No.1467 of 2012 are hereby confirmed, dismissing the criminal revision case, as it lacks merits.

In the result, the criminal revision case is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:
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