HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CRIMINAL PETITION NO.6051 OF 2011

ORDER:

In this criminal petition, under Section 482 of the Code of Criminal Procedure, 1973, ['the Code', for short], filed by the petitioner/accused, the request is to quash the calendar case in C.C.No.736 of 2010 on the file of III Additional Chief Metropolitan Magistrate at Vijayawada of Krishna District, taken on file for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. I have heard the submissions of Sri Ch.Dhanamjaya, learned senior counsel appearing for the petitioner/accused and of Sri P.R.Prasad, learned senior counsel, appearing for the 2nd respondent-complainant and also of the learned Public Prosecutor, State of Andhra Pradesh, representing the 1st respondent-State. I have perused the material record.

3. The case of the petitioner/accused (hereinafter, referred to as 'accused' for brevity) and the submissions made on his behalf, in brief, is this:

The 2nd respondent-complainant (hereinafter referred to as 'complainant' for brevity) filed the complaint under Sections 190 and 200 of the Code requesting to punish the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. In the complaint, it is alleged by the complainant that the accused borrowed Rs.3,00,000/- from him, on 12.05.2005, for the purpose of the business of the accused and that the accused executed a promissory note in favour of the complainant agreeing to repay the same with interest @24% per annum either to the complainant or his order on demand and that the accused issued a cheque, dated 26.04.2007, for the said sum drawn on Lakshmi Vilas Bank Limited, Vijayawada, towards part payment of the said liability and that the said cheque when presented for collection was dishonoured, on 24.09.2007, and was returned along with a memo by Dena Bank, Prakasam Road, Vijayawada, with the endorsement 'insufficient funds', and that the same was intimated to the accused and that a notice, dated 15.10.2007, was also issued demanding the father of the accused to pay the amount within fifteen days from the date of the receipt of the said notice and that on receipt of a reply from the father of the accused, the complainant got issued another notice, on 27.10.2007, to the accused and that the accused gave a reply with false and frivolous allegations. Thus, alleging in the complaint as stated above, the accused was falsely implicated in the case though the accused has nothing to do with the alleged transactions stated in the complaint. A plain reading of the complaint shows that initially a notice was got issued to the father of the accused and that on receipt of a reply from him, another notice was got issued by the complainant to the accused based on the same promissory note and the same cheque, which was dishonoured. Further, the complainant also filed O.S.No.763 of 2008 on the file of the IV Additional Senior Civil Judge (FTC), Vijayawada, against the accused for recovery of Rs.5,16,000/-. And, after full fledged trial, the civil Court dismissed the said suit holding that the cheque involved in the complaint case does not belong to the accused i.e., the defendant in the suit. It was also held in the said judgment in the civil suit that there was no occasion or necessity for the accused to issue a cheque and that the accused issuing a cheque does not arise as the bank account belongs to the father of the accused. The findings in the judgment of the civil Court are binding on the criminal Court and in the civil Court's judgment it was categorically held that the cheque for Rs.3,00,000/-, dated 26.04.2007, is not that of the accused. There is no privity of contract or existing liability on the part of the accused to attract the provisions of Section 138 of NI Act. The cheque return memo also indicates that the cheque was returned not only for the reason 'funds insufficient' but also for the reason that the 'drawer's signature defers'. Therefore, the facts of the case coupled with the said endorsement fortify the contentions of the accused that he has nothing to do with the transaction alleged in the complaint and also the alleged issuance of the alleged cheque and that the provisions of Section 138 of NI Act are not attracted to the case on hand. The complaint is vexatious and frivolous. The prosecution of the accused on such complaint is nothing but gross abuse of process of law. Hence, the complaint against the accused may be quashed.

4. No counter is filed by the respondent.

5. Learned senior counsel appearing for the complainant, would submit as follows:

On 12.05.2005, the accused borrowed Rs.3,00,000/- from the complainant for his business development and executed a demand promissory note for the said sum on the even date in favour of the complainant, agreeing to repay the said sum with interest @24% per annum either to the complainant or his order of demand. After repeated demands made by the complainant for repayment of the above said sum, the accused issued the cheque bearing No.772425 for Rs.3,00,000/-, dated 26.04.2007, drawn on Lakshmi Vilas Bank Limited, Vijayawada, towards part payment of the liability. However, when the complainant presented the said cheque for collection, on 24.09.2007, through his banker i.e., Dena Bank, Prakasam Road, Governorpet Branch, Vijayawada, the same was dishonoured and returned with the endorsement of the bank 'funds insufficient' vide memo, dated 24.09.2007. The same was informed to the complainant, on 26.09.2007, by the banker. The cheque was issued by the accused knowing fully well that there are no funds in his account; the accused cheated the complainant with dishonest intention. Hence, he is liable to be prosecuted for the offence punishable under Section 138 NI Act r/w section 420 of Indian Penal Code. On 15.10.2007, the complainant got issued a legal notice through his counsel demanding to pay the amount covered by the dishonoured cheque within fifteen days from the date of receipt of the said legal notice. By mistake the notice was issued to the father of the accused instead of issuing it to the accused. Therefore, on 27.10.2007, an amended notice was also sent to the address of the accused. The accused cannot take advantage of the notice mistakenly given to the father of the accused. Rectifying the mistake, a notice was again issued to the accused. In any view of the matter, the accused is liable for punishment under Section 420 of IPC. Hence, he is not entitled to be discharged or seek to quash the proceedings against him.

6. I have given detailed and thoughtful consideration to the facts and submissions.

7. It is to be first noted that the present accused is one Ch.Amarnath and his father's name is Babu Rao. The explicit case of the complainant in the complaint is that, on 12.05.2005, the accused borrowed Rs.3,00,000/- from the complainant for his business development and executed a demand promissory note in favour of the complainant on the even date for the said sum agreeing to repay the same with interest @ 24% per annum either to the complainant or his order on demand and that on demands made for repayment of the said loan, the accused issued a cheque, dated 26.04.2007, for Rs.3,00,000/- drawn on the Lakshmi Vilas Bank Limited, Vijayawada, towards part payment of the said loan and that on presentation of the said cheque for collection through the banker of the complainant i.e., Dena Bank, Prakasam Road, Governorpet Branch, Vijayawada, the cheque was returned dishonoured with the endorsement 'insufficient funds'. Be that as it may, after such dishonour and return of the cheque with the memo of the banker, admittedly, the complainant issued a notice to the father of the accused and not to the accused. The said notice, dated 15.10.2007, addressed to the father of the accused, on a perusal, discloses that the complainant stated in the said notice that the father of the accused borrowed the money and issued the cheque. It is an admitted fact that the father of the accused gave a reply notice, dated 27.10.2007, stating that he did not borrow any amount from the complainant and never executed the promissory note. In the said reply notice, the father of the accused *inter alia* stated as follows: 'He and his wife jointly borrowed Rs.20,000/- in the year 2004 from one Smt.Kolipakula Durga Mahalakshmi, who is no other than the wife of the complainant, and executed a promissory note and that at that time two blank cheques bearing Nos.788635 and 772425 were issued towards security and that taking advantage of the said cheques in the possession of the wife of the complainant, the subject promissory note for Rs.3,00,000/- was fabricated and that the cheque bearing No.772425 for Rs.3,00,000/- was presented with active connivance of the wife of the complainant only to harass him, that is, the father of the accused.' Thus, in the reply notice, the father of the accused clearly stated that the subject cheque was issued by him in connection with the earlier loan transaction of Rs.20,000/- of the year 2004. Despite the said fact, the complainant again got issued a notice, dated 22.10.2007, to both the accused and his father styling the said notice as 'amended legal notice'. In the said notice, it is stated by the counsel for the complainant that he came to know that by mistake viz., typographical error that took place in the 'to address column', the notice was issued to Babu Rao, the father of the accused, instead of issuing the notice to the accused and, therefore, the inconvenience is regretted. Thus, while tendering apologies for the inconvenience and confusion caused, it is stated in the said notice as follows:

> *'(i) you have borrowed an amount of Rs.3,00,000/- (Rupees Three Lakhs only) from our client on 12.05.2005 for your Business Development and on even date you have executed a demand valid promissory note in favour of our client and you have promised to repay the same along with interest @24% per annum either to our client or to his order on demand.'*

In the further contents of the notice also it is stated 'you have issued the cheque'. Thus, in the amended notice got issued by the complainant to both the accused and his father, the word employed is 'you' and it is not specified as to who among the father and the son borrowed the amount and issued the cheque. Thus, the notice was conveniently kept ambiguous. It is not specifically stated in the notice by the complainant that the accused borrowed the amount and executed the promissory note and issued the cheque, which was dishonoured. Later, the complaint was lodged before the Court of the learned Magistrate stating that the accused borrowed the amount and executed the promissory note and issued the cheque, which was dishonoured and it was sought to be explained that the notice was issued by mistake to the father instead of issuing it to the son, the accused. However, in the notice, as already noted, it is not specifically stated that the accused borrowed the amount and issued the cheque; and, the contents of the notice were conveniently kept ambiguous without clarifying as to who among the father and son executed the promissory note and issued the cheque. Admittedly, the bank account on which the cheque was issued is that of the father of the accused and not that of the accused. The father of the accused in his reply notice, dated 27.10.2007, categorically stated that he issued the subject cheque bearing No.772425 and another cheque 788635 as security in connection with earlier loan transaction of Rs.20,000/- of the year 2004 and that the said cheque was misused by the complainant in connivance with his wife. The bank account, on which the cheque was issued stands in the name of the father of the accused, is undisputed. Admittedly, this cheque bearing No.772425 was presented by the complainant for collection and was dishonoured and returned by the banker along with a memo, dated 26.09.2007. In the memo, the reasons stated for return of the said cheque are as follows:

> "01: Insufficient funds and
>
> 11: Drawers signature incomplete/differs."

Thus, the cheque was returned not only for the reason 'insufficient funds', but also as 'drawer's signature differed'. The complainant alleges in the complaint that after repeated demands for repayment of the loan, the cheque was issued by the accused, though the cheque relates to the bank account of the father of the accused. The accused is not supposed to sign a cheque leaf from the cheque book of his father relating to the account of his father. It is not the case in the complaint that the accused did so only to cheat the complainant and that he had such intention to cheat from the inception. On the other hand, the contents of the complaint specify that the accused gave a cheque on his account and it bounced. In the complaint, the further fact that the cheque was returned also for the reason 'drawer's signature differs' is suppressed.

8. On a plain examination of the entire record, including the notices exchanged between the complainant and the father of the accused and also the second notice given jointly to both the accused & the father of the accused, and on a careful consideration of the fact that the contents of the said notice were conveniently kept ambiguous and that the cheque allegedly signed and given by the accused does not relate to his bank account but relates to the bank account of the father of the accused and that the said cheque was returned also for the reason that the signature of the drawer of the cheque differs, this Court finds that there is acceptable merit in the request of the accused.

9. In the light of the peculiar facts & the broad probabilities of the case, the total effect of the evidence, the documents produced before the Court and the basic infirmities appearing in the case, this Court finds that the ingredients of Section 138 of the N. I. Act are not attracted to the case on hand and that even if the complainant's case is taken on the face value, no case much less a *prima facie* case warranting trial of the accused for the offence under Section 138 of N.I. Act r/w 420 IPC is made out.

10. Accordingly, this Court holds that there is acceptable merit in the contentions of the accused and that this is a fit case to grant the relief to the petitioner/accused as the prosecution of the accused in the absence of a *prima facie* case would amount to abuse of process of law.

11. In the result, the criminal petition is allowed and the calendar case against the petitioner/accused in C.C.No.736 of 2010, on the file of the III Additional Chief Metropolitan Magistrate at Vijayawada, is hereby quashed. The bonds of the petitioner/accused, if any, shall stand cancelled.

Miscellaneous petitions pending, if any, in this case shall stand closed.

M.SEETHARAMA MURTI, J

17.08.2017
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