THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Criminal Petition No.2306 of 2011

ORDER:

This criminal petition, under Section 482 of the Code of Criminal Procedure, 1973, ('the Code', for short), is filed by the petitioner-accused requesting to quash the proceedings against her in C.C.No.146 of 2010 on the file of the Court of the learned Special Judicial Magistrate for Excise Cases, Ongole of Prakasam District.

2. I have heard the submissions of *Sri Dr.K.Satyanarayana Rao,* learned counsel for the petitioner-accused; of *Sri N. Nirmal Kumar,* learned counsel for the 1st respondent-complainant; and, of the learned Public Prosecutor (AP) representing the 2nd respondent-State. I have perused the material record.

3. At the outset, it is to be noted that the complainant filed the afore-stated Calendar Case against the accused under Section 142 of the Negotiable Instruments Act, 1881, read with Sections 190 & 200 of the Code requesting to punish the accused for the offence punishable under Section 138 of the N.I. Act. The accused having entered appearance filed this petition to quash the proceedings in the above Calendar Case against her. The complainant is resisting this petition.

4. The case of the petitioner-accused in support of her request to quash the proceedings in the Calendar Case against her, in brief, is this:

The case filed against her is a false case. It was alleged that this accused issued a cheque bearing no.597728 drawn on State Bank of Hyderabad, Ongole Branch, for Rs.1,30,000/- to the complainant towards discharge of a legally enforceable debt viz., loan of Rs.90,000/- alleged to have been borrowed, on 18.10.2006, by the accused for HER family necessities on the foot of a promissory note executed on the even date agreeing to repay the same with interest at 24% per annum either to the complainant or her order on demand and that the accused failed to repay the debt inspite of repeated oral demands and written demand, dated 23.09.2009. The complainant in-fact filed O.S.No.408 of 2009 against this accused on the file of the Court of the learned Additional Senior Civil Judge, Ongole, for recovery of the alleged promissory note debt and the accused is resisting the said suit. The accused belongs to a reputed family and is a Government servant. There is no need for her to borrow money from any others. The complaint is filed to degrade and defame the petitioner-accused. The complainant has no capacity to lend the alleged amount. The cheque purported to have been issued was created and fabricated. In the complaint it is alleged that the said cheque when presented for collection through SBI, Chimakurthy branch, was honoured and a sum of Rs.1.00 lakh was received by the complainant under the said cheque. However, it was further alleged in the complaint that the Bank did not pay the balance amount subsequently to the complainant on one pretext or the other and hence, the complainant raised a consumer dispute and filed C.D.No.42 of 2010 before the District Consumer Forum, Ongole, against the bank authorities for deficiency of service and that on receipt of summons in the said dispute the bank authorities surprisingly took a 'U' turn and returned the cheque along with a communication, dated 18.05.2010 and along with a memo of SBH, Ongole, stating that the cheque was dishonoured for the reason 'insufficient funds' and asked the complainant to pay back Rs.1.00 lakh, which was paid by the bank to her and that on that the complainant came to know that the cheque was dishonoured and, therefore, the complainant got issued a statutory notice, dated 08.06.2010, to the accused demanding payment of the amount covered by the dishonoured cheque and that the accused received the said notice at her work place, on 14.06.2010, under an acknowledgement, but, the accused failed to give a reply or make the payment. From the complaint averments itself, it is manifest that the ingredients of the penal provisions are not attracted to the case on hand. The Magistrate while taking cognizance is obliged to satisfy himself as to whether the ingredients of the offence alleged are made out or not. Even according to the case of the complainant, the cheque was partly honoured and she received Rs.1.00 lakh; and, she did not return the said amount to the Bank; and, later on the basis of an endorsement given by the bank that the cheque was dishonoured the present complaint was lodged. The statutory notice was not given within the time allowed under law. The cheque return memo was manipulated for the purpose of getting over the issue of limitation. The subsequent dishonour of the cheque, after the cheque was partly honoured and the complainant received part of the cheque amount, does not attract the penal provision under Section 138 of the NI Act. The ingredients of the penal provisions are not satisfied and, therefore, the accused is entitled to be discharged.

5. Per contra, learned counsel for the complainant while reiterating the pleaded case of the complainant would submit as follows:

The cheque was issued towards part satisfaction of a legally enforceable promissory note debt. When the cheque was presented to complainant's banker, viz, SBI, Chimakurti Branch, the cheque was initially honoured and the Bank credited an amount of Rs.1.00 lakh to her account. The complainant has withdrawn the said amount of rupees one lakh. Subsequently, the bank did not pay the balance amount to the complainant on one pretext or the other. Therefore, the complainant raised a Consumer Dispute. After receiving summons in the Consumer Dispute, the bank surprisingly took a 'U' turn and returned, on 19.05.2010, the cheque with the communication, dated 18.05.2010, along with memo of SBH, Ongole, dated 24.04.2010, informing that the cheque was dishonoured due to 'insufficient funds' and asked the complainant to pay back Rs.1 lakh, which was paid to her earlier. Since the complainant filed a consumer dispute she did not return the said amount. In any view of the matter, the cheque was returned with the endorsement 'funds insufficient' through communication, dated 18.05.2010. The same was received by the complainant, on 19.05.2010. On 08.06.2010, that is, within the time allowed under law, a statutory notice was issued. The notice was served at the work place address of the accused, on 14.06.2010. Hence, in the peculiar circumstances and for no fault of the complainant and for the mistake, if any, of the Bank, the complainant cannot be penalised and the accused cannot take undue advantage of the situation and seek quashment of the Calendar Case against her. In view of the complex fact situation of the case, the case has to be tried and the accused is required to face trial.

6. Before proceeding further, it is profitable to refer to the undisputed legal position obtaining. A charge can be framed against an accused in a case where the prosecution/complainant has placed on

record sufficient evidence to show a *prima facie* case against her under a particular penal provision of law. In case the prosecution or complainant fails in its primary duty to show a *prima facie* case to proceed against the accused i.e., when the Court comes to the conclusion that there is no sufficient ground to proceed against the accused, he shall be discharged forthwith. It is a well settled principle of Criminal Jurisprudence that a Court would not require the prosecution/complainant to prove its case beyond any shadow of doubt at the time of framing of the charge or at the pre-trial stage as the prosecution or the complainant is required to do so only at the time of conclusion of its case in order to bring home the guilt of the accused. At the stage of framing of charge or at the time of considering the request made by the accused for quashing the proceedings, the prosecution/complainant is under an obligation to place only that much material against the accused which may be sufficient enough in the circumstances of a given case to draw a presumption that the accused has committed an offence. Further, in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja and others [1990 Cri L.J. 1869], the Supreme Court held as follows: "From the above discussion it seems well settled that at the Section 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case." In Union of India v. Prafulla Kumar Samal and another [1979CriLJ154], the Supreme

Court held as follows: "The Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out. Where the materials placed before the Court disclose grave suspicion against the accused, which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial. The test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. In exercising his jurisdiction under Section 227 the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial." Be it noted that the present CC can be disposed of on merits by adopting summary procedure envisaged under the Code.

7. I have given earnest consideration to the facts and submissions. This Court at the time of examining the request for quashing the proceedings will not conduct a roving enquiry or a mini trial. Whether the promissory note transaction between the parties is true or not will

have to be adjudged after full fledged trial in the proceedings between the parties in the trial Court. According to the case of the complainant, a cheque bearing no.597728, dated 27.10.2009, for Rs.1,30,000/- drawn on SBH, Ongole, was issued by the accused to the complainant towards part satisfaction of the legally enforceable debt. The accused denies borrowal stating that she is a reputed person and a Government servant and there was no need for her to borrow any money. These rival contentions and the issue arising out of the facts asserted and denied require adjudication after full fledged trial. Be that as it may. The cheque in question when presented through SBI, Chimakurthi branch, was initially honoured and an amount of Rs.1,00,000/- was credited and paid to the account of the complainant. As per her statement in the complaint, she also withdrew the said amount from the account. Later, the bank did not pay her, the balance amount covered by the cheque. Therefore, the complainant raised a consumer dispute. On receipt of summons in the consumer dispute, the bank returned the cheque with communication, dated 18.05.2010, along with a memo of the SBH, Ongole, dated 24.04.2010, informing the complainant that the cheque was dishonoured for the reason 'insufficient funds'; the bank further asked the complainant to pay back Rs.1.00 lakh which was already paid to her. Thus, according to the complainant she came to know about the dishonour of the cheque for the first time only when the said communication was received on 19.05.2010. Later, on 08.06.2010, a statutory notice was issued. The complaint was lodged *inter alia* alleging that the said notice was received under acknowledgement, dated 14.06.2010, and that neither a reply was issued nor the amount covered by the cheque was paid and hence, the accused is liable to be punished as per law.

8. In this backdrop it is to be noted that the accused contends that the complaint is barred by time as the memo showing the dishonour of the cheque with the endorsement 'insufficient funds' is dated 24.04.2010 and in that said memo the date originally put as 24.10.2010 was corrected as 24.04.2010. The cheque in question is dated 27.10.2010. However, the date of return, 24.10.2010, which was corrected under the signature of a bank officer as 24.04.2010 does not help the accused to contend that the cheque return memo is manipulated, is the contention of the complainant. Even the manipulation aspect being a question of fact need not be prejudged at this stage. Be that as it may. In the peculiar facts and circumstances of the case, the complainant contends that, on 19.05.2010, he was served with the cheque return memo of the SBI, dated 24.04.2010, along with communication, dated 18.05.2010, of his banker. Therefore, she submits that the notice was issued well within time. In view of the rival contentions, this aspect also being a mixed question of fact and law has to be adjudicated after full fledged trial but not at this stage.

9. Coming to the aspect of non fulfilment of the ingredients of the provision of Section 138 of the NI Act, there is no dispute with the legal propositions in the decisions in M/s.Pearey Lal Rajendra Kumar Pvt.Ltd., v. State of Rajasthan & another[1]; Subodh S. Salaskar v. Jayprakash M. Shah and another[2]; Harman Electronics Private Limited v. National Panasonic India Private

[1] CRIMES IX-1994(3) 308
[2] AIR 2008 SC 3086

Ltd.,[3]; and, Siva Kumar v. Natarajan.[4] From a reading of the decisions, it is manifest that at the time of taking cognizance a Magistrate has to examine as to whether conditions precedent for taking cognizance under Section 138 of the NI Act are satisfied or not. It is also true that a complaint petition alleging commission of the offence under Section 138 of the NI Act must demonstrate that the following ingredients exist: (a) a cheque was issued; (b) the same was presented; (c) but, it was dishonoured; (d) a notice in terms of the said provision was served on the person sought to be made liable; and (e) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice. In the case on hand, the complaint discloses that a cheque was issued, the same was presented and that it was eventually dishonoured and a notice in terms of the said provision was served on the person to be made liable and that the notice was also issued within time from the date of the knowledge of the dishonour of the cheque and that despite service of notice neither payment was made nor a reply was issued. When the complainant raises all the pleas regarding the ingredients of offence under Section 138 of the NI Act, then at the time of taking cognizance a Magistrate is not expected to go into the niceties of the case; and, at the stage of taking cognizance and before the parties enter trial the learned Magistrate is not required to examine the niceties of the case and he has to only examine as to whether the complaint discloses a *prima facie* case. It is trite to observe that this present case presents a queer and rare complex fact situation and the complainant says that the

[3] (2009) 1 SCC 720
[4] (2009) 13 SCC 623

bank is responsible and that she cannot be faulted for various acts of the bank and that the accused also cannot take advantage of the peculiar fact situation for which the complainant is not responsible. In any view of the matter, in view of the strange and complex fact situation of the case, this Court holds that this is not a fit case for quashing the proceedings by exercising jurisdiction under Section 482 of the Code and that it is difficult to hold at a pre trial stage that the penal provisions are not attracted to the case on hand.

10. On the above analysis and for all the reasons assigned supra and the legal position obtaining, this Court finds that the request of the petitioner-accused to quash the criminal proceedings against her does not merit consideration and that the petition is liable for dismissal. However, it is needless to state that this Court did not express any opinion on the merits of the matter and it is open to the accused herein to raise before the trial Court all the contentions and defences, which the facts of the case and law permit.

11. In the result, the Criminal Petition is dismissed.

Miscellaneous petitions pending, if any, shall stand closed.

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M.SEETHARAMA MURTI, J

18.09.2017
Vjl