

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL APPEAL NO.394 OF 2015

ORDER:

The complainant in C.C.No.71 of 2014 on the file of the II Special Magistrate at Hastinapuram, R.R.District, being aggrieved by calendar and judgment dated 31.01.2015 preferred this appeal challenging the acquittal of the respondent/accused, finding him not guilty for the offence punishable under Section 138 of Negotiable Instruments Act (for short "the N.I.Act").

The appellant herein is the complainant and the respondent herein is the accused in C.C.No.71 of 2014 respectively and they will hereinafter be referred as 'complainant' and 'accused' for the sake of convenience.

The complainant R.Chennakesava Rao allegedly lent an amount of Rs.1,00,000/- on 02.05.2011 for the personal necessities and the respondent/accused promised to repay the same with interest at 24 % p.a. Again the accused approached the complainant on 07.09.2011 and requested for advance of Rs.1,00,000/-. Accordingly, the complainant paid an amount of Rs.1,00,000/- on 07.09.2011. Thus, the complainant lent an amount of Rs.2,00,000/- on the promise made by the accused to repay the same at the earliest with interest thereon. Despite several reminders, the accused did not discharge the debt, but issued two cheques i.e. cheque bearing No.478401 dated 05.11.2013 for Rs.1,00,000/- drawn on ICICI, Dilsukhnagar Branch and cheque bearing No.747639 dated 15.11.2013 for Rs.1,00,000/- drawn on HDFC Bank, Saleem Nagar, Malakpet branch towards discharge of debt due to the complainant. The

complainant presented those two cheques with the collecting bank i.e. L.B.Nagar Branch for collection of amount covered by cheques on 13.12.2013, but those two cheques were dishonoured with a return memo dated 14.12.2013 with endorsement "funds insufficient". Thereafter, the complainant got issued a legal notice dated 19.12.2013 to the accused demanding him to pay the amount covered by cheques by registered post with acknowledgement due, but the accused neither discharged the debt nor issued any reply to the notice and the amount covered by the cheques remained unpaid. Hence, he filed complaint under Section 200 of Cr.P.C. for the offence punishable under Section 138 of the N.I.Act.

Upon securing the presence of the accused by issuing summons after compliance of necessary formalities, the accused was examined under Section 251 of Cr.P.C. explaining the accusations made against him, but he pleaded not guilty and claimed to be tried.

During trial, the complainant himself was examined as P.W.1 and marked Exs.P.1 to P.9.

After closure of the complainant's evidence, the accused was examined under Section 313 of Cr.P.C. explaining incriminating material appeared against him, he denied the same and reported no defence.

Upon hearing arguments of both the counsel, the trial Court dismissed the complaint on two grounds, viz.

- (1) The complainant failed to prove compliance of clause (b) of proviso to Section 138 of the N.I.Act.

(2) The complainant failed to establish the issue of two cheques by the accused towards discharge of legally enforceable debt or liability and acquitted the accused for the offence punishable under Section 138 of Negotiable Instruments Act.

Aggrieved by the acquittal of the accused dismissing the complaint, the present appeal is preferred under Section 378 (4) of Cr.P.C. on various grounds.

The main contentions raised before this Court are that the complainant sent legal notice dated 19.12.2013 and receipt of the same was acknowledged under Ex.P.9, but the trial Court on erroneous appreciation of the evidence concluded that the complainant failed to comply with the mandatory requirement of clause (b) of proviso to Section 138 of N.I.Act and the same is contrary to the law declared in “**Satish Jayantilal Shah v. Pankaj Mashruwala**¹”

It is also contended that when the accused did not deny the service of notice in the examination under Section 251 of Cr.P.C. and also in examination under Section 313 of Cr.P.C. mainly questioning the correctness of address, to which the legal notice was sent by registered post with acknowledgement due, the Court ought not to have entertained such objection and on erroneous appreciation of law, the trial Court concluded that the notice was not served strictly adhering to clause (b) of proviso to Section 138 of N.I.Act.

The trial Court also failed to consider the presumption under Sections 118 and 139 of N.I.Act in proper perspective and the

¹ 1996 Cri.L.J. 3099

judgment of the trial Court is contrary to the principle laid down in “**John K. John v. Tom Varghese**²” and “**Sanjay Mishra v. Kanishka Kapoor @ Nikki**³” and prayed to allow the appeal setting aside the calendar and judgment and convict him as per law.

During hearing learned counsel for the complainant contended that service of notice by registered post to the correct address give rise to the presumption under Section 27 of General Clauses Act. Therefore, with the aid of Section 27 of General Clauses Act the Court is bound to accept the due service of notice in compliance of clause (b) of proviso to Section 138 of N.I.Act, but on erroneous appreciation of facts concluded that the notice was not served on the accused and drawn the attention of this Court to “**C.C.Alavi Haji v. Palapetty Muhammed**⁴” and “**Sheela v. Gopalakrishnan**⁵”. But the trial Court contrary to the principles laid down in the above said judgments, acquitted the accused on the ground that the complainant failed to comply with the requirements of clause (b) of proviso to Section 138 of N.I.Act.

Learned counsel for the complainant also contended that when the accused admitted issue of cheque, the Court is bound to draw a presumption that the cheque was issued towards discharge of legally enforceable debt invoking Section 139 of N.I.Act and placed reliance on a judgment of Apex Court rendered in “**ICDS Ltd. v. Beena Shabeer**⁶” and the judgment of Kerala High Court

² 2008 CrL.J.434

³ 2010 (1) ALD (crL.) (NOC) 3 (BOM)

⁴ (2007) 6 SCC 555

⁵ 2005 Law Suit (Ker) 48

⁶ (2002) 6 SCC 426

rendered in “**Bhaskaran Chandrasekharan v. V.Radhakrishnan**”⁷.

Basing on the material available on record and contentions raised before this Court including the judgment of the trial Court, the points that arise for consideration are as follows:

- (1) Whether the cheques were issued towards discharge of legally enforceable debt?
- (2) Whether the complainant (appellant) served notice as required under clause (b) of proviso to Section 138 of N.I.Act and alleged service of notice vide postal acknowledgment marked as Ex.P.9 is appropriate service, if so, whether the accused (respondent) is liable for conviction for the offence punishable under Section 138 of N.I.Act.

Before advertng to the points formulated herein above, I would like to discuss about the powers of this Court to interfere with the acquittal recorded by the trial Court in the appeal.

Code of Criminal Procedure makes no distinction between an appeal against the acquittal and an appeal against the conviction, but the High Court in appeal against acquittal would be justified in reappreciating the evidence in order to determine whether the charge against the accused was established by adducing satisfactory evidence. However, where no two views are reasonably possible in the matter, and view taken by the trial Judge was perverse and unsustainable, the High Court would be well within the limits of its power and would not transgress the self imposed limitations of the powers of the High Court in interfering with an

⁷ 1998 Cri.L.J.3228

order of acquittal as held in “**S.Madhavan Nair v. State of Kerala**”⁸. In “**S.Madhavan Nair v. State of Kerala**” (referred supra) laid down certain guidelines which are as follows:

“The High Court has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as

- (1) the view of the trial judge as to the credibility of the witnesses;
- (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;
- (3) the right of the accused to the benefit of any real and reasonable doubt; and
- (4) the slowness of an appellate court disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses;
- (5) the High Court should also take into account the reasons given by the court below in support of its order of acquittal and must express its reasons in the judgment which lead it to hold that the acquittal is not justified;
- (6) further, if two conclusions can be based upon the evidence on record, the High Court should not disturb the finding of acquittal recorded by the trial court. It would follow as a corollary from that that if the view taken by the trial court in acquitting the accused is not unreasonable, the occasion for the reversal of that view would not arise.”

In view of the law declared by the Apex Court, this Court cannot interfere with the calendar and judgment acquitting the accused unless the conclusions reached by the trial Court are palpably wrong or based on erroneous view of law or its decision is likely to result in grave injustice, normally the High Court should be reluctant to interfere with its conclusions. Therefore, the powers of the High Court in an appeal against the acquittal are limited.

⁸ AIR 1974 SC 1857

Keeping in view of the principles laid down by the Apex Court, I would like to decide the points formulated by me hereunder.

P O I N T No.1:

Undisputedly, the cheques were issued by the accused, but contended that the cheques were not issued towards discharge of legally enforceable debt. Before deciding issuance of cheques towards discharge of legally enforceable debt, I would like to state what are the requirements, the complaint has to fulfil to constitute the offence punishable under Section 138 of N.I.Act, which are as follows:

- (1) *A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person out of that account.*
- (2) *The cheque should have been issued for the discharge in whole or in part of debt or other liability.*
- (3) *That cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
- (4) *That the cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from the account by an agreement made with the bank.*
- (5) *The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.*
- (6) *The drawer of such cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

(7) The debt or other liability referred to under Section 138 of N.I.Act means a “legally enforceable debt or other liability”.

The trial Court rightly pointed out the ingredients to constitute the offence punishable under Section 138 of N.I.Act., however, recorded a finding that the cheques were not issued towards discharge of legally enforceable debt.

Accused allegedly issued one cheque on 05.11.2013 and the other cheque on 15.11.2013, but they were presented on 13.12.2013 for collection, but on 14.12.2013 those two cheques were returned with an endorsement “funds insufficient”. Thereafter, the complainant issued legal notice dated 19.12.2013, but the contention of the accused is that those cheques were not issued towards discharge of legally enforceable debt.

The presumption under Section 139 of the N.I.Act would arise only when the issue of cheques is admitted by the accused and those cheques were issued towards discharge of legally enforceable debt.

It is alleged in the complaint that the complainant paid Rs.1,00,000/- on 02.05.2011 and Rs.1,00,000/- on 07.09.2011 to the accused to meet his personal necessities. But the accused denied the very borrowing of money from the complainant, in such case it is for the accused to explain under what circumstances and for what purpose Exs.P.1 and P.2 cheques were issued. But the cross-examination of P.W.1 shows that the cheques were not issued towards discharge of legally enforceable debt. Even in the examinations under Section 251 and 313 Cr.P.C. the accused denied the subsisting legally enforceable debt between him and

complainant, in such case the presumption under Section 139 of N.I.Act is in favour of drawee, the accused has to rebut such presumption either by adducing independent evidence or by eliciting something in the cross-examination of P.W.1.

In the cross-examination, P.W.1 made certain inconsistent statements with regard to subsisting legally enforceable debt between himself and the accused. His evidence is clear that he lent the amount to two others apart i.e prior to lending amount to the accused, but he does not state whether he obtained any promissory notes from other two persons. P.W.1 categorically made an admission that he is an income tax assessee and he does not remember whether the amount lent to the accused and two other persons is shown in his income tax returns and he has no documentary evidence to show that he advanced Rs.1,00,000/- on 02.05.2011 and again Rs.1,00,000/- to the accused.

P.W.1 further made a categorical admission that he has no proof to show that the accused borrowed an amount of Rs.1,00,000/- on 02.05.2011 and borrowed an amount of Rs.1,00,000/- on 07.09.2011 apart from the cheques under Exs.P.1 and P.2. Further, P.W.1 admitted that the accused did not pay any amount towards interest after borrowing the amounts. P.W.1 also made an unequivocal admission that there is no proof with him with regard to lending of amount to the accused till issue of cheques marked as Exs.P.1 and P.2.

This piece of evidence is highly improbable as the complainant being a money lender advanced amount to two others besides the accused herein, he is expected to disclose whether he lent amount under promissory notes or as hand loan, but simply

he avoided to answer the questions put to him in the cross-examination obviously for different reasons. When the complainant lent Rs.1,00,000/- on 02.05.2011 and Rs.1,00,000/- on 07.09.2011, he would have obtained any piece of paper evidencing the transaction between himself and the accused, but normal procedure is to obtain promissory note or at least chit in proof of transaction, but no such document was produced to establish the transaction between the parties.

In fact, P.W.1 disclosed that he got acquaintance with the accused when he used to visit his relatives house at Vasavi Colony. But the accused was not his friend or relative, but he got acquaintance with the accused. When P.W.1 had no relationship or friendship with the accused, the question of lending money without obtaining any piece of paper from him is highly improbable to the natural circumstances and conduct of human being, more particularly money lender, when such huge amount is advanced.

When the conduct of the accused is highly improbable, the Court is entitled to take note of the conduct of the parties. When the complainant did not approach the Court with clean hands, his conduct is contrary to the conduct of prudent man and failed to explain why no instrument was executed although a huge sum of money was allegedly paid to the accused was a relevant question which could be posed in the matter. It was open to the Court to draw its own conclusion therein. Not only no document had been executed, even no interest has been charged. It would be absurd to form an opinion that despite knowing that the accused even was not in a position to discharge his burden to pay instalments. An advance would be made to him and that too even after institution

of three civil suits the amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of N.I.Act and no exception thereto can be taken vide “**John K. John v. Tom Varghese**” (referred supra).

Here, the principle laid down in the above judgment is aptly applicable for the reason that the complainant is a money lender within Telangana, who has to possess money lending license.

Section 2 (7) of the A.P. (Telangana Area) Money Lenders Act (for short “the Act”) defined “Money Lender” and it is extracted hereunder:

“(7) ‘Money lender’ means a person including a pawn broker, who, within the meaning of this Act, only advances loan in the ordinary course of his business or does so along with other business, and shall also include the legal representative of such person, and the person claiming to be his representative on the ground of succession or assignment or otherwise.”

In view of the said definition, who is lending amount or advances loan to the other on payment of interest would fall within the definition of Section 2 (7) of the Act. The person, who does such business must possess license to carry on such business, but here the complainant did not possess any such license and he himself admitted about lending amount orally without obtaining any document, on payment of interest at 24 % p.a. Therefore, the complainant is a money lender within the meaning of Section 2 (7) of the Act.

When the complainant lent or advanced amount, for payment of interest along with principal amount by the borrower, without possessing any license to carry on such business is totally

in contravention to Section 2 (7) of the Act. When an identical question came up before this Court in “**M/s. Krishnam Raju Finances, Hyderabad v. Abida Sultana**”⁹ this Court held as follows:

“Since the appellant had no money lending business licence, it cannot be said that there was a legally enforceable liability of the respondent in view of Section 9 (2) read with Section 2 (4) of the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli. Once an Act declares that a particular transaction is illegal, it cannot be made legal for the purpose of any other Act. The sheet-anchor of Section 138 of the Act is as to legally enforceable liability against the respondent, which is conspicuously absent in the case on hand. Therefore, there was no legally enforceable liability against the respondent.”

The facts of the above case are identical to the facts of the present case and the law declared in the judgment is binding on the coordinate bench. Therefore, following the same, I hold that the debt due, if any, by the accused to the complainant is not legally recoverable in view of clear admission that the complainant did not possess any license for doing money lending business. Therefore, on this ground also the complaint is liable to be dismissed.

If the amount lent by the complainant, who did not possess license under the Act, it can safely be held that the cheques were not issued towards discharge of legally enforceable debt.

Yet, a crucial aspect in this case is that the complainant is an income tax assessee and money lender, but he did not disclose this amount in his income tax returns and that such admission itself is suffice to conclude that the amount lent, if any, is unaccounted money. **When the cheques were not issued towards discharge of legally enforceable debt, it is for the accused to**

⁹ 2004 (1) ALT (Cri.) 474 (A.P)

rebut the presumption under Section 139 of N.I.Act and when the complainant admitted that the amount was not disclosed in the income tax returns, it would be unaccounted money and thereby it is not legally recoverable. Similar, situation came up before the Bombay High Court in “**Sanjay Mishra v. Kanishka Kapoor @ Nikki**” (referred supra), wherein the Single Judge of Bombay High Court concluded that when there is categorical admission on part of applicant/complainant that amount advanced was ‘unaccounted’ amount, not disclosed in Income Tax returns, it cannot be said that liability to repay unaccounted cash amount is a legally enforceable liability within the meaning of the explanation to Section 138 of N.I.Act, as such the debt is not recoverable. Though, the judgment of Bombay High Court is not binding precedent, but it has got persuasive value. Therefore, persuaded by the judgment of Bombay High Court it can be said that the amount allegedly lent to the accused by the complainant is unaccounted and not shown in the income tax returns for the relevant year, hence, it is sufficient to hold that the accused was able to rebut the presumption under Section 139 of N.I.Act by eliciting true facts in the cross examination of P.W.1. When the amount is not legally recoverable, it is difficult to hold that the cheques were issued towards legally enforceable debt invoking presumption under Section 139 of N.I.Act.

Even in “**Rangappa v. Sri Mohan**”¹⁰ the Apex Court held that a presumption available under Section 139 of N.I.Act is rebuttable presumption and such presumption can be rebutted by raising any defence. There can be no doubt that there is initial

¹⁰ AIR 2010 SC 1898

presumption in favour of the complainant and such presumption can be rebutted in view of reverse onus by adducing independent evidence or by eliciting something in the cross-examination of complainant.

Therefore, in view of the law declared by the Apex Court in “**Rangappa v. Sri Mohan**” and “**John K. John v. Tom Varghese**” (referred supra) the accused in this case could dispel the presumption under Section 139 of N.I.Act. When the accused dispelled such presumption, the burden will shift on to the complainant to prove that the cheques were issued towards discharge of legally enforceable debt. Though the complainant adduced evidence he failed to establish that the amount allegedly lent to the accused is not unaccounted money and that he possessed license to lent the money being the native of Telangana area. Therefore, the trial Court rightly concluded that the complainant failed to establish that Exs.P.1 and P.2 cheques were issued towards discharge of legally enforceable debt and that the finding of the trial Court is not perverse or not against law laid down by this Court or Apex Court, as such this Court while exercising power under Section 378 (4) of Cr.P.C. can accept such findings.

Learned counsel for the appellant drawn the attention of this Court to a judgment rendered in “**Bhaskaran Chandrasekharan v. V.Radhakrishnan**” (referred supra) wherein the Kerala High Court held that the drawer issued blank cheque as security for loan transaction, issuance of cheque admitted and no dispute regarding signature, amount and name shown in cheque, it can be presumed that cheque was supported by consideration and the

presumption cannot be rebutted merely because there were some transactions between drawer and drawee of cheque. But this principle is of no assistance to the appellant/complainant as the accused could dispel the presumption under Section 139 of N.I.Act by eliciting true facts in the cross-examination.

Learned counsel for the appellant drawn the attention of this Court to a judgment rendered in **“ICDS Ltd. v. Beena Shabeer”** (referred supra) wherein the Apex Court held that the words “any cheque” and “other liability” occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt that for whatever reason it may be, the liability under Section 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature. The High Court got carried away by the issue of guarantee and guarantor’s liability and thus has overlooked the true intent and purport of Section 138 of the Act. But the law declared in the above judgment is not relevant for the purpose of deciding the present controversy.

On an overall consideration of the material available on record including the law declared by various Courts and the Apex Court, it is clear that when the accused could rebut the presumption under Section 138 of the N.I.Act the burden will shift on to the complainant and he has to prove that the cheques were issued towards discharge of legally enforceable debt or liability, but in the present case, the complainant failed to establish that the cheques Exs.P.1 and P.2 were issued towards discharge of legally

enforceable debt. Moreover, the amount lent by the complainant to the accused is unaccounted money. Therefore, such debt is not recoverable, consequently the accused is not liable for the offence punishable under Section 138 of the N.I.Act, as such I find no perversity or illegality in the calendar and judgment of Trial Court, finding the accused not guilty for the offence punishable under Section 138 of the N.I.Act while dismissing the complaint and the same does not suffer from any legal infirmity and this Court can not interfere with the findings recorded by the trial Court by exercising power under Section 378 (4) of Cr.P.C. in view of the limited scope as discussed in earlier paragraphs.

P O I N T No.2:

In view of my finding on point No.1, no finding need be recorded about compliance of clause (b) of proviso to section 138 of N.I.Act, as such, no finding is recorded.

In view of my finding on point No.1, I find no infirmity or irregularity in the judgment of the trial Court warranting interference by exercising power under Section 378 (4) of Cr.P.C. Consequently, the appeal is liable to be dismissed.

In the result, the appeal is dismissed.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Dated 01.06.2017
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