**THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

**CRIMINAL PETITION No.17383 OF 2016**

**ORDER:**

This criminal petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), is filed to quash the proceedings against the petitioner in C.C. No.65 of 2016 pending on the file of XI Metropolitan Magistrate, Cyberabad, at L.B. Nagar, for the offence punishable under Section 138 of Negotiable Instrument Act, 1882 (for short, 'the Act'), on various grounds.

The second respondent filed a complaint for the offence punishable under Section 138 of the Act alleging that the petitioner approached him in the first week of December, 2014, borrowed an amount of Rs.3,60,000/- to meet his urgent business needs and promised to repay within three months either on demand or to his order, as and when demanded. Later the petitioner failed to discharge the debt due to him. A long persuasion and demands made by him to discharge the debt due, the petitioner issued cheque bearing No.140870 dated 29.06.2015 drawn on ING Vysya Bank Limited, Vanastalipuram Branch, for Rs.3,60,000/- towards discharge of hand loan dated 20.12.2014, on its presentation with collected bank i.e. Corporation Bank, Dilsukhnagar Branch, on 29.06.2015 the cheque was dishonoured on the ground 'funds insufficient' on 30.06.2015 and issued notice demanding to pay the cheque amount within 15 days as required under the proviso (b) to Section 138 of the Act. The petitioner failed to discharge the debt due. Hence, filed the complaint.

The petitioner filed the present petition on the ground that he was only Surety for the chit subscribed by one Hari Gopal and that at the instance of Hari Gopal, he issued cheque as security for the debt due. Therefore, there is no legally enforceable debt and issue of a cheque for not legally enforceable debt, thereby the complaint is not maintainable. It is also further contended that the petitioner further alleged that a complaint against Hari Gopal was registered in Cr.No.302 of 2015 dated 10.03.2015 at L.B. Nagar police station, as the petitioner is a victim in the hands of the second respondent at the instance of the said Hari Gopal. Therefore, the complaint is not maintainable. The said Hari Gopal and the *de facto* complainant cheated him and thereby requested to quash the proceedings in C.C. No.65 of 2016

During hearing, learned counsel for the petitioner contended that the cheque was issued as a security for the debt due for the chit installment on behalf of the said Hari Gopal, who became a prized subscriber in the unregistered chit and therefore, there is no subsisting legally enforceable debt, consequently the complaint is not maintainable and liable to be quashed.

As seen from the allegations made in the complaint, the petitioner borrowed an amount of Rs.3,60,000/- from the second petitioner and executed promissory note dated 20.12.2014 for the said amount incorporating usual conditions to constitute promissory note as defined under Section 4 of the Act and later issued a cheque which was dishonoured, on its presentation, by the Payee Bank and returned with a Memo dated 29.06.2015 on the ground 'funds sufficient', but the petitioner's contention is that the cheque was issued as a security. Even in the reply notice dated 01.08.2015, at paragraph 3, the petitioner contended as follows:

> "…. Mr.Hari Gopal has obtained chit amount for a sum of Rs.3,60,000/- and Mr.Hari Gopal requested my client to give surety for the chit amount obtained from you and upon the request of Mr.Hari Gopal my client stood as surety holder for the sum obtained by Mr.Hari Gopal and as per you demand my client has handed over a undated cheque bearing No.140870 Drawn on ING VYSA LTD. Vanastalipuram Branch for a sum of Rs.3,60,000/- and also signed the promissory note as surety holder…"

These allegations, at best, shows that the petitioner handed over undated cheque and promissory note duly signed by the petitioner. Whether the petitioner borrowed the amount covered by promissory note and issued cheque towards discharge of the debt are disputed questions of fact. Even assuming for a moment that undated cheque and promissory note falls within the definition of inchoate instrument as defined under Section 20 of the Act, by necessary implication the second respondent is authorized to fill or complete instrument being holder of cheque in view of Division Bench judgment of this Court in **DUGGINENI SESHAGIRI RAO VS. KOTHAPALLI VENKATESWARA RAO[1].**

Even otherwise, when the cheque was issued to the holder, there is a presumption under Section 139 of the Act that the cheque was issued in lieu of discharge of legally enforceable debt and such presumption can be dispelled by adducing evidence, since it s a rebuttable presumption. Therefore, it is a question of fact, whether

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[1] 2001(6) ALT 95 (DB)

the cheque was issued towards discharge of legally enforceable debt or not. A similar question came up before the Apex Court in **SAMAPALLY SATYANARAYANA RAO v. INDIAN RENEWABLE ENRGY DEVELOPMENT AGENCY LIMITED**[2] wherein it was observed that when a cheque is issued as security for payment of loan due, it can be said to be issued in lieu of discharge of legally enforceable debt and the court has to look into the allegations made in the complaint not the defence, if it would constitute the offence punishable under Section 138 of Negotiable Instrument Act, 1881, the court cannot quash the proceedings and disputed questions of fact cannot be decided while exercising jurisdiction under Section 482 Cr.P.C.

Thus, the law declared by the Apex Court is clear when there is a disputed question of fact in a complaint under section 138 of the Act, the court cannot quash the proceedings on the basis of disputed questions of fact and in view of presumption that cheque is deemed to have been issued towards legally enforceable debt. Therefore, following the principle laid down by the Apex Court in the cases referred above, it is difficult for me to quash the proceedings on the grounds urged before this court during argument and similarly, lodging the complaint is of no consequence against Hari Gopal and the second respondent in filing the present complaint. Hence, I find no ground to quash the proceedings and the petition is liable to be dismissed.

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[2] AIR 2016 SC 4363

Accordingly, the criminal petition is dismissed at the stage of admission.

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

**M. SATYANARAYANA MURTHY, J**

Date: 03.01.2017
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