

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.R.C.No.2245 of 2017

JUDGMENT

This revision under Sections 397 and 401 of Cr.P.C. is filed questioning the propriety, legality and regularity of the order passed by the Judge, Family Court-cum-VI Additional Sessions Judge at Khammam in Crl.A.No.192 of 2015 dated 27.07.2017, confirming the conviction and substantive sentence of imprisonment imposed against the petitioner/accused for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'the Act'), while reducing compensation from Rs.2,50,000/- to Rs.1,50,000/- in C.C.No.749 of 2013 on the file of Special Judicial Magistrate of First Class, Prohibition and Excise Court, Khammam, dated 30.11.2015.

2. The first respondent/complainant filed a complaint before the Special Judicial Magistrate of First Class at Khammam under Section 200 Cr.P.C., for the offence punishable under Section 138 of the Act, alleging that the petitioner/accused borrowed an amount of Rs.1,50,000/- on 02.05.2011 from him for his family necessities and executed a promissory note on even date, agreeing to repay the same with interest at 24% per annum as and when demanded. Despite several demands, the petitioner did not discharge the debt. However, at last, the petitioner issued a cheque bearing No.035558 dated 03.12.2012 drawn on IDBI Bank, MVR Complex, Khammam, towards part payment of the debt due to the first respondent and when the said cheque was presented for collection with the State Bank of Hyderabad, Church Road Branch, Khammam, it was returned unpaid with an endorsement as 'insufficient funds' to the

credit of the account of petitioner vide cheque return memo dated 13.12.2012. Immediately, the complainant got issued a legal notice on 04.01.2013 by registered post calling upon the petitioner to pay the amount covered by the cheque within 15 days from the date of receipt of the notice, but the legal notice was returned with an endorsement that 'addressee left' and that the accused had neither paid the amount nor issued any reply. Hence, the first respondent filed complaint against the petitioner for the offence punishable under Section 138 of the Act.

3. During trial, the complainant was examined himself as P.W.1 and got marked Exs.P1 to P6 on his behalf. After closure of prosecution evidence, the petitioner/accused was examined under Section 313 of Cr.P.C. explaining the incriminating evidence that appeared against him in the testimony of P.W.1, he denied the same and reported no evidence.

4. Upon hearing argument of both the counsel, the trial Court found the petitioner/accused guilty for the offence punishable under Section 138 of the Act, sentenced him to undergo simple imprisonment for six months and to pay the cheque amount of Rs.2,50,000/-towards compensation as provided under Section 357(3) Cr.P.C., to the complainant.

5. Aggrieved by the same, the petitioner preferred an appeal before the Judge, Family Court-cum-VI Additional Sessions Judge, Khammam. Upon hearing the arguments of both the counsel, the District Judge reduced the compensation from Rs.2,50,000/- to

Rs.1,50,000/- while maintaining the finding recorded by the trial Court and substantive sentence of simple imprisonment for six months.

6. In the appeal, one of the grounds urged before the appellate Court was that the petitioner is entitled to adduce evidence to substantiate his contention and that the petitioner also filed an insolvency petition before the competent Court and pendency of the said petition was not considered by the appellate Court and that the trial Court though observed that the petitioner did not choose to afford any opportunity to adduce additional evidence, the appellate Court failed to consider the same. The present revision is filed challenging the order on various grounds.

7. During hearing, learned counsel for petitioner Sri C. Vikram Chandra, has drawn the attention of this Court to paragraph No.5 of the appellate Court judgment regarding the ground raised before it to adduce evidence by petitioner and filing of insolvency petition and at the same time, the Court also considered the said ground in the judgment, but no opportunity was afforded to petitioner to adduce evidence and dismissed the appeal erroneously.

8. In view of the grounds raised by petitioner before this Court, this Court has to examine the legality of such findings with reference to the law.

9. As seen from the contention raised before this Court that an opportunity ought to have been given to the petitioner by the

appellate Court when he raised a ground that he is entitled to adduce evidence, but the appellate Court did not consider the said ground in proper perspective. No doubt, a ground is urged in the grounds of appeal before the appellate Court, but it is for the petitioner to report that he has got evidence to be adduced before the trial Court after completion of his examination under Section 313 Cr.P.C., but having reported no evidence after completion of his examination under Section 313 Cr.P.C., he cannot now assail such finding recorded by the Court in the appeal for the first time. Even if he is entitled to adduce any evidence, it is open to him to file appropriate application seeking leave of the Court to adduce evidence, but the petitioner simply raised a ground before the Court without filing any such application. In the absence of any application to adduce evidence before the appellate Court, the findings of the appellate Court cannot be faulted and on that ground, the judgment of the appellate Court confirming the conviction and substantive sentence of imprisonment imposed by the trial Court cannot be reversed.

10. As seen from the material on record, the petitioner leisurely prosecuted the proceedings at his convenience and he did not report before the Court that he has got evidence to be adduced after completion of his examination under Section 313 Cr.P.C. and not even made any attempt to adduce any evidence either before the trial Court or appellate Court, except, raising a ground before the appellate Court. In the absence of any application seeking leave of the Court to adduce evidence before the appellate Court, the finding

recorded by the appellate Court cannot be faulted and on such ground, it is difficult to hold that the order of the trial Court is irregular or illegal. On the other hand, the conduct of the petitioner is blameworthy as he did not prosecute the proceedings properly and more particularly, by filing an application for adducing any evidence before the appellate Court, at least. The petitioner was not diligent in prosecuting the proceedings and this Court cannot afford an opportunity to adduce evidence before the appellate Court.

11. The second ground raised before the appellate Court was that the petitioner filed an insolvency petition. Pendency of insolvency petition is of no consequence unless an interim protection under Section 13 of Provincial Insolvency Act, 1920 is granted. Therefore, in the absence of any details whether the petitioner obtained any interim protection under Section 13 of the said Act, the ground raised before the appellate Court does not stand to any legal scrutiny and therefore, it is rejected as it lacks merit.

12. The other ground urged before the trial Court and the appellate Court is that the notice, which was marked as Ex.P5, was not served on the petitioner and in the absence of service of notice, the prosecution is vitiated. No doubt, the notice was returned unserved with an endorsement as 'addressee left', but the petitioner did not deny the correctness of the address mentioned on the registered cover and in such case, the Court shall draw a presumption of service of notice in terms of Section 27 of General Clauses Act, 1897. In a decision reported in **I(2007) BC page 96 (Deelip Apte -Vs- Nilesh P.Salgaonkar)**, Justice N.A.Britto, while

deciding the matter U/Sec.138 of N.I.Act, held in para 5 of the judgment as follows:

“When notice was sent to the correct address of accused by registered post, the same is deemed to have been served on accused in terms of Section 27, General Clauses Act.”

In **K.Bhaskaran Vs Sankaran Vaighyan Balan and another**¹, the Apex Court decided similar questions and held that a presumption can be drawn U/Sec.27 of General Clauses Act. In another decision reported in **Indo Automobiles –Vs- Jai Durga Enterprises and others**², the Division Bench of Apex Court held as follows:

“It is well settled that once notice sent by registered post with acknowledgment due to the correct address, it must be presumed that the service has been made effectively.”

From the principle laid down in the above two decisions, it is clear that when the notice was sent by registered post to the correct address, it is a deemed service drawing presumption U/Sec.27 of General Clauses Act. Unless the presumption rebutted, the petitioner did not adduce any evidence to rebut the presumption contained under Section 27 of General Clauses Act, 1897. Therefore, based on the statutory presumption under Section 27 of the General Clauses Act, 1897, it is no more a ground to interfere with the fact findings.

13. Since the trial Court and the appellate Court recorded concurrent findings, this Court cannot interfere normally with the

¹ 1999(7) SCC page 510,

² 2008(8) SCC 529

concurrent findings of fact unless the Court finds that there is any error apparent on the face of the record, but here no such error is brought to the notice of this Court by the learned counsel for petitioner.

14. The Apex Court in **S.P.S.Jayam and company Vs. Nehrusadan and another**³ made it clear that as a general rule, the High Court will not interfere with the findings of fact, unless, they are perverse, but in special and exceptional circumstances, the High Court is entitled to go into the question of fact and do justice. Though the power should be exercised in revision petition, unless the finding is manifestly perverse or patently erroneous, such power would be exercised most sparingly and only when there appears to have miscarriage of justice or perversity or unreasonable as held by Gauhati High Court in **Attaur Rahman V. The State of Assam**⁴.

15. Keeping in view the law declared by the various Courts supra, I find no manifest perversity or apparent error warranting interference by this Court with the concurrent findings recorded by both the Courts below while exercising power under Sections 397 and 401 of Cr.P.C.

16. On the other hand, the appellate Court reduced the compensation from Rs.2,50,000/- to Rs.1,50,000/-, but it was not challenged by the first respondent by filing any revision. Therefore, I cannot disturb the findings recorded by the appellate Court based

³ AIR 1977 SC 1621

⁴ 1974 CrL.J.191

on fact findings recorded by the trial Court. Hence, I find no merits in the revision.

17. In the result, the Criminal Revision Case is dismissed confirming the judgment of the appellate Court in Crl.A.No.192 of 2015 confirming the conviction and the substantive sentence of imprisonment recorded by the trial Court in C.C.No.749 of 2013, except to the extent of reducing the compensation from Rs.2,50,000/- to Rs.1,50,000/-. Miscellaneous petitions, if any, pending in this revision shall stand dismissed.

7th August, 2017

sj

M. SATYANARAYANA MURTHY, J

