

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.73 OF 2017

ORDER:

This Criminal Petition is filed under Section 482 of Cr.P.C. to quash the proceedings in C.C.No.14 of 2015 on the file of I Additional Junior Civil Judge, Nellore, for the alleged offences punishable under Sections 138 and 142 of the Negotiable Instruments Act. (Herein after referred to as "the Act").

Petitioner herein is the accused and 2nd respondent herein is the defacto complainant.

Second respondent filed a private complaint against the petitioner for the offences punishable under Section 138 of the Act alleging that in the month of August, 2012, the petitioner borrowed a sum of Rs.40,00,000/- from the 2nd respondent for his business necessity and executed a demand promissory note in favour of petitioner undertaking to repay the same with interest at Rs.2/- per hundred per month, either to the 2nd respondent or to his order on demand. On 20-9-2013, the petitioner issued a cheque bearing No.380207 drawn on State Bank of Hyderabad, V.M.C.Branch, Nellore dated 20-9-2013 for Rs.50,12,000/- in favour of 2nd respondent in lieu of discharge of the debt due under the said promissory note. On the same day, the second respondent returned the promissory note and presented a cheque for collection through collecting bank to the payee bank i.e. State Bank, Nellore on 21-10—2013, But the cheque was returned with endorsement

“funds insufficient”, thereupon, a notice dated 24-10-2013 as required under Section 138 proviso ‘B’ of the Act was issued calling upon the petitioner to pay the amount covered by the cheque but the petitioner evaded to receive notice and failed to pay the amount covered under the cheque. Hence, the complaint was filed.

Present petition is filed challenging the proceedings in C.C.No.14 of 2015 pending on the file of I Additional Judicial Magistrate of I Class, Nellore on the following grounds.

- a) Cheque was not issued in favour of the petitioner in lieu of the discharge of legally enforceable debt.
- b) The purpose of borrowing the amount was not mentioned anywhere in the complaint.
- c) The return of promissory note on receipt of notice and cheque is not believable.
- d) There is no existing legally enforceable debt, the proceedings against them for the offence under Sections 138 and 142 of the Act cannot be continued.

Learned counsel for the petitioner reiterated the above grounds during argument and contended that failure to mention, the purpose for which the petitioner borrowed the amount and return of promissory note after receiving cheque is not believable and in the absence of compliance of Section 138 proviso B, the proceedings cannot be continued against the petitioner and prayed to quash the proceedings.

The first and foremost contention raised by the petitioner is that the cheque was not issued in discharge of legally enforceable debt. The petitioner did not deny dishonour of cheque. When the cheque was issued, the presumption under Section 139 of the Act is that the court shall presume that the cheque was issued in favour of the holder of the cheque in lieu of discharge of legally enforceable debt.

In view of the proviso under Section 139 of the Act, the petitioner is entitled to rebut the presumption by eliciting certain facts in the cross-examination of the witnesses or by examination of independent witness, till such presumption is rebutted. A similar question came before Apex court in *SAMPELLY SATYANARAYANA RAO VS. INDIAN RENEWABLE ENERGY DEVELOPMENT AGENCY LIMITED* (¹) and the apex court considered presumption under Section 139 of the Act and concluded that it is a question of fact and based on such contention, the proceedings cannot be quashed in view of limited power of the court under Section 482 Cr.P.C.

The second ground urged before this court is that the purpose of borrowing was not mentioned anywhere in the complaint. This contention is without any basis and in fact, in the first line of page No.2 of the complaint, it is specifically mentioned that for the business necessities, the petitioner borrowed the amount and executed promissory note, even otherwise, it is not mandatory

¹ AIR 2016 SC 4363

for the offence under Section 138 of the Act and therefore, on this ground, the proceedings in C.C.No.14 of 2015 cannot be quashed.

The third ground is the return of promissory note on receipt of notice and cheque is not believable. It is a matter of adducing evidence and it is a disputed question of fact which cannot be gone into while deciding the application under Section 482 of Cr.P.C. in view of the guidelines referred in the decision referred supra.

Last ground is mandatory notice under Section 138 proviso (b) of the Act was not served on the petitioner.

It is not the case of the petitioner that the notice was not issued to the correct address by registered post, in such a case, a presumption under Section 27 of the General Clauses Act, would come into play and notice is deemed to have served. Moreover, it is rebuttable presumption and such presumption can be dispelled by adducing evidence independently or by eliciting anything in the cross-examination of the witnesses examined. In fact, no contention was raised that he was not residing at the address given on the notice. Therefore, for the limited purpose of deciding the present issue, presumption is in favour of the second respondent under Section 27 of the General Clauses Act till it is rebutted and it is deemed to have been served. Secondly, it is not a ground to quash the proceedings.

In view of the foregoing discussion, I find no ground to quash the proceedings and none of the grounds raised by the petitioner are sufficient to exercise the powers under Section 482

Cr.P.C. to quash the proceedings and consequently, this Criminal Petition is liable to be dismissed.

In the result, this Criminal Petition is dismissed at the stage of admission.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Dated 4-1-2017.

Dvs.



HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Dvs