THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.227 OF 2017

ORDER:

This criminal revision case is filed under Sections 397 & 401 of Cr.P.C questioning the propriety, legality and regularity of the sentence imposed in Crl.A.No.161 of 2015 dated 29.12.2016, confirming the conviction and sentence passed by the Trial Court in C.C.No.562 of 2013 dated 16.09.2015, finding the accused guilty for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'N.I. Act'), imposing rigorous imprisonment for a period of one year and fine of Rs.12,00,000/- with default sentence.

The respondent filed a private complaint under Section 200 Cr.P.C against the petitioner for the offence punishable under Section 138 of N.I. Act alleging that the petitioner borrowed an amount of Rs.10,00,00/- for his family necessities from the respondent. On receipt of the said amount, the petitioner executed a promissory note Ex.P-1 on 24.05.2012 agreeing to repay the same with interest at the rate of 24% per annum, either to the respondent or to his order as and when demanded. On repeated demands made by the complainant, accused had issued a cheque bearing No.026323 dated 28.03.2013 for Rs.12,00,000/- drawn on I.C.I.C.I Bank, Khammam towards discharge of the debt due under the promissory note Ex.P-1. On presentation of the cheque for encashment with the collecting bank i.e. Karnataka Bank limited, the cheque was returned on 28.03.2013 along with cheque return memo Ex.P-3 informing dishonour of cheque on the ground of 'insufficient funds'. Thereafter the respondent issued statutory notice dated 08.04.2013 Ex.P-4 to the petitioner through registered post with acknowledgment due. Ex.P-5 is the postal receipt and the notice was served on the accused on 15.04.2013 and Ex.P-6 is the acknowledgment. Inspite of receipt of such notice, the accused did not pay the amount covered under cheque. Therefore, filed private complaint under Section 138 of N.I. Act against the accused.

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, P.Ws.1 to 3 were examined on behalf of the complainant and marked Exs.P-1 to P-6.

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 argument of both the counsel, the I Additional Judicial Magistrate of First Class at Khammam vide order dated 16.09.2015 in C.C.No.562 of 2013 found the accused guilty for the offence under Section 138 of N.I.Act and convicted the accused under Section 255(2) Cr.P.C and sentenced to undergo rigorous imprisonment for a period of one year and to pay Rs.12,00,000/- to the complainant towards compensation.

Aggrieved by then order dated 16.09.2015, the petitioner preferred an appeal in Crl.A.No.161 of 2015 before the Principal

Sessions Judge at Khammam, wherein, the Sessions Court vide judgment dated 29.12.2016 dismissed the appeal, confirming the conviction and sentence imposed in C.C.No.562 of 2013. Therefore, the present criminal revision case is filed against the judgment of the Appellate Court in Crl.A.No.161 of 2015 on the ground that the Appellate Court erred in confirming the judgment of the Trail Court and the sentence imposed therein, as the respondent failed to prove that he had no capacity to lend such huge amount to the petitioner and the complainant had not filed any documentary proof to show that the amount was drawn from his account. The other ground raised is that, any transaction exceeding Rs.20,000/- should be made only by way of cheque. When the complainant had knowledge about the fact, lending such huge amount of Rs.10,00,000/- is improper and issuing cheque for discharge of debt covered by the promissory note is not acceptable. That apart, the presumption would not come to the aid to record conviction against the petitioner for the offence punishable under Section 138 of N.I. Act and prayed to set-aside the conviction and sentence imposed by the Trial Court and confirmed by the Appellate Court.

During hearing, learned counsel for the petitioner initially agreed to pay the amount covered by the cheque in instalments, when this Court directed the petitioner to file an affidavit to that effect, today, the learned counsel for the petitioner on record expressed his inability to file an affidavit on the ground that the party is not willing to file an affidavit, agreeing to pay the cheque amount in instalments.

Learned counsel for the petitioner mainly contended that the observations made by the Appellate Court in its judgment is contrary to law, regarding imposing of fine of Rs.12,00,000/- by way of cheque and in the absence of any proof that the respondent possessed huge amount of Rs.12,00,000/- by Ex.P-1, based on presumption, the Trial Court and the Appellate Court cannot find the petitioner guilty for the offence punishable under Section 138 of N.I. Act and committed an error and prayed to set-aside the concurrent findings recorded by both the Trial Court and the Appellate Court and acquit the petitioner.

Learned counsel for the respondent totally supported the concurrent fact findings recorded by the Trial Court and confirmed by the Appellate Court and supported the conviction and sentence passed in C.C.No.562 of 2013 and contended that this Court cannot interfere with the said fact findings, unless the Court finds that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material.

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though section 401 of Cr.P.C. confers a kind of paternal and supervisory jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity or procedure, neglect or proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of I.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. Therefore, keeping in mind the scope of revision, I would like to decide the present issue before this Court. This Court normally cannot interfere with concurrent fact findings recorded by the Courts below, only in exceptional circumstances when findings are manifestly perverse or apparently erroneous.

Keeping the powers of this Court under Section 397 and 401 of Cr.P.C, I would like to advert to the disputed questions before this Court.

The first and foremost question raised by the learned counsel for the petitioner is that, when any transaction exceeds Rs.20,000/-, such payment shall be made by way of cheque, the Appellate Court also made a vague observation, but this was not raised before the Trial Court. However, that is only for the purpose of assessing income tax, but not for any other transaction. Consequently, payment of amount in cash, as consideration under Ex.P-1 cannot be doubted.

The other contention in this revision is that, the respondent failed to prove his capacity to lend such huge amount covered by Ex.P-1 promissory note. The petitioner admitted execution of Ex.P-1 and issue of cheque marked as Ex.P-2 duly signed by him.

When the accused admitted execution of pronote/ negotiable instrument or execution is proved, the Court may draw presumption that it is supported by consideration. In **Mallavarapu Kasivisweswara Rao vs Thadikonda Ramulu Firm & Ors**[1] the Apex Court held that under Section 118(a) of the Negotiable Instruments Act, the Court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. In paragraph 12 of the judgment in **Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Payrelal**[2], the Apex Court observed as under: -

> "Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either

[1] 2008 (7) SCC 655
[2] (1993) 3 SCC 35

> direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence.
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> Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist......"

In view of law declared by the Apex Court, a presumption under Section 118 of N.I. Act is rebuttable and the initial onus of proof is on the accused to establish by direct evidence or by eliciting something based on the preponderance of probability. But, here, in this case, before the Trial Court, the petitioner failed to rebut the presumption under Section 118 of N.I. Act. In such case, the Court is bound to draw a statutory presumption under Section 118 of N.I. Act that the promissory note is supported by consideration. When such presumption is drawn and the evidence of P.W.1 is clear that Ex.P-1 promissory note supported by consideration, the Court has no other option, except to believe that the promissory note Ex.P-1 was supported by consideration. In such circumstances, the respondent is not required to produce evidence to establish that he has got capacity to lend such huge amount and he is possession of the amount as on the date of executing promissory note Ex.P-1. Therefore, taking into consideration the facts and circumstances of the case, including the tenor of the cross-examination of P.W-1 by the learned counsel for the petitioner before the Trial Court, the alleged failure of the Appellate Court and the Trial Court to insist the respondent to prove his capacity to lend amount is insignificant. P.W. 2 is the attestor and P.W.3 is the scribe of Ex.P-1 promissory note. All the three witnesses viz., P.W.1 promisor, P.W.2 attestor and P.W.3 scribe have categorically stated about passing of consideration. But, the petitioner herein failed to rebut the presumption by adducing any independent evidence or eliciting anything in the cross-examination. Therefore, the Trial Court and the Appellate Court rightly concluded that Ex.P-1 is supported by consideration.

Issuance of original cheque Ex.P-2 is not in dispute. Even after receiving the legal Ex.P-6, no reply was given to the legal notice. If, really, the petitioner did not receive any consideration under Ex.P-1 towards discharge of the legally enforceable debt, he would have issued appropriate reply to the notice after acknowledging the receipt of notice under Ex.P-6. But, without any explanation for his failure to give reply, the petitioner contended that the cheque was not issued in lieu of discharge of legally enforceable debt due to the respondent.

In **K. Bhaskaran v. Sankaran Vaidhyan Balan**[3], the Apex Court held that when once the signature is admitted to be that of the accused, the presumption envisaged under Section 139 of N.I. Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. It was further held that Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharges of any

[3] AIR 1999 SC 3762

debt or liability and the burden was on the accused to rebut the aforesaid presumption.

Even in "***Rangappa v. Sri Mohan***[4]" 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 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.

In view of Section 139 of N.I. Act, the Court is bound to draw a presumption that cheque was issued in lieu of discharge of legally enforceable debt or liability. When once, the petitioner admitted about the cheque, it is for him to prove that it was not issued in lieu of discharge of legally enforceable debt or liability due to the respondent. But, for the reasons best known to the petitioner, the petitioner did not adduce any evidence either by examining himself as a witness before the Trial Court or by examining any witness on his behalf. On the other hand, in the evidence of P.Ws.2 & 3, nothing was elicited to disprove that cheque was issued lieu of discharge of legally enforceable debt or liability due to the respondent. On the other hand, in the cross-examination of P.W.1, it is elicited that the petitioner did not file any suit for recovery of money based on the promissory note Ex.P-1. But, that itself is not a ground to rebut the presumption. Therefore, the Trial Court and the Appellate Court recorded concurrent findings of fact that the petitioner borrowed

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[4] AIR 2010 SC 1898

Rs.10,00,000/- from the respondent under Ex.P-1 promissory note and the petitioner issued cheque Ex.P-2 which was dishonoured on 28.03.2013 returned along with cheque return memo vide Ex.P-3 and thereafter, as per mandatory requirements under Section 138(b) of N.I. Act. But, the petitioner did not discharge the legally enforceable debt or liability due to the respondent covered by Ex.P-2 within the time permitted under law. Thus, both the Courts found that the petitioner committed an offence punishable under Section 138 of N.I. Act. Therefore, the concurrent findings of fact recorded by the Trial Court and confirmed by the Appellate Court do not call for interference of this Court while exercising jurisdiction under Sections 397 & 401 of Cr.P.C. Consequently, the criminal revision case is devoid of merits and deserves to be dismissed.

In the result, the criminal revision case is dismissed at the admission stage.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:28.08.2017
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