THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE No.1285 of 2005

ORDER:

This Criminal Revision, under Sections 397 and 401 Cr.P.C. is filed challenging the Calendar and Judgment Dt.02.08.2005 passed in Criminal Appeal No.158 of 2001 by III Additional Sessions Judge (FTC), Khammam, confirming the conviction and sentence passed by I Additional Judicial Magistrate of First Class, Khammam, in C.C.No.49 of 1999, sentencing him to suffer SI for a period of six months.

Respondent No.2 filed a complaint against the petitioner herein/accused for the offence under Section 138 of NI Act before I Additional Judicial Magistrate of First Class, Khammam, alleging that the petitioner/accused borrowed an amount of Rs.25,000/ on 07.07.1996 from the complainant/second respondent and executed a promissory note on the even date, agreeing to repay the same together with interest as and when demanded by the complainant. Thereupon, the petitioner herein/accused issued a cheque bearing No.568775 drawn on Andhra Bank, B.S.Complex, Khammam, for Rs.25,000/- on 07.09.1998 in lieu of the discharge of the debt due under the promissory note. On presentation of the cheque, it was dishonoured and returned with an endorsement 'funds insufficient' along with the cheque return Memo on 01.12.1998. Thereafter, the complainant/R.2 issued a Notice on 04.12.1998 on the petitioner/accused in compliance of the requirement under proviso (b) of Section 138 of NI Act, calling upon the petitioner/accused to pay the amount covered by the dishonoured cheque within 15 days, but the petitioner/accused did not comply the legitimate demand for payment of the amount covered by the dishonoured cheque. Hence, the complaint.

The complaint was taken on file by I Additional Judicial Magistrate of First Class, Khammam, under Section 138 of NI Act, against the petitioner/accused and on securing the presence of the accused, examined him under Section 251 Cr.P.C. explaining the gist of acquisition in Telugu, he pleaded not guilty and claimed to be tried.

During trial, Pws. 1 and 2 and DW.1 were examined and Exs. P.1 to 6 were marked. After closure of the evidence of complainant, the petitioner/accused was examined under Section 313 Cr.P.C. explaining incriminating material that appeared against the accused in the witnesses of the complainant, he denied the same and reported no defence.

Upon hearing argument of both the counsel, the trial Court held that the petitioner/accused committed an offence punishable under Section 138 of NI Act as he failed to pay the amount even after receiving Notice under clause (b) of proviso to Section 138 of NI Act and convicted and sentenced to undergo SI for a period of six months.

Aggrieved by conviction and sentence passed by the trial Court, the petitioner/accused preferred an appeal in Crl.A.No.158 of 2001, which ended in dismissal by Judgment dt. 02.08.2005 by III Additional District and Sessions Judge, (FTC), Khammam, affirming the conviction and sentence passed by the trial Court.

Aggrieved by the concurrent fact findings recorded by the Courts, the present Criminal Revision Case is filed on the ground that the promissory note was stricken off, underwhich the petitioner allegedly borrowed the amount and both the Courts did not consider the strikings on promissory note and committed an error in passing the judgment and the petitioner never issued any cheque towards discharge of legally enforceable debt and in the absence of proof of issuing a cheque towards legally enforceable debt, recording conviction and imposing sentence to undergo SI for a period of six months is an illegality committed by both the Courts. It is finally contended that a notice under clause (b) of proviso to Section 138 of NI Act was not issued and therefore, on this ground also, the conviction and judgment passed by both the Courts are liable to be set aside.

Heard, Sri S. Venkateswarlu, learned counsel for the petitioner and the learned Public Prosecutor for the State of Telangana appearing for the respondents.

It is the case of the complainant/R.2 herein that the accused borrowed Rs.25,000/- on 07.09.1998 and executed a promissory note on the even date agreeing to repay the same with interest. Ex.P.6 is the promissory note, which created the relationship of debtor and creditor between the petitioner and the complainant. But, the contention of the petitioner/accused before this Court is that the promissory note was stricken of. It is the case of the petitioner that the trial Court framed an issue as Point No.1 and held that there are no corrections or striking in the pronote, but there are corrections in the complaint regarding the promissory note etc., since respondent No.2 thought that there is no need to file the promissory note along with the complaint, but filed subsequently. Therefore, the alleged corrections or striking in the complaint would not invalid the promissory note, which is marked as Ex.P.6. Therefore, the fact finding recorded by the trial Court, affirmed by the Appellate Court, regarding the relationship between the petitioner and complainant under Ex.P.6 is valid and the said fact finding cannot be disturbed by this Court while exercising power under Sections 397 and 401 Cr.P.C. except where this Court finds that there is a manifest perversity or apparent error in the findings of the Courts below. Therefore, I find no substance in the contention raised by the revision petitioner before this Court with regard to validity of the promissory note.

The other contention raised before this Court is that the cheque was not issued towards legally enforceable debt or liability. The trial Court framed an appropriate Point, as Point No.2 and recorded a common finding on Point Nos. 2 and 3 that the cheque was issued towards discharge of legally enforceable debt.

As seen from the material on record, the complainant was examined as Pw.1, who produced Ex.P.3--dishonoured cheque and Ex.P.6-promissory note to establish that there was subsisting relationship of creditor and debtor between complainant and the accused. When a promissory note was executed by the petitioner/accused, issued a cheque and its execution is admitted, the Court shall draw presumption under Sections 118 and 139 of NI Act that the promissory note was supported by consideration and that the cheque was issued in lieu of discharge of the legally enforceable debt or liability. The two presumptions are still rebuttal, the petitioner can rebut or dispel such legal presumptions either by eliciting something in the cross examination of PW.1 or by adducing independent evidence. But, in the present case, in the entire cross examination, nothing was elicited to dispel the presumptions under Sections 118 and 139 of NI Act. Therefore, in the absence of any material to rebut the presumption under Sections 118 and 139 of NI Act, the trial Court and the Appellate Court presumed that the promissory note was supported by consideration and that the cheque was issued towards discharge of legally enforceable debt or liability.

On the other hand, in the evidence, Pw.1 stated about issuance of Notice vide Ex. P.4 alleging about borrowing of amount covered by the pronote vide Ex.P.6 and dishonour of cheque and its return along with Cheque return Memos vide Exs.P.2 and P.3. But, the petitioner did not receive the notice and it was returned with an endorsement that addressee was not present for week days in the mentioned address, which is marked as Ex.P.5. The petitioner did not issue any reply since the notice was returned. However, the evidence on record, clearly establish that Ex.P.6 was executed by the petitioner for an amount of Rs.25,000/- after receipt of money and issued the cheque which is marked as Ex.P.1 towards discharge of legally enforceable debt vide Ex.P.6. Therefore, the concurrent fact finding recorded by both the Courts, do not call for interference of this Court while exercising power under Sections 397 and 401 Cr.P.C., in view of the limited jurisdiction that conferred on this Court.

The third contention urged before this Court in the revision is that the complainant did not comply under clause (b) of proviso to Section 138 of NI Act i.e., issuance of notice demanding payment of the amount covered by the dishonoured cheque within the time stipulated in the Act. Ex.P.4 is office copy of the Legal Notice dt. 04.12.1998 calling upon the petitioner/accused to pay the amount covered by the dishonoured cheque within 15 days. But the notice was returned unserved with an endorsement that addressee was not present for week days in the mentioned address. In the entire cross examination of PW.1, no suggestion was put to PW.1 that the address mentioned in the notice was not correct address of the petitioner. Therefore, when notice was sent to the correct address by registered post by the respondent/complainant to the addresses of the petitioner/accused and when it is returned, the Court shall draw a presumption under Section 27 of General Clauses Act, as held by the Supreme Court in *C.C. ALAVIHAJI v. PALAPETTY MUHAMMED AND ANOTHER*[1], wherein the Apex Court considered the various provisions of Evidence Act and Section 27 of General Clauses Act and concluded that where any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, in such case, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the General Clauses Act and Section 114 of the Evidence Act. On the other hand, Section 27 of the General Clauses Act permits the Court to draw presumption when a notice was sent to the correct address of the respondent by registered post. Section 27 of the General Clauses Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of

[1] (2007) 6 SCC 555

business. Thus, the law declared by the Apex Court is based on the presumption under Section 27 of the General Clauses Act and the failure of the petitioner to pay the amount covered by dishonour of cheque within 15 days, the court is bound to accept service of notice in compliance of Clause (b) proviso to Section 138 of N.I. Act.

Therefore, in view of the law declared by the Apex court, the Notice is deemed to have been served, in view of the statutory presumption contained under Section 27 of General Clauses Act. Therefore, the alleged non-compliance of proviso (b) of Section 138 of NI Act, is without any substance. Therefore, I find no error in the conclusion arrived by both the Court below finding the accused guilty recording concurrent fact findings. In view of the limited jurisdiction of this Court, I am unable to find any ground to interfere with the conviction and sentence passed by the trial Court, affirmed by the Appellate Court. Consequently, the Appeal is devoid of merits and it deserves to be dismissed.

Accordingly, this Criminal Revision Case is dismissed.

Consequently, miscellaneous applications pending, if any, shall also stand dismissed.

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JUSTICE M. SATYANARAYANA MURTHY

Date:08.09.2017
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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.R.C. No.1285 of 2005
Dt. 08-09-2017

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