THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.1749 OF 2005

ORDER:

This criminal revision case is filed under Sections 397 & 401 Cr.P.C, challenging the conviction and sentence passed by the V Metropolitan Magistrate, Hyderabad, and affirmed by the IV Additional Metropolitan Sessions Judge, Hyderabad, finding the accused guilty for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'Act'), sentencing him to undergo Simple Imprisonment for one year and to pay a fine of Rs.5,000/- with default sentence.

The case of the complainant is that the petitioner/accused approached the first respondent company through his brother in law by name P. Manoj Kumar who is one of the Directors of the Company and availed a loan of Rs.4.00 lakhs on 16.07.1997 under Account No.HL 72 after executing the necessary documents. At the request of the accused, the complainant paid an amount of Rs.2,00,400/- by way of demand draft in favour of the Excise Department. The complainant also transferred an amount of Rs.1,49,600/- in the account of P. Manoj Kumar, while the balance of Rs.50,000/- was transferred to the complainant's branch office from where P. Manoj Kumar withdrew the amount.

The accused initially promised to repay the amount within a period of one year with interest and the accused paid interest up to 17.11.1997 and thereafter, in discharge of his liability, the accused has issued the cheque bearing No.088303 dated 16.07.1998 for

Rs.4.00 lakhs drawn on the Andhra Bank, Khairatabad Branch, Hyderabad. When the cheque was presented for encashment, it was returned dishonoured with an endorsement as insufficient funds to the credit of the account of the accused. Then the complainant got issued a notice to the accused 11.11.1998 demanding the petitioner/accused to pay the amount covered by the dishonoured cheque and the receipt of the notice was acknowledged, but neither issued any reply nor paid the amount covered by the cheque. Hence, the complaint.

After recording the statement of the complainant, the Magistrate issued notice to the accused and after securing the presence of accused, complied Section 207 Cr.P.C, examined the accused under Section 251 Cr.P.C explaining the gist of acquisition made against him for the offence punishable under Section 138 of the Act, he denied and pleaded not guilty for the same.

The complainant got examined its Director as P.W.1 and got marked Ex.P-1 to P-16. After closure of evidence of the complainant, the accused was examined under Section 313 Cr.P.C, explaining the incriminating circumstances, he denied the same and proposed to examine the witness. On behalf of the accused, D.Ws 1 & 2 were examined and marked Exs.D-1 to D-5.

Upon hearing argument of both the counsel, the Trial Court found the accused guilty for the offence punishable under Section 138 of the Act and sentenced him to undergo Simple Imprisonment for a period of one year and to pay fine of Rs.5,000/- with default sentence. Aggrieved by the conviction and sentence, Crl.A.No.63 of 2005 was preferred before the IV Additional Metropolitan Sessions

Judge, Hyderabad, whereby, the Sessions Court confirmed the order of the Trial Court. Assailing the concurrent findings of both the Courts below, the present criminal revision case is preferred, questioning the propriety and legality of the conviction and sentence passed against the petitioner for the offence punishable under Section 138 of the Act, raising various contentions.

The main contention of the petitioner/accused in the grounds of revision is that Ex.P-7-cheque for Rs.1 lakh, was not issued towards discharge of legally enforceable debt or liability to the complainant. But, the Trial Court and the Appellate Court came to a wrong conclusion that Ex.P-7 was issued towards legally enforceable debt or liability. In fact, the loan amount was diverted for obtaining demand drafts in favour of Excise Department for Wine business by D.Ws. 1 & 2 and no amount was paid to the petitioner/accused. But the Trial Court did not consider those findings in proper perspective and failed to consider Exs.D-1 to D-3 in proper perspective and committed an error in finding the accused guilty for the offence punishable under Section 138 of the Act.

During hearing, learned counsel for the petitioner/accused had neither appeared nor got the matter represented by any counsel and advance arguments, but this Court cannot dismiss the revision for default. However this Court can decide the revision on merits in view of the law declared in **Nisha Sharma and others v. Vinod Kumar Sharma**[1] wherein it is made clear that the revision cannot be dismissed for default and even the petitioner or

[1] 1990 Cri.L.J. NOC 57 (Delhi)

his advocate did not appear before the Court, the Court shall examine the record and decide the revision on merits.

Persuaded by the law declared by the Delhi High Court, I would like to decide this revision, perusing the record.

It is the case of the petitioner/accused that the petitioner did not receive any amount under original of Ex.P-3-Pronote and issued Ex.P-4-Debit voucher and letter marked as Ex.P-5. It appears from the record that Ex.P-7 was the cheque admittedly issued by the petitioner in favour of the complainant company incorporated under Companies Act. But, the contention of the learned counsel for the petitioner is that, the cheque was not issued in lieu of any legally enforceable liability or debt. He did not deny execution of Ex.P-3-Pronote, issue of Ex.P-4-Debit Voucher and Ex.P-5-Request letter. The contents of Ex.P-5 is sufficient to conclude that the complainant was authorized by the petitioner to pay Rs.2,00,400/- to the Excise Department by way of demand draft on behalf of the petitioner and the balance amount of Rs.1,49,600/- was transferred in the account of P. Manoj Kumar and the remaining of Rs.50,000/- was transferred to the complainant's branch office. Therefore, payment of amount to P. Manoj Kumar who is not a debtor to the petitioner and not party to Ex.P-3-promissory note, such payment would not create a relationship of debtor and creditor between the petitioner and the first respondent for an amount of Rs.1,49,600/- + Rs.50,000/-, though there is a presumption that Ex.P-3-Promissory Note is supported by consideration, in view of Section 118 of the Act and that cheque was issued in lieu of legally enforceable debt under

Section 139 of the Act. Thus, the contents in the complaint and the evidence on record is sufficient to rebut those presumptions that Ex.P-3- Promissory Note was not supported by consideration of Rs.1,49,600/- + Rs.50,000/-, but, paid to one of the Directors of the company who is not an accused before the Courts below. Therefore, the petitioner is able to rebut the presumption both under Section 118 and 139 of the Act. In such case, it is for the first respondent/complainant to prove that the cheque was issued in lieu of discharge of legally enforceable debt or liability either in part or total. The admitted facts and circumstances, including the oral evidence in support of the allegations made in the complaint would suffice to conclude that the cheque was not issued in lieu of legally enforceable debt or liability. Apart from that, the evidence on record D.Ws.1 & 2 substantiated the contention of D.W.1 coupled with Exs.D-1 to D-4. Therefore, the Trial Court and the Appellate Court did not consider the evidence in proper perspective with regard to passing of consideration under original of Ex.P-3- Promissory Note, even to draw a presumption under Section 118 of the Act. In fact, the presumption was dispelled by the petitioner/accused based on the admissions made by the first respondent/complainant in the complaint and the evidence, in such case recording conviction of accused for the offence punishable under Section 138 of the Act, by the Trial Court and confirmed by the Appellate Court is illegal and the same is liable to be set-aside, since the concurrent fact findings recorded by both the Courts are manifestly perverse and apparently erroneous. Consequently, the conviction and sentence imposed by the

V Metropolitan Magistrate, Hyderabad in C.C.No.996 of 1998 dated 15.02.2005 and affirmed by the IV Additional Metropolitan Sessions Judge, Hyderabad, in Crl.A.No.481 of 2005 is set-aside.

In the result, criminal revision case is allowed and the petitioner/accused is set at liberty forthwith, in case, he is not required in any other case, without furnishing any security. The bail bonds, if any, shall stand cancelled.

Consequently, miscellaneous applications pending if any, shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Date:13.10.2017

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