THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE No.746 of 2006

ORDER:

This criminal revision case is preferred under Sections 397 and 401 of Code of Criminal Procedure (for short "Cr.P.C.") questioning the legality, propriety and regularity of the order dated 03.03.2006 passed in Crl.A.No.05 of 2005 by the V Additional Sessions Judge, Kurnool at Nandyal, whereby the conviction and sentence imposed by the Judicial Magistrate of First Class, Nandyal in C.C.No.121 of 2003 was confirmed.

The respondent No.1 filed complaint before Magistrate, Nandyal for the offence punishable under Section 138 and 142 of Negotiable Instruments Act (for short "N.I.Act") and under Section 420 of Indian Penal Code (for short "I.P.C.") alleging that the complainant is running a Mill for separating seed from cotton i.e. ginning and also sells seeds and cotton to various persons under the name and style of Gopal Reddy Agro Enterprises. He also own landed property, cultivating and he has stocked Fertilizers and Pesticides for his self cultivation. The accused has obtained lands on lease in and around Veldurthi of Dhoen Taluk in Kurnool District for the last three years, raising cotton crop and also for selling cotton seeds. The accused also used to come to the mill for separation of seeds from cotton i.e. ginning and gained confidence and taken pesticides and fertilizers kept by the complainant for his own use worth Rs.50,000/- in the month of June, 2002 promising him to return the goods or repay the cash towards the consideration. The accused also due to the complainant to a tune of Rs.1,40,000/- towards processing and separation of seeds. Hence, the accused had indebted to a tune of Rs.1,90,000/- to the complainant. In discharge of the said loan amount due to the complainant the accused issued a cheque for Rs.1,90,000/- in favour of the complainant bearing No.142222 drawn on State Bank of India, Veldurthi dated 10.07.2002. Accordingly, the complainant had presented the above said cheque for collection through the State Bank of Hyderabad in the month of October last week and the said cheque was returned with a memorandum on 10.12.2002 as unpaid due to funds insufficient in the account of the accused. The complainant states that within 15 days of the receipt of this information from the Bank regarding the return of the cheque as unpaid, the complainant got issued a registered notice dated 17.12.2002 through his advocate to the accused calling upon him to pay the said amount due under the dishonoured cheque within 15 days from the date of receipt of the notice. The accused received notice on 23.12.2002. The complainant contended that the accused issued the cheque with full knowledge of the fact that there was no sufficient amount to the credit of his bank account. Thus, the accused committed offences punishable under Sections 138 and 142 of N.I.Act.

Upon securing the presence of the accused, the trial Court on compliance of Section 207 of Cr.P.C. examined the accused under Section 251 of Cr.P.C. framed charges against accused for the offence punishable under section 138 of Negotiable Instruments Act, to which the accused pleaded not guilty and claimed to be tried.

During trial, P.W.1 was examined and marked Exs.P.1 to P.5.

After closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C. explaining incriminating material available against them, but he denied the same and reported no defence.

Upon hearing argument of both counsel, the trial Court found the accused guilty for the offence punishable under Section 138 of the N.I.Act, convicted and sentenced to undergo simple imprisonment for a period of six months and the period of detention, if any, was given set-off.

Aggrieved by the conviction and sentence passed by the trial Court, the petitioner/accused preferred an appeal No.05 of 2005 before the Sessions Court, and the same was dismissed, confirming the conviction and sentence passed by the trial Court. Aggrieved by the concurrent findings of both the Courts below, the present revision is preferred on various grounds.

Ex.P.1 – cheque was issued in favour of firm, but the firm is not the complainant and thereby the complainant herein in his individual capacity is incompetent to file complaint, as such the complaint itself is not maintainable and that P.W.1 has no authorisation to file complaint and prosecute the same, but the trial Court did not consider the same in proper perspective and committed an error in finding the accused guilty for the offence punishable under Section 138 of Negotiable Instruments Act.

It is also contended that as per Ex.P.4 legal notice there are no allegations of personal transactions between the accused and the complainant and the entire transaction is out of business transaction, as such without making the business firm as a party, the complaint is not maintainable on this sole ground.

Complainant also failed to produce relevant material before the Court to substantiate that the accused became due Rs.1,90,000/-, which is inclusive of charges for processing seed from cotton, so also supply of pesticides and fertilisers to the petitioner. In the absence of any documentary proof, the trial Court and the appellate Court ought to have acquitted the petitioner finding him not guilty for the offence punishable under Section 138 of Negotiable Instruments Act.

When the matter reached, Sri K.R.Swamy on behalf of K.L.N.Swamy, learned counsel for the petitioner, sought time on the ground that the matter is already settled outside the Court and he intend to obtain instruction from the petitioner.

Since this revision is of the year 2006, and the Apex Court issued directions to decide matters of pre-2012, this Court without waiting for arguments by the learned counsel for the petitioner, verifying the material can decide the revision since this Court is required to decide the propriety and legality of the order under challenge and mostly confined to legal aspects.

This revision is filed under Section 397 and 401 of Cr.P.C. Section 401 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 of procedure, neglect or apparent harshness of treatment which has on one hand resulted in some injury to the due maintenance of law and order or on the other hand, in some undeserved hardship to individuals. The revisional power conferred on the High Court by this section is discretionary power, has to be exercised in the aid of justice and this Court will not exercise jurisdiction under this Section if there has been no failure of justice even though the proceedings of the lower court suffer from irregularity or impropriety as held by Apex Court in "***State of West Bengal v. Tulsidas***[1]**"**. The revisional jurisdiction conferred upon this Court by Section 401 Cr.P.C. has to be exercised only for the purpose of relieving persons who have not had a fair trial or whose

[1] (1964) 1 Crl.L.J. 443 (SC)

convictions have been arrived at by non-observance of material provisions of the law or by such mis-directions as must have occasioned a failure of justice as held in "***Prahlad v. Emporer***[2]".

Further, the High Court can, in exercise of its revisional powers, either *suo motu* on the basis of its own knowledge derived from any source whatsoever, or on an application by a complainant, exercise the powers of an appellate Court both with respect to acquittal and conviction. This revisional power is subject to the following three limitations:

Firstly, no order can be made to the prejudice of the accused or other person unless he had an opportunity of being heard personally or by a pleader in his own defence;

Secondly, it cannot convert a finding of acquittal into one of conviction;

Thirdly, no revision can be entertained at the instance of a party who could have appealed under the Code and has not appealed.

Thus, the powers of the High Court are limited, this Court cannot interfere with the concurrent fact findings recorded by the courts below. As a general rule, the High Court will not in revision, interfere with a finding of fact and this is specially so, where there are concurrent findings of facts of the lower Courts. But, in special and exceptional circumstances,

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[2] 48, Crl.LJ 173, 174 (Pat)

the High Court is entitled to go into questions of fact and do justice, though the power should be rarely exercised, as held by Apex Court in "***S.P.S. Jayam & CO. v. Nehrusadan***[3].

In revision, the High Court usually accepts the findings on questions of facts recorded by a subordinate Court unless the finding is manifestly perverse or patently erroneous in view of the law declared by the Apex Court in "**Bansilal v.Laxman**[4]."

The first and foremost contention before this Court is that the Ex.P.1, cheque was issued in the name of firm, but when the complainant presented the same for collection, it was dishonoured, thereby the complainant is incompetent to file complaint under Section 200 of Cr.P.C.

Ex.P.1 is the dishonoured cheque and it was issued in the name of T.Gopala Reddy on 10.07.2002 for Rs.1,90,000/- drawn on State Bank of India and it is not in the name of firm as contended by the learned counsel for the petitioner/accused. Even notice issued by the complainant marked as Ex.P.4 also disclosed that the cheque was issued in the name of T.Gopals Reddy, complainant and proprietor of Gopala Reddy Agro Enterprises. Even in the cross-examination of P.W.1 nothing was suggested to him that the cheque was issued in favour of Gopala Reddy Agro Enterprises, thereby he is incompetent to prosecute the proceedings. In the absence of any dispute regarding issuance of cheque in the name of

[3] 1977 Crl.L.J. 1101
[4] (1986) 3 SCC 445

complainant, the contention of the petitioner is merit less in this revision. Therefore, on this ground, the complaint cannot be dismissed.

The other contention raised before this Court is that notice marked as Ex.P.4 is not in compliance of clause (b) of explanation to Section 138 of the N.I.Act i.e. demand of payment of amount covered by dishonoured cheque within the time prescribed under the Act, thereby the complaint is liable to be dismissed. Ex.P.4 notice dated 17.12.2002 was issued by the complainant on receipt of information of dishonour cheque vide Ex.P.2 dated 31.10.2002 and Ex.P.3 dated 10.12.2002. The cause of action for filing complaint would arise only in compliance of clause (b) of explanation to Section 138 of N.I.Act. The cheque return memo is marked as Ex.P.3 dated 10.12.2002, therefore, notice is required to be issued within 30 days from the date of receipt of Ex.P.3, in compliance of clause (b) of explanation to Section 138 of N.I.Act.

Receipt of notice was acknowledged by the petitioner on 23.12.2002 under Ex.P.5, but he neither paid the amount covered by the dishonoured cheque nor issued any reply. The complaint was filed before the Magistrate immediately after 15 days from the date of acknowledging the receipt of notice marked as Ex.P.5. Therefore, the complainant strictly complied with the requirement as specified in clause (b) of explanation to Section 138 of N.I.Act. Therefore, on this ground the complaint cannot be dismissed setting aside the conviction and sentence passed against the petitioner.

The other ground urged before this Court is that the complainant did not produce any book or document relating to Gopala Reddy Agro Enterprises to show that the Ex.P.1 cheque was issued towards discharge of legally enforceable debt and when the said cheque was presented for collection, the same was dishonoured.

When the Ex.P.1 cheque was issued towards discharge of legally enforceable debt, presumption under Section 118 and 138 of the N.I.Act shall be drawn. Such presumption can be rebutted by eliciting something in the evidence of prosecution witnesses or by examining any independent witness on behalf of the accused. But in the present case, the petitioner could elicit nothing in the evidence of P.W.1 to rebut the presumption or did not examine himself or examine any independent witness to rebut the presumption under Section 118 and 138 of the N.I.Act. If the issue of cheque was admitted, the Court shall draw a presumption that it was issued towards discharge of legally enforceable debt or liability as held by the Apex Court in "***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd.***[5]"

On close analysis of evidence of P.W.1, nothing was elicited by the counsel for the petitioner to rebut the presumption under the Act and no independent evidence is

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[5] AIR 2016 Supreme Court 4363

adduced to prove that the cheque was not issued towards discharge of legally enforceable debt or liability. A bald suggestion was put to P.W.1 that the accused was not due any amount and got denial. Therefore, putting suggestion and getting denial is not the evidence. Hence, in view of the presumption under Section 138 of N.I.Act, the Court is bound to presume that the cheque was issued towards discharge of legally enforceable debt.

Though an identical contention was raised before the appellate Court, the appellate Court placed reliance on "K.N.Beena v. Muniyappan (AIR 2001 SC 2895)" "V.Munikrishnaiah v. C.Janakirama Naidu (2005 (2) ALT (Crl.) 57 (A.P.)" concluded that till the presumption available under Section 138 of N.I.Act is rebutted, it shall be presumed that the cheque was issued towards discharge of legally enforceable debt.

Before the appellate Court, the accused placed reliance on "Bharat Bhushan v. Ved Prakash (AIR 12973 Delhi 199)", wherein it was held that the best evidence should always be presented and when it is withheld, it is fair to presume that the person who did not produce the best evidence had some motive for not producing it. But here, the best evidence rule is not applicable as the presumption under the Act is not rebutted. Therefore, non production of books of accounts maintained in the regular course of business is not a ground to dismiss the complaint and acquit the accused for the offence punishable under Section 138 of N.I.Act as the petitioner failed to rebut the presumption under Section 138 of N.I.Act.

Viewed from any angle, the petitioner miserably failed to establish that the Ex.P.1 cheque was not issued towards discharge of legally enforceable debt or liability and he neither paid the amount nor issued any reply to Ex.P.4 notice. Hence, the petitioner committed an offence punishable under Section 138 of N.I.Act.

In view of my foregoing discussion, I find no perversity in the order of the Courts below, so also no material to interfere with the concurrent fact findings recorded by both the Courts below. Consequently, the revision is liable to be dismissed.

In the result, the criminal revision case is dismissed.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

05.10.2017
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