

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE No.787 of 2005

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 judgment dated 13.05.2005 passed in CrI.A.No.65 of 2004 by the V Additional District and Sessions Judge (III Fast Track Court) Nalgonda at Miryalaguda, whereby the conviction and sentence imposed by the Judicial Magistrate of First Class, Miryalaguda in C.C.No.1641 of 2000 was confirmed.

The revision petitioner herein is the accused. Respondent No.2 filed the complaint before Judicial Magistrate of First Class, Miryalaguda alleging that petitioner borrowed Rs.40,000/- on 02.08.1998 and agreed to repay the same with interest of Rs.2/- per one hundred per one month, on execution of promissory note. Thereafter, the accused issued a cheque bearing No.003691 dated 07.09.2000 for an amount of Rs.55,000/- towards part satisfaction. When the complainant presented the said cheque in bank on 08.09.2000 for collection, the same was dishonoured due to insufficient funds, returned with return memo. The complainant got issued a legal notice to the accused, but the accused did not pay the amount covered by the dishonoured cheque.

As required under clause (b) proviso to Section 138 of the Negotiable Instruments Act (for short "N.I.Act") the

complainant issued Ex.P.4 notice demanding the accused to pay the amount covered by dishonoured cheque, but on receipt of the same, the petitioner neither paid the amount nor issued any reply. Hence, the accused committed an offence punishable under Section 138 of the N.I.Act.

Upon securing the presence of the accused, the trial Court on compliance of Section 207 of Cr.P.C., examined under Section 251 of Cr.P.C. explaining the gist of accusation for the offence punishable under section 138 of Negotiable Instruments Act, read over and explained to him in Telugu, 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.

Ex.P.1 is the original promissory note. Ex.P.2 is the original cheque. Ex.P.3 is the cheque return memo. Ex.P.4 is the office copy of legal notice. Ex.P.5 is the refused postal cover.

After closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. explaining incriminating material available against him, but he denied the same, and marked Exs.D.1 to D.3 on behalf of the accused.

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 to pay compensation of Rs.55,000/- to the complainant within two

months from the date of judgment under Section 357 of Cr.P.C.

Aggrieved by the conviction and sentence passed by the trial Court, the petitioner/accused preferred an appeal No.65 of 2004 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.

The complainant failed to satisfy the requirements provided under the Act, more particularly, service of notice under clause (b) of proviso to Section 138 of the N.I.Act and the trial Court committed an error in finding the petitioner guilty for the offence punishable under Section 138 of the N.I.Act. It is also contended that the cheque was issued as a collateral security for a chit transaction, though the said amount was paid, the trial Court and the appellate Court found the petitioner guilty for the offence punishable under Section 138 of the N.I.Act.

When the matter reached, learned counsel for the petitioners did not appear 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

¹ 1990 Cri.L.J. NOC 57 (Delhi)

dismissed for default and even the petitioner or his/her 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.

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**”². 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 convictions have been arrived at by non-observance of material provisions of the law or by such mis-directions as must have

² (1964) 1 Cr.L.J. 443 (SC)

occasioned a failure of justice as held in “**Prahlad v. Emporer³**”.

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, the High Court is entitled to go into questions of fact and do

³ 48, Crl.LJ 173, 174 (Pat)

justice, though the power should be rarely exercised, as held by Apex Court in “**S.P.S. Jayam & CO. v. Nehrusadan**”⁴.

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**”⁵.

The first and foremost contention raised before this Court is that the demand notice as required under clause (b) to Section 138 of the N.I.Act. was not issued by the complainant. As seen from the material on record, on presentation of cheque for collection in bank on 08.09.2000, the same was returned along with cheque return memo marked as Ex.P.3. Immediately, Ex.P.4 notice was issued. Ex.P.5 is the refused registered postal cover, but the petitioner did not deny the address mentioned on the postal cover. Hence, the Court shall draw the presumption that the petitioner is deemed to have knowledge about the contents of notice in view of Section 27 of General Clauses Act.

A similar question came up in a decision reported in “**C.C. Alavihaji v. Palapetty Muhammed and Another**”⁶, 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

⁴ 1977 CrL.L.J. 1101

⁵ (1986) 3 SCC 445

⁶ (2007) 6 SCC 555

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 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 dishonoured 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. Both the trial court and the appellate court recorded fact finding that a notice was served in compliance of Clause (b) of proviso to Section 138 of the N.I.Act, thereby such fact finding cannot be interfered with by this Court while exercising power under Section 397 and 401 Cr.P.C. i.e. revisional jurisdiction.

The 2nd ground urged by the petitioner is that the cheque was issued as a security for chit transaction though he paid the entire amount; both Courts erroneously convicted him.

When the petitioner admitted execution of promissory note and issuance of cheque, presumption under Section 118 and 138 of the N.I.Act shall be drawn that the promissory note was supported by consideration and the cheque was issued towards discharge of legally enforceable debt. Though the presumption is rebuttable, 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. Even if the cheque was issued as a security and the debt was not discharged, the Court shall draw a presumption as held by the Apex Court in “**Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd.**”⁷

Even according to the principle laid down in the above judgments, the presumption is rebuttable and the petitioner is entitled to rebut or dispel the presumption in any of the modes as specified in the Act, but here no such evidence was adduced to rebut or dispel the presumption under Section 118 or 138 of the N.I.Act.

In such case, both Courts have no other option except to conclude that the Ex.P.1 promissory note was supported by consideration and Ex.P.2 cheque was issued towards discharge of legally enforceable debt. When Ex.P.4, notice was issued, it was returned. Ex.P.5 is the refused postal cover. Thereby, presumption under Section 27 of General Clauses Act shall be drawn. Accordingly, the trial Court and the appellate court concluded that the cheque was issued towards discharge of legally enforceable debt, thereby the petitioner committed an offence punishable under Section 138 of the Negotiable Instruments Act, as the petitioner failed to discharge the debt even after the demand made by the complainant under Ex.P.4.

⁷ AIR 2016 Supreme Court 4363

As there is no perversity in the order of the Courts below;
I find 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

14.09.2017
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