THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL APPEAL No.130 OF 2017

JUDGMENT:

The complainant in C.C.No.65 of 2015 filed this appeal challenging the acquittal of the accused for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'the Act'), whereby the XV Additional Judge-cum-XIX Additional Chief Metropolitan Magistrate, Hyderabad dismissed the complaint vide calendar and judgment in C.C.No.65 of 2015 dated 30.11.2016.

The appellant herein is the complainant and the respondent is the accused in C.C.No.65 of 2015 respectively and they will hereinafter be referred as complainant and accused for the sake of convenience.

The facts of the case are that the complainant is a partnership firm carrying on its business in the name and style of M/s Durga Enterprises, represented by Mr. Eshwar Kumar Kabra, dealing with MS Black, Galvanised Steel Tubes. The accused is also carrying on steel business in the name and style of Sri Alankritha Steel Traders and the accused used to purchase steel pipes from the complainant firm on credit basis by placing orders and the complainant used to supply the material of steel pipes.

During the month of December, 2013, the accused placed orders for supply of material worth Rs.37,89,781/- to the complainant and accordingly the complainant supplied the requisite material on credit basis. As the accused failed to pay the debt due, the complainant demanded the accused to discharge the debt due to him, thereupon, the accused issued the following five cheques, for total sum of Rs.23,50,518/- as part payment towards discharge of legally enforceable debt.

1. Cheque bearing No.035212 dated 23.12.2013 for a sum of Rs.5,49,969/- drawn on ICICI Bank, M.G. Road Branch, Secunderabad.
2. Cheque bearing No.037386 dated 23.12.2013 for a sum of Rs.4,95,766/- drawn on ICICI Bank, M.G. Road Branch, Secunderabad.
3. Cheque bearing No.035223 dated 26.12.2013 for a sum of Rs.4,58,341/- drawn on ICICI Bank, M.G. Road Branch, Secunderabad.
4. Cheque bearing No.035228 dated 26.12.2013 for a sum of Rs.2,97,360/- drawn on ICICI Bank, M.G. Road Branch, Secunderabad.
5. Cheque bearing No.035229 dated 27.12.2013 for a sum of Rs.5,49,074/- drawn on ICICI Bank, M.G. Road Branch, Secunderabad.

When the complainant presented the five cheques for encashment through his banker i.e. City Union Bank, M.G. Raod, Secunderabad, the cheques were dishonoured and returned unpaid with an endorsement "Funds Insufficient" and the cheque return memos were also issued by the banker. Further, the complainant got issued a legal notice dated 02.04.2014 through registered post with acknowledgment due and the said notice was received by the accused on 03.04.2014. Inspite of receiving the legal notice, the accused had neither repaid the amount nor gave any reply. Thus, the amount covered by the five cheques referred supra remained unpaid. Hence, a private complaint was filed for the offence punishable under Section 138 of the Act before the Magistrate.

After following necessary procedure, the complaint was taken on file by the Trial Court for the offence punishable under Section 138 of the Act and issued process, secured the presence of the accused on 09.03.2015, examined under Section 251 of Cr.P.C explaining the gist of acquisitions, but the accused pleaded not guilty.

During trial, on behalf of the prosecution, complainant was examined as P.W.1, marked Exs.P-1 to P-29 and on behalf of the defence, Exs.D-1 & D-2 were marked. After closure of the complainant's evidence, accused was examined under Section 313 Cr.P.C explaining incriminating material available in the complainant's evidence against her. The accused denied incriminating evidence and reported no defence evidence on her behalf.

Upon hearing arguments of both sides, the Trial Court found the accused not guilty on three counts.

(a) The first reason for acquittal of the accused recorded by the Trial is that the complainant had no valid authorization to file a complaint and thereby, the complaint itself is not maintainable.

(b) The complainant failed to establish that the five cheques were issued towards discharge of legally enforceable debt and thereby disbelieved the debt.

(c) The Magistrate also found that the five cheques were obtained forcibly in the Mahankali Police Station, Secunderabad, confining both the accused and her husband in police station and by using those five cheques, the complaint was filed and therefore, the cheques were not issued towards discharge of legally enforceable debt and thereby, not liable for conviction and acquitted them for the offence under Section 138 of the Act.

Challenging the order in calendar and judgment dated 30.11.2016, the present criminal appeal is preferred on the ground that the complainant is a Managing Partner of the M/s Durga Enterprises and Mr. Eshwar Kumar Kabra is authorized to represent the firm and file complaint. Even in the absence of written authorization, the complainant is entitled to prosecute the proceedings as, Mr. Eshwar Kumar Kabra is the Managing Partner of the complainant's firm, in view of the provisions of Parntership Act. But, the Trial Court took a different view and concluded that the complainant was not authorized to file an appeal. The Trial Court did not appreciate the evidence, more particularly, the evidence in proper perspective and also the answers given by the accused in her examination under Section 313 of Cr.P.C, no credence can be given to such answers in examination under Section 313 of Cr.P.C, and thereby, committed an error in dismissing the complaint and acquitted the accused holding that there was no legal enforceable debt to be paid to the complainant. The Trial Court on erroneous appreciation of evidence, concluded that the five cheques were obtained confining both the accused and her husband in Mahankali Police Station, Secunderabad, though there was no satisfactory evidence in support of such conclusion. Therefore, the finding of the Trial Court is liable to be set-aside. Finally the complainant requested to re-appreciate the entire evidence and come to an independent conclusion and prayed to allow the appeal by setting-aside the order of acquittal in C.C.No.65 of 2015 dated 30.11.2016 and convict the accused for the offence punishable under Section 138 of the Act and punish him.

During hearing, learned counsel for the appellant Sri R. Ranganathan would contend that absence of any separate authorization to Mr. Eshwar Kumar Kabra i.e. P.W.1 is not fatal to the case, as he is the Managing partner of the partnership firm and in view of the Section 19(2) of the Partnership Act, no separate authorization is required. To support his contention, learned counsel for the appellant placed reliance on the judgment of this Court in **Sri Lakshmi Kanchana Finance Corporation v. The State of A.P. & Anr.**[1].

Learned counsel for the appellant Sri R. Ranganathan appearing for the complainant further contended that when the five cheques were issued, presumption under Section 139 of the Act shall be drawn and till such presumption is dispelled or rebutted, the presumption is in favour of the complainant that the cheque was issued towards discharge of legally enforceable debt. But the Trial Court totally ignoring the presumption without insisting rebuttable evidence, erroneously concluded that the five cheques were not issued towards legally enforceable debt or liability. Therefore, the finding of the Trial Court that the five cheques were not issued towards discharge of legally enforceable debt is incorrect and the same is liable to be set-aside and prayed to set-aside the order in C.C.No.65 of 2015 dated 30.11.2016 and convict the accused for the offence punishable under Section 138 of the Act.

At the stage of admission, this Court heard learned counsel for the appellant at length. Considering the contentions of the learned counsel for the appellant, the points that arose for consideration are as follows:

1. ***Whether Mr. Eshwar Kumar Kabra, P.W.1 is competent to file the complaint.***

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[1] AIR 2010 (NOC)406 (A.P.)

2. ***Whether the Cheque bearing Nos.035212, 037386, 035223, 035228 and 035229 were issued by the accused towards discharge of legally enforceable debt or liability.***

3. ***Whether the demand was made in compliance of 138(b) of N.I. Act. If not, whether the accused is liable for punishment for the offence punishable under Section 138 of N.I. Act.***

Before deciding the points formulated by this Court, I would like to examine the scope of Section 378 of Code of Criminal Procedure, more particularly, with regard to the powers of the High Court to interfere with the opinion of the Trial Court against the acquittal of the accused in an appeal in a complaint.

Code of Criminal Procedure makes no distinction between an appeal against the acquittal and an appeal against the conviction, but the High Court in appeal against acquittal would be justified in reappreciating the evidence in order to determine whether the charge against the accused was established by adducing satisfactory evidence. However, where no two views are reasonably possible in the matter, and view taken by the trial Judge was perverse and unsustainable, the High Court would be well within the limits of its power and would not transgress the self imposed limitations of the powers of the High Court in interfering with an order of acquittal as held in "***S.Madhavan Nair v. State of Kerala***[2]". In "***S.Madhavan Nair v. State of Keralaz***" (referred supra) laid down certain guidelines which are as follows:

> "The High Court has full power to review at large the evidence on which the order of acquittal was founded and to reach the

[2] AIR 1974 SC 1857

> conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as
> (1) the view of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;
> (3) the right of the accused to the benefit of any real and reasonable doubt; and
> (4) the slowness of an appellate court disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses;
> (5) the High Court should also take into account the reasons given by the court below in support of its order of acquittal and must express its reasons in the judgment which lead it to hold that the acquittal is not justified;
> (6) further, if two conclusions can be based upon the evidence on record, the High Court should not disturb the finding of acquittal recorded by the trial court. It would follow as a corollary from that that if the view taken by the trial court in acquitting the accused is not unreasonable, the occasion for the reversal of that view would not arise."

In view of the law declared by the Apex Court, this Court cannot interfere with the calendar and judgment acquitting the accused unless the conclusions reached by the trial Court are palpably wrong or based on erroneous view of law or its decision is likely to result in grave injustice, normally the High Court should be reluctant to interfere with its conclusions. Therefore, the powers of the High Court in an appeal against the acquittal are limited.

To constitute offence punishable under Section 138 of N.I Act, the offence has to establish the following ingredients.

(1) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person out of that account.

(2) *The cheque should have been issued for the discharge in whole or in part of debt or other liability.*

(3) *That cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*

(4) *That the cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from the account by an agreement made with the bank.*

(5) *The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.*

(6) *The drawer of such cheque fails to make the payment of the said amount of money to the payee orto the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

(7) *The debt or other liability referred to under Section 138 of N.I.Act means a "legally enforceable debt or other liability".*

Keeping in mind the powers of the Court to interfere with the findings recorded by the Trial Court in a complaint case in acquittal, I would like to decide the points that are formulated for consideration.

P O I N T NO.1

The complaint was filed by Mr. Eshwar Kumar Kabra, Managing Partner of the complainant firm and he was authorized to file the complaint. There is a specific allegation in the complaint that the complainant was a partnership firm registered with the Registrar of Firms and Mr. Eshwar Kumar Kabra is its managing partner. There is no dispute that Mr. Eshwar Kumar Kabra is the Managing Partner, but denied the authorization given to him by the partners of the firm M/s Durga Enterprises in the evidence of P.W.1 by putting suggestions. The Trial Court in paragraph 15 of the judgment adverted to the evidence of P.W.1 and concluded that Ex.P-28 is the Authorization Letter issued by the partners of the complainant firm in favour of P.W.1. According to the contents of Ex.P-28, Smt. Vandana K. Rathi is another partner of the firm entered into partnership agreement. Ex.P-29 is the partnership deed. A perusal of Ex.P-29 partnership deed would show that on each page, both Smt. Vandana K. Rathi and Mr. Eshwar Kumar Kabra subscribed their signatures and it was attested by witnesses. As per P.W.1, the other partner of the complainant firm Smt. Vandana K. Rathi authorized him by way of letter i.e. Ex.P-28 to file a complaint. But, on a perusal of Ex.P-28 authorization letter issued by Smt. Vandana K. Rathi, her signature is totally differing from the signature in Ex-29-Partnership Deed. On the other hand, P.W.1 also admitted about the difference in the signatures of Smt. Vandana K. Rathi. On the strength of such admission and variation in the signatures of Smt. Vandana K. Rathi, the Trial Court concluded that Mr. Eshwar Kumar Kabra was not authorized to file a complaint. But, this finding of the Trial Court is contrary to law declared by this Court in **Sri Lakshmi Kanchana Finance Corporation** case, where an identical question came up before this Court regarding authorization and this Court was of the view that except those acts which are barred under Section 19(2) of the Partnership Act, 1932, a partner can file a complaint because the act of the firm is defined under Section 2(a) of the Partnership Act, 1932, which means any act or omission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. The act of the firm in filing of complaint of cheque dishonour was exercised by one of the partners. Therefore, the partner was given a right enforceable on behalf of the firm or against the firm unless contrary is appearing in the partnership deed. Therefore, one of the partners exercised his right in filing the complaint. By virtue of the definition of "the act of the firm" includes any partner and any partner can enforce the right on behalf of the firm, one partner can file the complaint. Every partner is an agent of the firm and his other partners, for the purpose of the business of the partnership and the acts of every partner who does not act for carrying on in the usual way business of the kind carried on by the firm of which he is a member binding the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter. Therefore, partner though not specifically authorized but by virtue of the definition under Section 2(a) of the Partnership Act, 1932, he can exercise his right to enforce on behalf of the firm.

Thus, in view of the law declared by this Court referred supra, anyone of the partners can file a complaint for dishonour of cheque against the third party and no specific authorization is required to file such compliant. As such, the finding of the Trial Court that P.W.1 was not authorized to file a complaint is unfounded and contrary to the law declared by this Court in **Sri Lakshmi Kanchana Finance Corporation** case. Hence, the finding of the Trial Court is hereby set-aside, holding that P.W.1 being a managing partner of the firm is competent to file a complaint on behalf of M/s Durga Enterprises.

Accordingly, the point is answered in favour of the complainant and against the accused.

P O I N T NO.2

The complainant admittedly was in possession of the five cheques issued for various amounts. Thus, the total amount covered by the five cheques is Rs.23,30,518/-, which is allegedly issued towards discharge of part of the legally enforceable debt by the accused. But, the contention of the accused is that those five cheques were not issued towards legally enforceable debts and those cheques were obtained by the police forcibly confining the accused and her husband in Mahankali Police Station, Secunderabad. The accused also denied placing any order for supply of material from the complainant's firm during the month of December, 2013. P.W.1 during evidence, while reiterating his contention about placing order and products of material, under Exs.P-1 to P-12 for Rs.37,89,781/- produced Exs.P-13 to P-17, the cheques allegedly issued by the accused towards discharge of legally enforceable debt, cheque return memos marked as Exs.P-18 to P-22, Ex.P-23 legal notice dated 02.04.2014, to establish that the accused purchased material worth Rs.37,89,781/- and issue of cheques towards discharge of liability and compliance of Section 138(b) of N.I. Act i.e. demand for payment of amount covered by those cheques. In the cross-examination, several suggestions were put to the accused that the accused never placed any order to the complainant firm for supply of any material i.e. steel tubes at any point of time and that the husband of the accused was confined in Mahankali Police Station on 14.02.2014 and the accused was also threatened and taken into custody by the police. By keeping them under threat and coercion, the police obtained signatures on five cheques without filling the blanks of the cheques. But, these suggestions were denied. However, receipt of the cheques by the complainant is not in dispute, but whether those cheques were received through police or directly from the accused is a question of fact to be decided.

It is evident from the original of Ex.D-1 that a private complaint was filed on 07.02.2014 by P.W.1 on behalf of the complainant firm against the accused and her husband before the XI Additional Chief Metropolitan Magistrate, Secunderabad. Ex.D-2 is the certified copy of the First Information Report in Crime No.39 of 2014 dated 07.02.2014 issued by Mahankali Police Station, Secunderabad. Based on these two documents i.e. Exs.D-1 & D-2, it is contended that when a private complaint dated 07.02.2014 was filed before the XI Additional Chief Metropolitan Magistrate, Secunderabad, the same was referred to Mahankali Police Station exercising power under Section 156(3) of Cr.P.C, on the strength of the reference, a crime was registered in Crime No.39 of 2014 and the accused and her husband were taken into custody on 14.02.2014, under threat and coercion, these five cheques were allegedly obtained. But, this fact was not supported by satisfactory evidence, except the answers in examination of the accused under Section 313 of Cr.P.C. But, that is insufficient to believe that the accused and her husband were confined in Mahankali Police Station and the police obtained signatures on the cheques forcibly under threat and coercion, the Trial Court, on erroneous appreciation, disbelieved that these five cheques were obtained by the police by threat or coercion and such finding is not based on any satisfactory evidence.

It is the case of the complainant from the beginning that the accused purchased material under Exs.P-1 to P-12 worth Rs.37,89,781/-. But, the bills produced before the Court are full of blanks and the column meant for mentioning the order number and date were left blank. Therefore, the purchase of the material under Exs.P-1 to P-12 was disbelieved by the Trial Court assigning its own reasons. No doubt, the tax invoices were raised on different dates commencing from 06.12.2013 to 23.12.2013. But, it bears no signatures of the accused or her agent, evidencing receipt of the material covered by Exs.P-1 to P-12. On the other hand, the orders placed by the accused are not produced before the Court to substantiate the purchase and raising of tax invoices marked as Exs.P-1 to P-12, more particularly, when the accused denied very placing of orders for purchase on credit basis. Even those bills does not disclose the particulars of the accused as to when and where and on what mode of information, the accused placed the alleged orders to the complainant for supply of materials i.e. steel pipes for business. The order number and date columns were left blank, thereby, by necessary implication, the Trial Court concluded that no orders were placed for supply of any material. The delivery of goods or material covered by Exs.P-1 to P-12 was not acknowledged by the accused or her agent. Undisputedly, the tax invoices is the evidence to establish purchase of material on credit basis. But, those tax invoices by itself which are loose sheets would not firm basis to claim amount. When the complainant is a firm, the firm is expected to maintain its accounts in regular course of business, being an assesse under both Central and State Taxes. Obviously for different reasons, the complainant did not produce any accounts, more particularly, the books of accounts, ledgers maintained in the company, which are substantive piece of evidence to establish the credit transactions and so also the stock registers maintained in the firm.

Section 34 of Indian Evidence Act, 1972 deals with entries in books of account and when relevant Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability.

Thus, Section 34 of Indian Evidence Act specifies that entries in the books of accounts, regularly kept in the course of business corroborated with other evidence, the court has to inquire but such entries shall not alone be sufficient evidence to charge anyone with liability i.e. no decree can be passed on the basis of entries alone, but there must be in addition to some independent evidence of the transactions relating to the entries. The entries are therefore only corroborative evidence. Thus, the books of accounts maintained in the regular course of business are corroborative piece of evidence to the transaction i.e. the alleged transaction covered by Exs.P-1 to P-12. But, the accused, except production of Exs.P-1 to P-12, the bills, which are not duly signed by either the accused or her agent, acknowledging delivering of material, no corroborative piece of evidence is brought on record. Therefore, such bills with blanks, cannot form the basis for the claim.

From the beginning, it is the contention of the accused that no order was placed for purchase of material on credit basis. In such a case, the burden is upon the complainant to prove that there exists a legally enforceable liability and those five cheques were issued towards discharge of such legally enforceable liability. But, in view of Section 139 of N.I. Act, a presumption shall be drawn that these five cheques were issued towards discharge of part of legally enforceable liability. However, such presumption is rebuttable and the accused can rebut such presumption either by adducing independent evidence or by eliciting any facts in the cross-examination of the witnesses examined on behalf of the complainant to dispel such presumptions. Here, in this case, the accused put several suggestions to P.W.1 that no order was placed for purchase of material on credit basis and thereby, denied its liability while contending that those five cheques were obtained forcibly by the police, Mahankali Police Station confining the accused and her husband in the police station under threat and coercion. Whether such evidence is sufficient to dispel the presumption will depend upon the nature of defence set up by the accused and evidence brought on record by both the parties. When the cheques were allegedly obtained in the presence of police officer, the presumption would disappear, as held by the Bombay High Court in **Manjit Singh Obhan vs State Of Maharashtra And Ors**[3], where the Court held that when the accused raised a plea that the complainant obtained blank cheques in the presence of a police officer, a presumption under Section 139 of N.I. Act cannot be raised. In the present case, in the examination of the accused under

[3] 2007 CriLJ 3865

Section 313 Cr.P.C, she specifically stated that the accused and her husband were brought to the police station in connection with C.C.No.39 of 2014 marked as Exs.D-1 & D-2 and under threat, her signatures on the five cheques were obtained under threat and fear. However, the factum of filing complaint under the original of Ex.D-1 referring the same under Section 156(3) Cr.P.C by the Magistrate to the Mahankali Police Station and registration of crime under original of Ex.D-2 is established.

The next question is whether the accused and her husband were taken to the police station. But, no evidence is brought on record. The accused *prima facie* adduced evidence to establish that the five cheques were obtained by police, Mahankali Police Station and not towards discharge of legally enforceable liability or debt, the burden will automatically shift to the complainant to prove that those five cheques were issued towards discharge of legally enforceable liability or debt. But here, except production of Exs.P-1 to P-12, no other material is produced to substantiate existence of any legally enforceable liability or debt as on the date of issue of those five cheques. In such a case, the presumption can be said to be dispelled shifting the burden to the complainant. When the complainant failed to establish the existing legally enforceable liability or debt, the complainant cannot be made liable for the offences punishable under Section 138 of N.I. Act.

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

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[4] AIR 2010 SC 1898

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.

As the accused rebutted the presumption under Section 139 of Negotiable Instruments Act and when the complainant failed to establish the transaction of purchase of material on credit basis, it is difficult to hold that the five cheques were issued towards legally enforceable liability or debt. In those circumstances, it is difficult to interfere with the finding recorded by the Trial Court by exercising power under Section 378 Cr.P.C, in view of the limited scope of powers of this Court under Section 378 Cr.P.C. Hence, I find no ground to interfere with the findings of the Trial Court and the appeal deserves to be dismissed.

P O I N T NO.3:-

In view of finding on point no.2, no finding need be recorded as to compliance of Section 138 proviso (b), as such, no finding is recorded.

In the result, the criminal appeal is dismissed.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:01.06.2017

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