HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.R.C No.632 of 2005

ORDER:

This Criminal Revision Case under Sections 397 and 401 of Criminal Procedure Code is filed challenging the acquittal of the accused for the offences punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'the Act') in C.C.No.318 of 2003, dated 14.03.2005, passed by Additional Judicial Magistrate of First Class, Vizianagaram District.

2. The petitioner/defacto complainant filed a complaint under Sections 190 and 200 Cr.P.C. against the 1st respondent/accused for the offence punishable under Section 138 of the Act alleging that the 1st respondent borrowed an amount of Rs.20,000/- from the complainant on 10.12.2000 and executed a demand promissory note on even date, in favour of the petitioner agreeing to repay the same together with 24% interest per annum. The 1st respondent also issued a cheque No.271803 dated 10.07.2003 for Rss.32,600/- drawn on Corporation Bank, Vizianagaram, towards the discharge of debt together with interest. On presentation of the said cheque for collection in Karnataka Bank, Vizianagaram, the payee Bank dishonoured the cheque and the same was returned on the ground of insufficient funds with an intimation dated 24.07.2003. Thereupon a notice was issued by the petitioner under the Act on 30.07.2003 and receipt of the same by the 1st respondent was acknowledged on 02.08.2003 and he issued a reply denying the transaction, while admitting issue of cheques in connection of purchase of colour T.V., and failed to pay amount covered by dishonoured cheque. Thereafter, petitioner filed

complaint to punish the accused for the offence punishable under Section 138 of the Act.

3. After following necessary procedure, the trial Court examined the accused under Section 251 Cr.P.C., explaining the gist of allegations levelled against him, he pleaded not guilty claimed to be tried.

4. During the trial, PW1 was examined and Exs. P1 to P6 are marked. After evidence of complainant evidence, the respondent was examined under 313 Cr.P.C. he denied the incriminating evidence let in by the complainant and examined D.Ws.1 and 2, marked as Exs.D1 and D2.

5. Upon hearing both the counsel, the trial Court dismissed the complaint acquitting the accused on the sole ground that promissory note which is the basis for transaction for issue of cheque was not marked as Exhibit, while recording that initially the original promissory note was filed along with the complaint and it was taken back for filing civil suit for recovery.

6. Aggrieved by acquittal of the accused by dismissing the complaint in C.C.No.318 of 2003 dated 14.03.2009, the present Criminal Revision Case is filed on various grounds mainly on the ground that petitioner initially produced promissory note and taken back the same vide order in Crl.M.P.No.5029 of 2003 under Section 219 Cr.P.C. When the execution of promissory note is admitted, which is the evidence of borrowing the amount, that itself suffice and petitioner is not required to produce the document. But the trial Court had committed a serious error. It is also contended that the cheques were admittedly issued as

admitted in the reply notice. The trial Court ought to have drawn the presumption under Section 139 Act and convicted the accused for the offence alleged. The petitioner established all the ingredients of Section 138 of the Act and requested this Court to set aside the acquittal and convict the 1st respondent for the offences punishable under Section 138 of the Act.

7. During hearing, learned counsel for the petitioner vehemently contended that the burden is on the accused to prove that the cheques were not issued in lieu of discharge of debt due to the petitioner either in full or part of the debt due and that the 1st respondent failed to discharge initial burden, which he is bound to, under Section 139 of the Act. When the cheque was issued towards discharge of part or full debt due to the petitioner, and in such a case, the Court would have convicted the accused because the petitioner complied with all the formalities required under Section 139 of the Act, by issuing notice within the time specified. He also drawn attention of this Court to the order of return of promissory note vide Crl.M.P.No.5029/2003 under Section 219 of Cr.P.C. As such filing of promissory note along with the complaint is suffice and dismissing the complaint on the sole ground that the promissory note is not marked, is illegal and prayed to convict the accused under Section 138 of the Act.

8. None appears for respondents despite service of notice.

9. A bare look at the compliant shows that the basis for prosecution is promissory note dated 10.12.2000 for Rs.20,000/- referred supra. Therefore, the very basis or foundation for the claim of the petitioner is promissory note, which the petitioner

admittedly filed along with the complaint. Mere filing of promissory note along with the complaint and taking back for other proceedings is not suffice to conclude that the 1st respondent/accused executed the promissory note, more particularly when the 1st respondent in the reply notice dated 12.08.2003 at para 2 categorically denied the very borrowing and execution of promissory notice and issue of cheques. But at the later part of para, he admitted about issue of two cheques intentionally in connection with a transaction for purchase of colour TV. Since the basis for issuing cheques as per allegation made in the compliant is promissory note, while the borrowing and execution was denied by the 1st respondent, the initial onus of proof is on the petitioner/complainant to prove that the 1st respondent borrowed the amount and executed promissory note. If the petitioner establishes borrowing and execution of promissory note, then the burned will shift to the respondent to rebut the evidence and to substantiate his contention that cheques were not issued towards discharge of legally enforceable debt or liability.

10. Learned counsel for petitioner places reliance on a judgment in ***V.Munikrishnaiah v. C.Janakirama Naidu and another***[1] where in this Court held that burden to establish that the dishonoured cheque was not issued towards any legally enforceable debt or liability is on the respondent who is the drawer of the dishonoured cheque, but not on the appellant, who is the payee.

11. Even if the said principle is applied and that burden is upon the respondent to prove that the cheques were not issued towards

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discharge of legally enforceable debt, the respondent had examined D.Ws.1 and 2 and categorically asserted that he never borrowed any amount and executed promissory note. The presumption under Section 139 is rebuttable presumption and such presumption is rebutted and dispelled, by examining D.W1 and D.W2.

12. However, when the very basis for the claim of the petitioner that 1st respondent borrowed by executing promissory note, until and unless the execution of promissory note is proved, the burned is certainly on the petitioner to prove that the cheques were issued towards discharge of legally enforceable debt or liability. Here petitioner failed to establish very borrowing and execution of promissory note. Despite the denial in reply notice marked as Ex.D1 dated 12.08.2003, mere filing of promissory note and taking back for different purpose would not amount to admission of claim of the petitioner. Even if the document is available on record, till it is marked as exhibit, it cannot be considered for the purpose of deciding dispute between the parties more particularly borrowing and execution of promissory note. Therefore, the petitioner failed to establish the very existence of legally enforceable debt. In such a case, the burden will not shift on to the 1st respondent and rebut the presumption under Section 139 of the Act. Therefore, it is difficult to hold that the 1st respondent failed to discharge initial onus of proof that rests on him.

13. The trial Court taking into consideration the fact and circumstances, more particularly, failure of the petitioner to establish the very existence of debt under the promissory note, declined to convict the accused, dismissed the complaint and the

finding of the trial court cannot be found fault. The petitioner having failed to produce the original promissory note and took back. Normally procedure to be followed by the petitioner/complainant is to send for the documents from the Civil Court and after marking the same as exhibit; on substituting a certified copy of the same, the doubt shall be sent back to the Civil Court. Instead of following such procedure, 1st respondent is lamenting the trial Court, the petitioner failed to prosecute the proceedings in accordance with law. As such, the contentions of the petitioner cannot be accepted.

14. The powers of this Court under Section 397 and 401 of Cr.P.C., are limited and this Court normally would not interfere with the fact findings recorded by the Court below unless there is perversity or apparent error in the finding recorded by the Court below. Apart from that there is a clear interdict under Section 401 Cr.P.C which does not confer the power on the revision Court to convert the acquittal into conviction. Keeping in mind the powers of revision under Section 397 and 401 of Cr.P.C.,, I am not inclined to convert the acquittal into conviction. Therefore, I find no merit in this Criminal Revision Case and it deserves to be dismissed

15. In the result, the revision case is dismissed. No order as to costs.

16. Miscellaneous petitions, pending if any shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 01-09-2017
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