

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRL.R.C.NO.385 OF 2016

ORDER:

This criminal revision case is filed under Sections 397 and 401 of Cr.P.C. challenging the judgment, dated 20.01.2016 in CrI.A.No.566 of 2014 passed by the IV Addl. Metropolitan Sessions Judge, at Hyderabad confirming the judgment dt.30.05.2014 in C.C.No.237 of 2013 passed by the II Addl.Special Magistrate, Hyderabad.

2. The second respondent herein filed a private complaint against the petitioner for the offence punishable under Section 138 of Negotiable Instruments Act alleging that the petitioner borrowed Rs.10,90,000/- from the second respondent in the month of April, 2012 and in discharge of debt, the petitioner issued a cheque drawn on Development Credit Bank, Sanjeeva Reddy Nagar, Hyderabad in favour of the second respondent herein and on its presentation through his banker AP Vardhaman (Mahila) Co-operative Urban Bank Limited, Ameerpet Branch, the cheque was returned by his banker on 14.03.2013 with an endorsement that the cheque was dishonoured for the reason 'funds insufficient' with cheque returned memo, dt.16.03.2013. Thereafter, a notice dt.14.04.2013 calling upon the petitioner herein to pay Rs.10,90,000/- towards the amount covered by the cheque within the specified time. The petitioner having received the notice on 15.04.2013 did not comply the legitimate demand and no reply was issued and hence, filed the complaint before the Court by the first respondent herein for the offence punishable under Section 138 of Negotiable Instruments Act.

3. The trial Court found the petitioner guilty for the offence punishable under Section 138 of the Act, sentenced him to undergo imprisonment for a period of one year and to pay compensation of Rs.10,90,000/- within a

period of two months from the date of the order, with default sentence to undergo simple imprisonment for six months.

4. Aggrieved by the calendar judgment, dt.30.05.2014 in C.C.No.237 of 2013 passed by the II Special Magistrate, Hyderabad, the petitioner preferred an appeal before the Sessions Court and in turn, after hearing both counsel, dismissed the appeal by judgment, dt.20.01.2016 in CrI.A.No.566 of 2014 confirmed the conviction and sentence passed by the II Special Magistrate, Hyderabad having found no ground to interfere with the fact finding recorded by the trial Court.

5. Aggrieved by the concurrent findings of both trial and appellate Court, the present revision is filed on the ground that no notice was served on the petitioner and Ex.P-5 postal acknowledgement is not issued by the petitioner and signature appearing on Ex.P-5 is not that of the petitioner herein and when the notice was not served on the petitioner, the entire complaint is liable to be dismissed and apart from that the amount allegedly lent was not shown in the income tax returns of the second respondent and in such a case, the debt itself is not enforceable debt and the cheque was not issued towards discharge of legally enforceable liability and thereby the conviction and sentence passed against the petitioner by both trial court and appellate court are unsustainable and prayed to set aside the same by allowing the revision.

6. The learned counsel for the petitioner during hearing drawn the attention of this Court to Exs.P-5 postal acknowledgement and Ex.P-6 copy of income tax return for assessment year 2013-14 produced by the first respondent to substantiate his claim and Ex.P-5 does not bear the signature of the petitioner. Therefore, the petitioner did not comply the requirement under Section 138 of the Act i.e. the demand notice as required under law and consequently the conviction and sentence

passed by the trial Court as confirmed by the appellate court was vitiated. He also contended that when the petitioner denied the liability, it is for the second respondent to prove that the cheque was issued towards discharge of legally enforceable debt or liability and in the absence of any material, the conviction and sentence imposed by the trial Court as confirmed by the appellate Court cannot be sustained and prayed to set aside the same.

7. Per contra, the counsel for the first respondent argued totally in favour of the findings recorded by the trial Court while reminding this Court about powers vested on the revisional court under Section 397 and 401 Cr.P.C. which are limited and the fact findings recorded by the trial Court and appellate Court while exercising power of revision cannot be interfered with such fact finding generally unless those findings are manifestly perverse or patently erroneous. But, here no such perversity or error in the findings as pointed, thereby the court cannot interfere with the fact findings recorded by the trial Court and prayed to dismiss the revision, confirming the conviction and sentence imposed by the trial Court.

8. Considering rival contentions and material on record, the points that arise for consideration are:

- i) Whether the second respondent complied the requirements under Section 138 of Negotiable Instruments Act i.e issue of demand notice for payment of amount covered by dishonoured cheque within the time stipulated?
- ii) Whether the debt due by the petitioner is legally enforceable debt, if not, whether the fact findings recorded by the trial court and confirmed by the appellate court convicting the petitioner for the offence punishable under Section 138 of the Act is sustainable?

9. POINT NO.1: 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 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.

10. Thus, the powers of the High Court are limited, this Court cannot interfere with the concurrent fact findings recorded by the courts below.

¹ (1964) 1 Cr.L.J. 443 (SC)

² 48, Cr.L.J 173, 174 (Pat)

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 justice, though the power should be rarely exercised, as held by Apex Court in *S.P.S. JAYAM & CO. v. NEHRUSADAN*³.

11. 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 *BANSLAL v. LAXMAN*⁴. Keeping in view the limited powers of this Court under Section 401 Cr.P.C., I would like to appreciate the contentions of both parties.

12. The petitioner's main contention is that a notice in compliance of requirement under Section 138 of N.I. Act was sent which was not received by the petitioner/accused. Therefore, entire proceedings are vitiated. Proviso (b) of Section 138 of N.I. Act contemplates that the payee or the holder in due course of the cheque, as the case may be, 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 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. If the notice in writing was not sent, the entire proceedings vitiate. Here, in this case, Ex.P-3 is the office copy of legal notice, dt.13.04.2013 and Ex.P-4 is the postal receipts, dt.14.04.2013. These two documents establish that the notice was sent to the correct address of the petitioner. Ex:P-5 is the postal acknowledgement, dt.15.04.2013 acknowledging the receipt of the notice. But, according to the counsel for the petitioner, the signature appearing on the postal

³ 1977 Cr.L.J. 1101

⁴ (1986) 3 SCC 445

acknowledgement is not that of the signature of the petitioner herein. Service of notice on any one of the family members is sufficient service and receipt of notice and acknowledgement of the same by any one of the members of the family is sufficient as per Proviso (b) of Section 138 of N.I. Act. A similar question came up in a decision reported in C.C. ALAVIHAJI v. PALAPETTY MUHAMMED AND ANOTHER⁵, 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 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

⁵ (2007) 6 SCC 555

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.

13. 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 dishonour of 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. Hence, this point is held against the petitioner and in favour of the respondents.

14. POINT NO. 2: The other contention raised by the petitioner is that the cheque was not issued towards legally enforceable debt. The presumption under Section 139 of the N.I. Act which permits the court to raise presumption that the cheque was issued towards discharge of legally enforceable debt. The presumption under Section 139 of the Act is rebuttable in nature. However, such presumption can be dispelled by adducing independent evidence or by eliciting something in the cross-examination of the witnesses. But, in this case, the petitioner failed to rebut or dispel the statutory presumption contained under Section 139 of N.I. Act. On the other hand, the income tax returns for the year 2013-14, the balance sheet for the year ending by 31.03.2013 disclosed the amount in the right hand column of assets, the debt due by Venkat Reddy was shown as Rs.10,90,000/- since he paid Rs.10,000/- earlier. Therefore, the second respondent established that the petitioner is liable

to pay Rs.10,90,000/- and it was shown as an asset in the balance sheet ended by 31.03.2013 and it is sufficient to establish prima facie that the cheque was issued towards discharge of legally enforceable debt. But, the petitioner miserably failed to rebut the presumption under Section 139 of the N.I. Act. The trial Court and appellate court upon consideration of both oral and documentary evidence recorded a fact finding which cannot be interfered with while exercising jurisdiction under Section 401 Cr.P.C. Hence, I find no irregularity or illegality in the fact findings recorded by the trial Court as confirmed by the appellate court warranting interference of this Court exercising revisional jurisdiction. Consequently, the revision case is liable to be dismissed.

15. In the result, the criminal revision case is dismissed. Miscellaneous petitions, if any, pending in this case shall stand closed.

DATE:03-08-2017
ccm

M.SATYANARAYANA MURTHY,J



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Date:03.08.2017

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