

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL REVISION CASE No.194 of 2017

JUDGMENT:

This criminal revision case, under Sections 397 and 401 of Cr.P.C., is filed questioning the propriety and legality of the judgment, dated 30-12-2016 passed in CrI.A.No.13 of 2016 by the II Additional Sessions Judge, Nalgonda at Suryapet, confirming the conviction and sentence passed by the Special Magistrate, Suryapet, in C.C.No.329 of 2013 for the offence punishable under Section 138 of Negotiable Instruments Act.

The 1st respondent filed a complaint under Sections 190 and 200 of Cr.P.C., against the petitioner for the offence punishable under Section 138 of Negotiable Instruments Act, alleging that the complainant and one B. Rambabu (PW-2) are close friends and the accused is carrying on real estate business, he also started construction of residential apartment at Manikonda Jagir village of Rajendra Nagar Mandal of Ranga Reddy District in an area of 200 Sq. yards in Plot No.29 situated in Sy.No.36/aa. PW-2 has also purchased two flats bearing Nos.G1 and G2 in the said apartment, that the complainant, who is close friend of PW-2, also intended to purchase two flats in the same

apartment and the accused has offered to sell flat Nos.401 and 402 to the complainant for sale consideration of Rs.8,00,000/- per flat and that the complainant has also paid an amount of Rs.10,00,000/- to the accused on 22-08-2010 at Suryapet towards earnest money in the presence of PW-2 agreeing to pay the balance sale consideration amount at the time of handing over possession of the said two flats. As the accused failed to complete construction work of the flats within the stipulated and agreed time and as such the accused informed that he will return the earnest money of Rs.10,00,000/- to the complainant and cancel the agreement of sale entered into between him and the complainant. On 29-05-2011, the accused came to Suryapet along with PW-2 and issued post dated cheque Ex.P-1 for Rs.10,00,000/- in favour of the complainant in the presence of PW-2 and he has also taken back the agreement of sale dated 22-08-2010. At that time, the accused executed Ex.P-1, which was duly attested. On 01-07-2011, the complainant presented the cheque – Ex.P-1 in S.B.H. Main Branch, Suryapet for encashment but it was returned with an endorsement ‘insufficient funds’ to the credit of the accused along with cheque return memo. Thereupon a notice under Ex.P-5 was got issued demanding the petitioner to pay the amount covered by the cheque by RPAD to the office and residential addresses of the petitioner by courier. The petitioner received Ex.P-5 notice sent to his

office address and the notice sent to his residential address was returned with an endorsement as “not claimed”. Even after receipt of Ex.P-5 notice the petitioner had neither paid the amount covered by the cheque nor issued any reply. Hence, the complaint for the offence punishable under Section 138 of Negotiable Instruments Act.

The Magistrate took the case on file for the offence punishable under Section 138 of Negotiable Instruments Act and after securing the presence of petitioner/accused, copies of all documents were furnished to him under Section 207 of Cr.P.C. When the petitioner was examined under Section 251 of Cr.P.C., he pleaded not guilty and claimed to be tried.

During trial, on behalf of the complainant PWs.1 and 2 were examined and marked Exs.P-1 to P-10. After closure of evidence on behalf of the complainant the accused was examined under Section 313 of Cr.P.C., explaining the incriminating material that appeared against him in the testimony of PWs.1 and 2 and he denied the same. He himself was examined as DW-1 besides examining DWs.2 to 4 on his behalf and got marked Exs.D-1 to D-4.

Upon hearing argument of both the counsel and considering the material available on record the Magistrate found the accused guilty for the offence punishable under Section 138 of Negotiable Instruments Act and convicted him

to undergo rigorous imprisonment for six months and sentenced to pay an amount of Rs.15,00,000/- to the complainant towards compensation under Section 357 (3) of Cr.P.C.

Aggrieved by the conviction and sentence passed in C.C.No.329 of 2013 the petitioner/accused preferred an appeal before the II Additional Sessions Judge, Nalgonda at Suryapet in CrI.A.No.13 of 2016, which ended in dismissal by confirming the conviction and sentence passed by the Magistrate by judgment, dated 30-12-2016.

Aggrieved by the judgment of the appellate Court, the present revision is filed on various grounds. The main contention of the petitioner is that the Magistrate did not take into consideration the answers given by the accused in the examination under Section 251 of Cr.P.C. and the Magistrate also dismissed the application in CrI.M.P.No.905 of 2015 filed by the petitioner to send the dispute documents to the expert for comparison and opinion and atleast, the trial Court would have invoked Section 73 of the Indian Evidence Act in order to compare the disputed signatures with admitted signatures. The Courts below brushed aside Exs.D-1 and D-2 official registers which go to show that the petitioner/accused never approached the 1st respondent at Suryapet either on 22-08-2016 or 29-05-2011 as he was on duty, therefore,

there is an apparent error in finding the petitioner guilty for the offence punishable under Section 138 of Negotiable Instruments Act and requested this Court to set aside the impugned judgment.

During hearing, learned counsel for the petitioner did not represent the matter, despite granting time, listing the matter 'for dismissal. But this Court cannot dismiss the petition for default and this Court is entitled to decide the revision verifying the record as held in ***Misha Sharma v. Vinod Kumar Sharma***¹, wherein it is made clear that a revision petition cannot be dismissed for default. Even if the petitioner or his advocate does not appear, the court shall examine the record and decide the revision on merits.

The first and foremost contention raised in the grounds of revision is that the answers given in the examination under Section 251 of Cr.P.C., by the petitioner were not considered and the observations made by the trial Court with regard to answers given by the accused under Section 251 of Cr.P.C., is erroneous.

No doubt, the answers given in Section 313 of Cr.P.C., examination will have no evidentiary value but answers in Section 251 Cr.P.C., of the accused having bearing on the

¹ 1990 Cr.LJ. (NOC) 57 (Del.)

issue, therefore, the observations made by the trial Court based on such answers in Section 251 Cr.P.C., examination cannot be ignored totally as relevant. Even if such answers are ignored it is for the petitioner/accused to prove that the cheques were not issued in lieu of discharge of legally enforceable debt or liability in view of presumption under Section 139 of Negotiable Instruments Act and that apart the initial onus of proof is on the accused to prove, and dispel presumption under Section 139 of Negotiable Instruments Act by eliciting something in the cross-examination of PWs.1 and 2 or by adducing independent evidence. More curiously, the petitioner filed Crl.M.P.No.905 of 2015 with a request to send the disputed signatures along with admitted signatures to the expert for comparison and opinion, the trial Court declined to refer those signatures on the disputed documents along with admitted signatures. But the petitioner did not carry the matter into revision before the competent Court challenging the order in Crl.M.P.No.905 of 2015. In such case, the order passed by the Court below became final and the petitioner cannot lament the Court for his failure to prosecute the case effectively before the Magistrate.

It is also contended that Section 73 of Indian Evidence Act empowers the Magistrate to compare the disputed signatures with admitted signatures to form an opinion to

find out the genuineness of signatures on the disputed documents, such power has to be exercised sparingly in exceptional circumstances not in a routine manner.

Even if the Court did not exercise such power still it is the duty of the petitioner/accused to disprove that the cheques were not issued in lieu of the discharge of legally enforceable debt or liability and dispel the presumption under Section 139 of Negotiable Instruments Act.

The complainant by examining PW-2 and by producing Exs.P-1 to P-10 proved that the petitioner issued Ex.P-1 cheque in lieu of discharge of legally enforceable debt. Ex.P-1 is original transaction, dated 29-05-2011 and it is supported by evidence of PW.2 in whose presence Ex.P-2 was executed. Even the notice under Ex.P-5, entire transaction was narrated and notice was also received by the petitioner/accused but he neither issued any reply putting forth his defence at the earliest stage and nor paid amount covered by the cheque. Apart from that a notice was also sent to the residential address of the petitioner, which is returned with an endorsement un-claimed. The residential address is not disputed and in such case a presumption under Section 27 of General Clauses Act shall be drawn by the Court that a notice is deemed to be served.

Taking into consideration of the circumstances including issuance of Ex.P-1 and its presentation vide Ex.P-3, which is returned with an endorsement 'insufficient funds to the credit of the petitioner account', would suffice to conclude that the petitioner issued cheques in lieu of discharge of legally enforceable debt or liability.

It appears from the material on record that the petitioner was not present at the place where Ex.P-2 was executed and to prove the same he produced Ex.D-1 attendance register from October, 2009 to November, 2010 pertaining to office of accused and Ex.D-2 attendance register from May, 2011 to December, 2012 pertaining to office of accused. Based on these two documents he contended that he did not execute Ex.P-1 and issued Ex.P-2 but merely because he was in office at the time of execution of Exs.P-1 and P-2 cannot be ruled out in absence of production of any movement register maintained in office, he is also required to establish that there is no possibility to reach Suryapet within the leisure time available on that day.

Ex.D-3 is the Xerox copy of Demand Draft, dated 07-06-2013 for Rs.3,00,000/- and at best it would show that an amount of Rs.3,00,000/- is allegedly paid but it is not proved by the petitioner that it was issued in lieu of discharge of debt covered by Ex.P-2, therefore, there is absolutely nothing to

establish that the petitioner has paid any amount to the respondents.

On the other hand, if really no amount was due under Ex.P-2 why did he pay the amount covered by Ex.D-3 was not explained. Therefore, it is difficult for me to believe any of the defence set up by the petitioner while exercising power under Sections 397 and 401 of Cr.P.C. Both the trial Court and appellate Court recorded a finding of fact and this Court normally would not venture to interfere with the concurrent findings recorded by the Courts below, unless, there is manifest perversity or apparent error in the findings recorded by the Courts below. Here, nothing is brought to the notice of this Court about such manifest perversity or apparent error in the fact findings recorded by the Courts below, therefore, I am unable to interfere with the fact findings recorded by both the Courts below regarding commission of offence punishable under Section 138 of Negotiable Instruments Act. So far as punishment is concerned, the trial Court imposed sentence of R.I. for six months and to pay fine of Rs.15,00,000/-, which is inconsonance with the seriousness and gravity of the offence.

In fact, the Apex Court in **SUGANTHI SURESH KUMAR VS JAGDEESHA**², by imposing a flee-bite sentence, provisions of the act cannot be frustrated and directed the Courts to

² 2002 (1) SCR 269

impose appropriate punishment commensurate with the gravity of the offence, therefore, I find that the sentence imposed by the trial Court is in accordance with law.

In view of my forgoing discussion, I find no grounds to interfere with the judgment of trial Court in C.C.No.329 of 2013, which is confirmed by the appellate Court in CrI.A.No.13 of 2016 and consequently the revision case is deserves to be dismissed.

In the result, the Criminal Revision Case is dismissed, at the admission stage.

The Miscellaneous Petitions, if any, pending in this Criminal Revision Case shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

September 04, 2017

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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