

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.2318 OF 2017

ORDER:

This criminal revision case is filed questioning the conviction sentence passed by the Special Magistrate, Nandyal in C.C.No.490 of 2013, finding the accused guilty for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'Act'), sentencing him to undergo simple imprisonment for a period of three months and to pay compensation of Rs.2,12,000/- to the complainant under Section 357(3) Cr.P.C, which is confirmed by the V Additional District & Sessions Judge, Kurnool at Nandyal in CrI.A.No.104 of 2015 dated 14.07.2017.

The petitioner is accused in C.C.No.490 of 2013 entered into loan-cum-hypothecation agreement on 10.05.2011 No.NADY 20105090001 with the complainant for purchase of Tata Magic 2009 model vehicle bearing registration No.AP 21 TV 6372 for an agreement value of Rs.2,40,512/-. In terms of agreement, the accused paid only Rs.31,300/- towards instalments as on 01.12.2011. Thereafter, the accused failed to pay subsequent instalments and also did not produce the vehicle. Despite repeated demands made by the complainant, the accused issued a cheque bearing No.345621 dated 24.11.2012 for Rs.2,12,000/- in lieu of discharge of loan due to the complainant under the agreement referred supra.

On presentation of cheque by the complainant for collection with the collecting bank, i.e. HDFC Bank Limited, Nandyal Branch

on 26.11.2012, the said cheque was dishonoured on the ground of 'insufficient funds' and was returned with cheque return memo. Thereafter, notice under Section 138 proviso clause (b) was issued calling upon the accused to pay the amount covered by the cheque. Though the notice was received, no purpose was served. Therefore, the petitioner filed private complaint.

The Trial Court took the case on file and upon securing the presence of the accused by issuing summons after compliance of necessary formalities, the accused was examined under Section 251 of Cr.P.C. explaining the accusation made against him, but he pleaded not guilty and claimed to be tried.

During trial, P.Ws.1 to 3 were examined on behalf of the complainant and marked Exs.P-1 to P-7. On behalf of the accused, none were examined and no exhibits were marked.

After closure of the complainant's evidence, the accused was examined under Section 313 of Cr.P.C. explaining incriminating material appeared against him; he denied the same and reported no defence.

Upon hearing argument of both the counsel, the Trial Court found the accused guilty for the offence punishable under Section 138 of Act, sentencing him to undergo simple imprisonment for a period of three months and to pay compensation of Rs.2,12,000/- to the complainant under Section 357(3) Cr.P.C. Aggrieved by the order of the Trial Court, the accused preferred Crl.A.No.104 of 2015 which has ended in dismissal, confirming the conviction and sentence imposed by the Trial Court.

Aggrieved by the order in Crl.A.No.104 of 2015, the present criminal revision case is filed challenging the concurrent findings recorded by both the Trial Court and Appellate Court, on the ground that the complainant did not make out the essential requirements to constitute an offence punishable under Section 138 of the Act, more particularly, as per Clause (b) of proviso of Section 138 of the Act, which is *sine quo non* and in the absence of such compliance, there was no cause of action and both the Courts below did not consider this contention.

During hearing, learned counsel for the petitioner while reiterating the same, contended that, when no notice was served, the accused cannot be found guilty and therefore, the conviction and sentence imposed by both the Courts below are erroneous and prayed to set-aside the same.

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though section 401 of Cr.P.C. 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 failure to take proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to

individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of I.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. This Court normally cannot interfere with concurrent fact findings recorded by the Courts below, only in exceptional circumstances when findings are manifestly perverse or apparently erroneous.

At the same time, while deciding an application under Section 397 Cr.P.C, this Court cannot disturb the concurrent fact findings recorded by both the Courts, in view of the limited jurisdiction that conferred on this Court.

In view of the limited scope, the point to be decided by this Court is ***“whether the complaint complied Clause (b) of proviso of Section 138 of the Act?”***

According to the complainant, he had received cheque along with memo marked as Ex.P-4 after dishonour, on the ground of insufficient funds, the complainant issued original of Ex.P-5 notice dated 05.12.2012 and receipt of the same was acknowledged under Ex.P-6 on 06.12.2012. Acknowledgment of notice is disputed by the accused and if, Ex.P-6 is discarded, the material on record would not give rise to cause of action for filing a complaint for non-compliance of Clause (b) of proviso to Section 138 of the Act. Undoubtedly, the cause of action for filing a complaint is failure to pay the amount demanded after serving notice within the time

prescribed under Section 138 of the Act. Here, the original of Ex.P-5 dated 05.12.2012 was issued and the receipt of the same was acknowledged under Ex.P-6 dated 06.12.2012. The contention of the petitioner is that the acknowledgment does not bear the signature of the accused, though the acknowledgment bears the signature of the petitioner/accused, he denied the actual receipt of notice. Curiously, the address on the registered letter was not denied and when the notice was sent to the correct address by registered post, the Court shall draw a presumption under Section 27 of General Clauses Act that the notice is deemed to have been served to the petitioner/accused. Therefore, when notice was sent by registered post by drawing a presumption under Section 27 of General Clauses Act, the Court shall presume that the notice is deemed to have been served. Apart from that, the signature though disputed, the evidence of P.W.1 is sufficient to conclude that the petitioner/ accused acknowledged receipt of original of Ex.P-5.

A similar question came up in a decision reported in **C.C. Alavihaji v. Palapetty Muhammed and another**¹, 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

¹ (2007) 6 SCC 555

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.

In view of the law declared by the Court, when a notice was sent to the correct address by registered post and it bears the signature of the petitioner or some of his inmates of the house, this is non-compliance of Clause (b) to Section 138 of the Act and any payment covered by the dishonoured cheque would give rise to cause of action to file complaint. Therefore, I find no substance in

the contention raised by the learned counsel for the petitioner and consequently, the criminal revision case is dismissed, as it lacks merits.

In the result, criminal revision case is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:31.08.2017

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