THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.R.C.No.1989 of 2017

ORDER:

This criminal revision case is filed under Sections 397 and 401 Cr.P.C. challenging the judgment dated 16.05.2017 passed in Crl.A.No.598 of 2015 by the XVI Additional District and Sessions Judge-cum- XVI Additional Metropolitan Sessions Judge-cum-III Additional Family Court, Ranga Reddy District at Malkajgiri confirming the judgment dated 25.06.2015 in C.C.No.232 of 2013 passed by the Special Magistrate-I, Cyberabad at Malkajgiri, against the petitioner finding him guilty for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'the Act') and sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for two months.

2. The case of the prosecution in brief is that due to acquaintance with the 1st respondent, the petitioner approached him for loan of Rs.5,00,000/- promising to repay the same within one month. On several requests of the petitioner, the 1st respondent/complainant advanced Rs.4,00,000/- on 04.08.2012 by way of cash withdrawing from his father's account lying with UCO Bank and for the remaining sum of Rs.1,00,000/- he issued cheque bearing No.402411 to be drawn from his bank. The said amount was withdrawn, but the petitioner did not repay the same. As the petitioner failed to repay the amount as agreed, the 1st respondent insisted him for repayment. Thus, the petitioner issued a cheque bearing No.214335 and executed a promissory note for the amount already borrowed, but the promissory note was returned. Thereafter, even before payment of the amount, as the petitioner did not repay the same, with a malafide intention, filed C.C.No.100 of 2013 before X Special Magistrate, Hasthinapuram for the offence punishable

under Section 138 of the Act basing on cheque No.402411 for Rs.1,00,000/-. It is further contended that when the 1st respondent presented cheque bearing No.214335 issued by the petitioner drawn on Corporation Bank, Sainikpuri on 06.04.2013, it was dishonoured on the same day with an endorsement 'account closed'. Subsequently, the 1st respondent issued legal notice on 26.04.2013 in compliance of Clause (b) of proviso to Section 138 of the Act by speed post with acknowledgment due demanding for repayment of the cheque amount. But the said notice was returned with an endorsement 'no such person' on 29.04.2013.

3. The Magistrate took the case on file for the offence punishable under Section 138 of the Act and upon securing the presence of the petitioner/accused and after complying with the procedure under Section 207 Cr.PC., examined the petitioner/accused under Section 251 Cr.P.C., and explained the gist of accusation for the offence punishable under Section 138 of the Act, the petitioner pleaded not guilty and claimed to be tried.

4. During trial, on behalf of the complainant/1st respondent, PWs.1 to 3 were examined and marked Exs.P.1 to P.8 and after closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C. explaining the incriminating circumstances that appeared against him. The petitioner denied the same and he himself examined as DW.1 and marked Exs.D1 and D2.

5. Upon hearing argument of both the counsel, the trial Court found the accused guilty for the offence punishable under Section 138 of the Act, convicted and sentenced him as stated above.

6. Aggrieved by the conviction and sentence imposed under impugned calendar judgment, the petitioner preferred an appeal in Crl.A.No.598 of

2015 which was ended in dismissal by judgment dated 16.05.2017 confirming the conviction and sentence passed by the trial Court under impugned calendar judgment.

7. Aggrieved by the conviction and sentence of the appellate Court in Crl.A.No.598 of 2015, the present revision case is filed on various grounds mainly on the ground that the said cheque was not issued to discharge legally enforceable debt or liability and that the complainant did not adduce satisfactory evidence to establish the ingredients of the offence punishable under Section 138 of the Act. But the trial Court instead of dismissing the complaint, found the accused guilty erroneously and the same was affirmed by the appellate Court committing the same error. It is also contended that Ex.P.1 is not the conclusive proof to convict the accused for the offence punishable under Section 138 of the Act and in the absence of any material to establish that Ex.P.1 is not supported by any consideration, recording conviction of the accused by the trial Court and confirmation by the appellate Court is an apparent error, which warrants interference of this Court by exercising power under Sections 397 and 401 of Cr.P.C. and finally prayed to set aside the conviction and sentence passed by the trial Court and confirmed by the appellate Court dismissing the complaint.

8. When the matter was called on 05.10.2017 there was no representation on behalf of the petitioner. Hence, the matter is listed today under the caption for 'orders'. Even today also there was no representation for the petitioner to advance arguments. As per the decision in **Misha Sharma and others v. Vinod Kumar Sharma**[1] a criminal case cannot be dismissed for default, but this Court can decide the revision on merits without waiting for counsel or the petitioner.

[1] 1990 Cri.L.J. NOC 57 (Delhi)

Persuaded by the law declared by the Delhi High Court, I would like to decide the present revision case verifying the available material.

9. As seen from the material on record, cheque bearing No. 214335 was issued by the petitioner in favour of the 1st respondent/complainant and on its presentation, it was dishonoured on the ground that the account was closed and returned on 06.04.2013 with returned memo dated 08.04.2013. Thereafter, for non-compliance of Clause (b) of proviso to Section 138 of the Act, notice was issued by speed post with acknowledgment due, but the same was returned and the same was marked as Ex.P.6. Ex.P.1 is the cheque bearing No.214335, dated 06.04.2013 for Rs.5,00,000/-. These contentions are not in dispute. The grounds raised in the revision are formal in nature and did not raise any specific contention except contending that the complainant failed to establish requirements to constitute the offence punishable under Section 138 of the Act. To constitute the offence punishable under Section 138 of the Act, the following are the essential 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 from out of that account;
2. the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
3. that cheque should have been presented to 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. on such information no payment of the amount due on the dishonoured cheque within 15 days of the receipt of the notice by the drawer the complaint should be filed within one month;
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 15 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 payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

10. Keeping in mind the above requirements, the trial Court and the appellate Court held that since the 1st respondent/complainant established all the above six ingredients, the petitioner was found guilty.

11. This Court normally would not reappraise the entire evidence in view of the limited jurisdiction of this Court under Sections 397 and 401 of Cr.P.C. and this Court cannot interfere with the concurrent fact findings recorded by both Courts below unless those findings are manifestly perverse or apparently erroneous or without any evidence on record.

12. Here Ex.P.1 is the cheque bearing No.214335, dated 06.04.2013 for Rs.5,00,000/- and Ex.P.2 is the cheque deposit voucher, which establish that the cheque was deposited on 06.04.2013 itself and it was returned with an endorsement 'account closed' and thereupon, Ex.P.4-notice was issued demanding the petitioner to repay the amount covered by the dishonoured cheque within 15 days from the date of receipt of notice. But, the said notice was returned un-served, which was marked as Ex.P.6, with an endorsement 'no such person is available'. Taking advantage of return of the notice-Ex.P.6, the petitioner contended that no notice was issued and thereby the ingredients of offence punishable under Section 138 of the Act were not established. But the petitioner did not dispute the address mentioned on Ex.P.6 notice and when the address was not disputed and the notice was sent by registered post to the address of the petitioner, the Court shall draw presumption under Section 27 of the General Clauses Act to the effect that the notice is deemed to have been served.

13. A similar question came up in a decision reported in "***C.C.Alavihaji v. Palapetty Muhammed and Another***[2]**",** wherein the Apex Court after considering various provisions of the Evidence Act and Section 27 of General Clauses Act, 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 a 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 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 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.

14. Since the presumption is rebuttable, no evidence is brought on record to establish or dispel the presumption that the address mentioned in Ex.P.6 is correct address of the petitioner. In such circumstances, it

[2] (2007) 6 SCC 555

is difficult to hold that no notice was issued. The trial Court and the appellate Court believed that notice was issued under Ex.P.4 and by drawing presumption under Section 27 of the General Clauses Act held that the petitioner has complied with the requirement under Clause (b) of proviso to Section 138of the Act. Therefore, the fact finding recorded by the trial Court cannot be interfered with by this Court while exercising limited jurisdiction under Sections 397 and 401 of Cr.P.C., since the concurrent findings recorded by the Courts below are based on material on record.

15. It is also contended that based on Ex.P.1-cheque, the Court cannot draw presumption under Section 139 of the Act and it is not a conclusive proof that Ex.P.1 was issued towards discharge of legally enforceable debt. No doubt, the presumption under Section 139 of the Act shall be drawn in favour of the holder of the cheque. In such a case, when the question came before the Apex Court in **Vijay v Laxman and others[3],** the Apex Court concluded as under:

> "The standard of proof required for rebutting the presumption under Sections 118 and 139 of the Act is not as high as that required of the prosecution and is rebuttable on the preponderance of probabilities. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. The Courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted."

16. In the present case to rebut the presumption, the petitioner was examined as DW.1 and marked Exs.D1 and D2. Ex.D.1 is the promissory note executed by PW.3 on 06.06.2012 in favour of the accused for Rs.3,00,000/- and Ex.D.2 is the certified copy of the statement of account of the accused for the period from 01.01.2007 to 31.12.2007. At

[3] (2013) 3 SCC 86

best, Ex.D.1 supports the case of the 1st respondent that he advanced Rs.3,00,000/- on 06.06.2012 as contended in the complaint. Even assuming for a moment, if the cheque was issued towards discharge of the amount covered by the promissory note-Ex.P.1, but the cheque was for Rs.5,00,000/- inclusive of the amount of Rs.1,00,000/- covered by the cheque bearing No.402411 issued by the 1st respondent to the petitioner. It is the contention of the petitioner that a blank cheque bearing No.214335 was obtained from DW.1, but in the cross examination of PWs.1 to 3 a suggestion was put to them that during the year 2007 the complainant borrowed Rs.5,00,000/- from DW.1, one Satya Prasad, and the accused furnished his blank signed cheque as third party security and they denied the same. Therefore, there was no evidence to rebut the presumption. Even otherwise, it is improper to conclude that a cheque was issued by the petitioner as a third party security for the debt borrowed by the 1st respondent. If really, the complainant/1st respondent borrowed any amount from the third party and the petitioner stood as guarantor or surety, the cheques should be in favour of the creditor from whom the 1st respondent borrowed the amount. But such cheque need not be issued in favour of the debtor when he allegedly borrowed amount from third party. Therefore, this improper defence cannot be accepted and when issue of cheque is proved or admitted, the Court shall draw presumption under Section 139 of the Act. Even if the cheque was issued as a security and the debt was not discharged, the Court shall draw a presumption as held by the Apex Court in "***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd.***[4]

17. Here in this case, no positive evidence is advanced to rebut the presumption and thereby the trial Court found the accused guilty for the

[4] AIR 2016 Supreme Court 4363

offence punishable under Section 138 of the Act as he failed to repay the amount covered by the dishonoured cheque and consequently, sentenced the accused to undergo imprisonment as stated above. As there is no perversity in the order of the Courts below, this Court cannot interfere with the concurrent fact findings recorded by both the Courts below while exercising limited jurisdiction under Section 397(1) and 401 of Cr.P.C. Therefore, I find no ground to interfere with the concurrent fact finding of both Courts below and consequently, the criminal revision case is liable to be dismissed.

18. Accordingly, the criminal revision case is dismissed.

Miscellaneous petitions, if any, pending in the criminal revision case, shall stand closed.

M. SATYANARAYANA MURTHY J

Date: 11.10.2017
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