

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO
CRIMINAL REVISION CASE Nos.1732 & 1733 of 2016

COMMON ORDER:

Crl.R.C.No.1732 of 2016 was filed by the petitioner/accused impugning the order dated 09.03.2015 passed in Crl.A.No.52 of 2008 by the IV Additional District & Sessions Judge, Kurnool, confirmed the order dated 08.04.2008 passed in C.C.No.658 of 2005 by the Judicial Magistrate of First Class, Kurnool.

Crl.R.C.No.1733 of 2016 was filed by the petitioner/accused impugning the order dated 09.03.2015 passed in Crl.A.No.51 of 2008 by the IV Additional District & Sessions Judge, Kurnool, confirmed the order dated 08.04.2008 passed in C.C.No.265 of 2005 by the Judicial Magistrate of First Class, Kurnool.

At request of the learned counsel for both sides, both the matters are taken up together for common disposal.

C.C.Nos.658 & 265 of 2005 were filed by the complainant M/s. Elukuru Iron Mart, Kurnool represented by its partner Y.Dwarakanath, for the offence under Section 138 of the Negotiable Instruments Act (for short 'the Act') for dishonour of cheques Ex.P1 respectively bearing Nos.185896 and 185895 for an amount of Rs.5,93,885/- and Rs.40,880/- respectively, said to have been issued by the accused for the amount due. When the complainant presented the cheques for collection, the same were returned on the ground of 'insufficient funds', then he approached the accused and informed the same, but the accused requested the complainant to present the cheques in the first

week of February, 2005 and assured the cheques will be honoured. Accordingly, the complainant presented the cheques for collection on 19.05.2005 and 08.02.2005 respectively and the same were returned due to insufficient funds and the complainant got issued legal notices to the accused and notices were served on the accused, but the accused failed to make payment within the statutory period. It is from the sworn statement recorded and cognizance for the offence against the accused taken respectively and from examination and denial of commission of offence, trial of the two cases conducted and therefrom the learned Magistrate in C.C.Nos.658 & 265 of 2005 convicted the accused and sentenced to undergo simple imprisonment for six months and to pay fine of Rs.10,000/- (in default simple imprisonment for 2 months) and also further ordered to pay compensation of Rs.6,00,000/- and Rs.41,000/- respectively to the complainant. Aggrieved by the orders passed by the Magistrate, the accused preferred Crl.A.Nos.52 and 51 of 2008 on the file of IV Additional District and Sessions Judge, Kurnool. The learned Sessions Judge confirmed the conviction judgments passed by the learned Magistrate. Aggrieved by the concurrent findings of the Courts below, the accused filed the two revisions i.e., Crl.R.C.Nos.1732 and 1733 of 2016.

The respective grounds in the revisions vis-à-vis the oral submissions of the learned counsel for the revision petitioner/accused are that the judgments of the Courts below are illegal, arbitrary and contrary to the provisions of Section 138 of the Act without considering the contention of the accused of the legal notice was issued through 2nd respondent/complainant

i.e., M/s. Elukuru Iron Mart in the capacity of proprietary concern but not in the capacity of partner and also failed to appreciate the contention that the 2nd respondent i.e., Dwarakanath was not the partner of the firm, to have locus to maintain the complaints. Both the courts below failed to appreciate contention of accused that, the 2nd respondent's letter pad on which the authorization letter dated 08.04.1997 was stated given under Ex.P8 contains six digit phone number and the six digit number came into existence only after 2006 to say the same as antedated fabrication. The Courts below failed to consider the contention of the accused that 2nd respondent partnership deed was registered in the year 1994, but the said copy was not filed in the courts below, but the partner by name Y.Dwarakanath was joined in partnership on 01.04.1999 as per partnership deed, but the authorization letter dated 08.04.1997. Hence these two documents are manipulated by the 2nd respondent. The lower Court failed to consider that the 2nd respondent/complainant is not at all a partner of the firm i.e., M/s. Elukuru Iron Mart, he was not authorized to file the complaint since the firm registration certificate shows that it was registered in the year, 1994. It is therefrom sought to allow the revisions by setting aside the conviction judgments with concurrent findings of the courts below.

The learned Public Prosecutor representing the State and the complainant submits that the conviction judgments of the Courts below hold good and for this Court while sitting in revision within the limited scope there is nothing to interfere and hence to dismiss the two revisions.

Heard both sides and perused the material on record.

The 2 complaints shown filed by M/s. Elukuru Iron Mart represented by its partner Y.Dwarakanath for the offence under Section 138 of the Act against M.Venkateswar Reddy S/o. Ramchandra Reddy accused in both cases vide C.C.No.265 of 2005 based on cheque bearing No.185895 dated 27.12.2004 for Rs.40,880/- and C.C.No.658 of 2005 based on cheque bearing No.185896 dated 14.02.2005 for Rs.5,93,885/- both drawn on SBH towards alleged part satisfaction of the credit dealings of the material purchased by accused contractor from the complainant and when the cheques presented since returned dishonoured from the statutory notice issued for non-payment. Among the evidence of PW.1 with reference to Exs.P1 to P13 in C.C.No.265 of 2005 and PW.1 evidence with reference to Exs.P1 to P12 in C.C.No.658 of 2005, Ex.P8 of C.C.No.265 of 2005=Ex.P7 of C.C.No.658 of 2005, is the partnership firm registration certificate and the date of registration was 27.05.2005. Ex.P13 in C.C.No.265/2005=Ex.P12 in C.C.No.658/2005 is the partnership deed between PW.1 Dwarkanath and his wife Smt. Jaya Lakshni as partners of the partnership at will vide deed dated 01.04.1999. The other partner supra issued authorization to PW.1 on behalf of the firm to file the complaint and to depose and prosecute the cases. Thus as rightly concluded by the trial Court particularly at Para 9 of the judgments, the complainant got locus standi to maintain the 2 complaints.

So far as the contentions in the grounds of revision of the letter head with 6 digit phone number, the trial Court observed there is no any positive evidence to support the said contention of

accused as to when it came into force of 6 digit phone number for the mentioning in the letter pad showing in the year 1999 onwards. There is no explanation by the accused for non-giving of reply to the legal notice even served and acknowledged suffice to draw inference of, but for any defence he could have been issued reply denying the statutory notice contents of the 2 dishonoured cheques as laid down by this Court in **Chapala Hanumaiah Vs. Kavuri Venkateswarlu**¹ with reference to Section 3 read with Section 149 of the Evidence Act and also by the three Judge Bench of the Apex Court in **Rangappa Vs. Sri Mohan**² particularly at Para 15. Once the same is evidence and there is material to substantiate the amount due under the credit dealings for the purchase made by the accused for which the 2 cheques said to have been issued showing legally enforceable debt or other liability apart from the signatures on the cheques issued by the accused rooted from his account not in dispute, the burden lies on the accused to rebut under the reverse onus clause as laid down in **Rangappa** supra there is nothing from the cross examination of PW.1 by accused to rebut the same by preponderance of possibilities apart from nothing to discredit the credit dealings and transactions under which the amounts due covered by the respective cheques. The trial Court rightly thereby came to the conclusion so also in confirming the same by the lower appellate Court and also in their answering of the firm registered already the complained cases respectively are maintainable and there is no legal bar, for this Court while sitting in revision there is nothing to interfere, including from the

¹ 1971 (1) An.W.R. 65

² (2010) 11 SCC 441

statutory notice once mentioned the cheques and dishonour and demand to repay.

So far as conviction judgments concerned on finding of guilt, but for if at all to modify the sentence either of imprisonment or of fine as the case may be. In this regard in C.C.No.265 of 2015 confirmed by Crl.A.No.51 of 2008, for the Ex.P1 cheque amount of Rs.40,880/- the trial Court found accused guilty and sentenced the accused to undergo six (6) months simple imprisonment and to pay fine of Rs.10,000/- in default to under two months simple imprisonment and further compensation of Rs.41,000/-. A combined reading of Section 138 read with Section 143 of the Act and Section 357 Cr.P.C. though under Section 143 of the Act the Court can impose sentence of imprisonment up to one year and fine unlimited for the bar under Section 29 Cr.P.C. has no application. Once fine is imposed compensation to be paid out of the fine and not otherwise, the lower appellate Court in Crl.A.No.51 of 2008 thereby set aside the fine amount by ordering refund in confirming on other aspects, however the same also requires modification by following the expression of the Apex Court in **Somnath Sarka vs. Utpal Basu Mallick**³ from the principle laid down and also from the say of the endeavour of the complainant is to recover rather than punishing the accused & keeping in jail, by converting into simple imprisonment till raising of the day and to pay fine of Rs.60,000/-, out of which Rs.10,000/- goes to the State and remaining Rs.50,000/- as compensation to the complainant.

³ 2013 (16) SCC 465

Likewise in C.C.No.658 of 2005, the accused sentenced to undergo six months simple imprisonment and fine of Rs.10,000/- in default to undergo two months simple imprisonment and Rs.6,00,000/- compensation from Ex.P1 cheque for Rs.5,93,885/- modified by the lower appellate Court to the extent of setting aside the fine of Rs.10,000/- by confirming other aspects, however the same also requires modification by following the expression of the Apex Court in **Somnath Sarka supra** from the principle laid down and also from the say of the endeavour of the complainant is to recover rather than punishing the accused & keeping in jail, by converting into simple imprisonment till raising of the day and to pay fine of Rs.7,50,000/-, out of which Rs.50,000/- goes to the State and remaining Rs.7,00,000/- as compensation to the complainant.

Subject to the above observations, both the criminal revision cases are allowed in part.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 23.03.2017
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