

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.101 OF 2017

ORDER:

This Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed to quash the proceedings against the petitioner in C.C. No.230 of 2016 pending on the file of III Additional Munsiff Magistrate, Ongole, for the offence punishable under Section 138 of Negotiable Instrument Act, 1882 (for short, 'the Act') on various grounds.

The second respondent filed a complaint alleging that the petitioner herein borrowed from him an amount of Rs.5,00,000/- for his family expenses, executed promissory note on the even date i.e. 28.06.2013 agreeing to repay the same with interest @ 24% P.A. either to him or to his order as and when demanded. Despite several demands, the petitioner did not discharge the debt due under promissory note, but the petitioner issued a cheque bearing No.050086 dated 28.04.2016 for Rs.5,00,000/- drawn on IDBI Bank, Ongole, in lieu of discharge of part of the debt. The cheque was presented in United Bank of India, Srinivasa Colony, Kurnool Road, Ongole on 28.04.2016 for encashment and the same was returned with a Memo of IDBI Bank, Ongole stating that 'Account closed'. Thereupon, he issued notice dated 02.05.2016 in compliance of proviso (b) to Section 138 of Negotiable Instrument Act, 1881 (for short, 'the Act'), but it was returned as 'unclaimed'. Hence filed the complaint.

The main ground urged by the counsel for the petitioner before this court is that the complaint is lacking main ingredient that the petitioner did not repay the amount covered by the cheque after notice and placed reliance on the Judgment of the Madras High Court in **K.DEVARAJ v. T.K. KOYA**¹, wherein it was held that it is mandatory on the part of the complainant to state in clear terms whether the accused had paid the amount, or gave any other explanation withholding the payment or any other excuses after issuing notice as mandated under the Proviso (b) to Section 138 of the Act.

Learned counsel for the petitioner mostly relied on the principle laid down in the judgment of the Madras High Court and requested to quash the proceedings against the petitioner in C.C. No.230 of 2016.

The Judgment relied on by the counsel for the petitioner is the Judgment of the Madras High Court, which is not binding precedent under Article 141 of the Constitution of India, but it has got persuasive value. Even otherwise, according to Proviso (b) to Section 138 of the Act, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and according to Proviso (c), the drawer of such cheque fails to make the payment of the said amount of

¹ 2003 (10) SCALE 1123

money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

The facts of the case are peculiar for the reason that a notice in compliance of Proviso (b) to Section 138 of the Act was issued, but it was returned with an endorsement 'unclaimed'. The issue of notice is not in dispute. But when a notice was issued to the correct address of the petitioner by registered post to correct address, there is a presumption under Section 27 of General Clauses Act, 1897 that the notice is deemed to have knowledge contents of notice. In such case, it is for the petitioner to pay the amount. But such presumption can be rebutted by placing independent evidence and by eliciting something in the cross-examination of the prosecution witnesses, to dispel the presumption that petitioner is aware of the contents of the notice.

Even otherwise when the notice was returned as 'unclaimed', question of demand made by the second respondent does not arise and the compliance of Proviso (c) to Section 138 of the Act would arise only when a notice was served on the respondent. Therefore, it is not mandatory to make specific mention about the non payment of amount after receipt of notice. In this case, notice was not served, though sent to correct address by registered post. Therefore, the principle laid down in the above judgment cannot be applied to the present facts of the case, for the simple reason that the notice was served on the respondent in the facts of the above judgment. But still the

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complainant did not make any mention about non payment of any amount in the complaint. In view of variation in the facts, it is difficult to apply the principle though the judgment has got persuasive value.

Hence, it is not a fit case to quash the proceedings at this stage, consequently, the criminal petition is liable to be dismissed.

In the result, the criminal petition is dismissed at the stage of admission.

Miscellaneous petitions, if any, pending in this criminal petition, shall stand closed.

Date: 05.01.2017
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M. SATYANARAYANA MURTHY, J

