

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHARA PRADESH**

CRIMINAL PETITION Nos.4362, 4363, 4364 & 4365 of 2017

Between:

PTNVR Sudharshan

.....Petitioner

and

The State of Telangana and another

.....Respondents

Date of Judgment pronounced on : 25-10-2017

HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No
2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes/No
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/No

*** HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO**

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< **GIST:**

> **HEAD NOTE:**

! Counsel for the petitioner : Sri Y Rama Rao for Sri Parsa
Ananth Nageswar Rao

^ Counsel for the respondents : Sri Milind G. Gokhale
Learned Public Prosecutor

? **Cases referred**

1. (2014) 11 SCC 790
2. (2005) 2 SCC 217
3. (2002) 1 SCC 234
4. (2014) 12 SCC 539
5. 2016 1 ALD (Crl.) 1044 (AP)
6. (2008) 13 SCC 678
7. 2017 (4) ALT 488

HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO**CRIMINAL PETITION Nos.4362, 4363, 4364 & 4365 of 2017****COMMON ORDER:**

The petitioner is accused of C.C.Nos.484, 486, 563 & 498 of 2013 on the file of XI & XXIII Special Magistrate, Erramanzil, Hyderabad respectively, for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act') respectively from the 4 private complaints of the 2nd respondent-defacto complainant selfsame entity against the accused.

2. The averments in the respective complaints of the 4 cases supra that were taken cognizance show that the accused and Mr. Umesh Chandra Lunker, the representative of the complainant company are well known to each other and having certain financial and business relations. It is averred that taking advantage of such acquaintance, accused has borrowed an amount of Rs.1,50,00,000/- on various occasions for purchasing the shares of various companies and subsequent to it, the complainant even made several requests to repay said amount, accused is postponing without repayment on one pretext or the other and ultimately, by expressed his inability to repay the entire loan at a time, requested the complainant to accept the repayment in installments and the complainant accepted for such repayment in installments by taking into consideration of long relation between them. Accordingly, the accused executed an agreement dated 18.06.2011 with Mr. Umesh Chandra Lunker, the representative of the complainant company to repay the entire loan amount of Rs.1.5 crores in 30 equal installments of Rs.5,00,000/- each and also assured that he will issue 30 postdated cheques with duration

of 15 days for each cheque and had issued postdated cheques to the complainant and also executed promissory notes to repay the amount. It is further averred that after entering into agreement with repayment schedule, the accused committed default even from the first installment itself on 08.08.2011 covered under the 1st 3 cheques bearing Nos.377121, 377122 & 377123 totaling Rs.15 lakhs and later paid the said 3 cheques amount at a time after committing default and taken back the cheques and promissory notes issued by him towards repayment of first three installments out of 30 installments. The complainant presented out of the other, the 4 cheques bearing Nos.377132, 377133, 377147 & 377148 for Rs.5,00,000/- each dated 15.12.2011, 31.12.2011, 30.06.2012 & 15.07.2012 drawn on Karnataka Bank Limited, Bhupal Towers, Rajbhavan Road, Hyderabad, with its bankers namely HDFC Bank Limited, Suryodaya, Begumpet, Hyderabad, that were returned dishonoured with an endorsement "funds insufficient". Thereafter the complainant issued legal notices to the accused, however the accused neither complied with the said notice nor denied the liability and is thereby liable for the offence under Section 138 of the Act from the cause of action accrued and the respective 3 cheques in the 3 cases to take cognizance. It is pursuant to which and from the respective sworn statements, cognizance was taken viz., C.C.No.484 of 2013 is for cheque bearing No.377132 dated 15.12.2011, C.C.No.486 of 2013 is for cheque No.377133, C.C.No.563 of 2013 for cheque bearing No.377147 dated 30.06.2012 and C.C.No.498 of 2013 is for cheque bearing No.377148 dated 15.07.2012.

3. The contentions in the quash petitions are that the 4 complaints were filed by the private limited company, whereas the agreement entered by the accused is with the individual i.e., Mr. Umesh Chandra Lunker and thus it cannot be enforced in law. It is also contended that out of 6 cheques, C.C.Nos.790 & 1162 of 2012 were also filed for dishonour of 2 cheques, in which initially trial Court convicted the petitioner/accused for 3 months, against which the petitioner preferred Crl.A.Nos.387 & 388 of 2013 on the file of III Metropolitan Sessions Judge, Hyderabad and the same were allowed by setting aside the judgment of the court below. It is further contended that the cheques in question are some of the exhibits P4 to P9 in Crl.A.No.388 of 2013, which has become final and the present cases which are arising out of the same transaction barred by law, even no case made out and the continuation of the proceedings against the accused are nothing but abuse of process and are liable to be quashed.

4. Learned counsel for the petitioner/accused reiterated the same and sought for allowing the criminal petitions. Whereas it is the submission of the learned counsel for the complainant that the prosecution is sustainable against the quash petitioner and the learned Magistrate has rightly taken cognizance, there is nothing to interfere with the cognizance orders and thereby sought for dismissal of the quash petitions.

5. Heard both sides at length and perused the material on record.

6. The copy of the agreement dated 18.06.2011 filed, contents not in dispute, shows the same was entered between Mr.

PTNVAR Sudarsan, the accused/quash petitioner in the 4 quash petitions herein and Mr. Umesh Chandra Lunker (the representative of the 2nd respondent, complainant entity). The agreement further speaks that said Sudarsan borrowed amounts total Rs.1.5 Crores at various times for personal needs and for purchase of shares from M/s. Neha Investments Private Limited and Mr. Umesh Chandra Lunker (said Neha Investments Private Limited is the complainant and said Lunker is its authorized representative in filing the complaints). The agreement further speaks that said amount payable in 30 equal installments of Rs.5,00,000/- each starting from 30.06.2011 within a gap of 15 days each and said Sudarsan for that handed over the 30 post dated cheques and promissory notes against the payments to be done to Lunker and Lunker will hand over the pronotes to Sudarsan once the cheques are cleared, no shares will neither be sold nor transferred by Sudarsan till all payments are made. This will be kept as security with M/s. Neha Investments Private Limited, the complainant. The 30 cheques are referred with respective amounts of each Rs.5,00,000/- and dates of the cheques shown issued post dated pursuant to the agreement date as payable in future dates therefrom and in case of non payment to utilize the cheques if any. The contentions of the accused in quash petitions therefrom there is no any debt or legally enforceable liability for which the cheques were issued, but cheques given only to keep as security before answering to that it is also to refer the complaint filed by Neha Investments Private Limited represented by Lunker and not individual array as Umesh Chandra Lunker also as co-complainant along with the complaints there is no

authorization filed. There is no verification of the fact are within the personal knowledge of the representative of the entity. However, the fact remains from the very agreement it cannot be said much less to contend by accused of said Launker is not aware of the fact as the quash petition averments itself contend that the agreement is with the Lunker and cheques are taken by Neha Investments Private Limited and the prosecution is unsustainable.

7. Whether there is sufficient compliance for sustainability of the complaint is though in question, here more particularly with reference to the expression of the Constitution Bench of this Court in **A.C. Narayanan Vs. State of Maharashtra**¹ in answering the reference with reference to the earlier expressions in **Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Limited and Others**² and **M.M.T.C. Limited and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another**³, no doubt, the **AC Narayanan supra** clarified that there is no conflict between the earlier expressions and MMTC also speaks the defect is a curable one.

8. Thereby this aspect of the locus of the complainant without authorization filed the four complaint cases and same are not maintainable is left open to raise before trial Court any such defence including as to any non-mention of he got personal knowledge of the facts and the consequence of it.

9. Even coming to the agreement entered with Lunker and cheques given to the Neha concerned, even the agreement speaks

¹ (2014) 11 SCC 790

² (2005) 2 SCC 217

³ (2002) 1 SCC 234

the amounts borrowed from Neha and Lunker and also form acquaintance to the accused with Lunker and accused agreed to pay the amounts for which the cheques and pro-notes executed to serve as security. The cheques in question given are post dated cheques undisputedly. Whether Lunker is separately to be arrayed as co-complainant is also a matter left open to raise as part of defence of the accused before trial Court.

10. Mainly coming to the cheques given are only to serve as security and no legally enforceable debt or other liability that was the issue raised is concerned, the Apex Court in **Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited**⁴ observed that when cheque issued for advance payment and not for existing liability and the transaction for which advance payment made was on the agreement to supply material, once not supplied there can be no liability to hold as debt or other liability within the meaning of Section 138 of the Act. This Court in **Nusun Genetic Research Limited and Others Vs. The State of Telangana**⁵ on similar issue raised in this regard before this Court referring to **Indus Airways supra** observed at Para 20 is as follows:

“Further more in this context, this Court is constrained to refer for more clarity of the position of law the expression of the Apex Court in M/s. Indus Airways Pvt. Ltd v. M/s. Magnum Aviation Pvt. Ltd.; wherein it was held referring to the expressions of several High Courts in M/s. Swastik Coaters Pvt. Ltd. v. M/s. Deepak Brothers (2013 (1) ALT (Crl.) 62), Shanku Concretes Pvt. Ltd v. State of Gujarat (2012 (7) SCC 621), Balaji Sea goods Exports (India) Ltd v. Mac Industries Ltd. and supply House, represented by Managing Partner v. Ullas, Proprietor Bright Agencies and another (2015 (3) ALT (Crl.) 421), that once cheque is issued for supply of goods or to perform an act once there is a breach of the same, it can be said that there is no legally enforceable debt or other

⁴ (2014) 12 SCC 539

⁵ 2016 1 ALD (Crl.) 1044 (AP)

liability even cheque presented returned dishonoured and all other ingredients of Section 138 of the Act even satisfied, the prosecution under Section 138 of the Act, no way sustainable. The stress here from the expression, though in relation to different facts, as what is requirement to be satisfied under Section 138 of the Act is not mere giving of cheque admitting for a particular amount from the account of the drawer with signature of the drawer and its dishonour within the statutory time when presented for insufficient funds or the like and giving of statutory notice and non-payment and from accrual of cause of action filing of complaint taking cognizance but also the pre-requisite saying of existence of legally enforceable debt or other liability. No doubt as per Rangappa (supra) there is a presumption under Section 139 of the Act in relation to legally enforceable debt or other liability and the burden is on the accused to rebut the presumption once cheque issued admitted from his account is not in dispute equally by invoking presumption under Sections (a) to (f) of Section 118 of the Act. As it is clear from the factual matrix supra the cheque issued is not for any legally enforceable debt or any other liability but for as security for the so called one time settlement under which already borrowed amount covered by two cheques issued and criminal prosecutions pending and those not even withdrawn by virtue of one time settlement apart from there is a stipulation for payment of amounts and not only that the cheques also obtained and the stipulation is not to the dates of the post-dated cheques to commence but even prior to the date of post dated cheques on its face and apart from it for non-payment and dishonour of cheques even subsequently presented on the date mentioned of the post dated cheques the remedy provided is to give a go-bye to the terms and proceed for the original amount when such is the case when the very settlement is no way in subsistence from not adhering to it and any cheques issued pursuant to it to enforce while going back to the settlement that too when earlier prosecution is pending though strictly not within the scope of Section 300 Cr.P.C. which is directly within the meaning of no legally enforceable debt or other liability for not to apply the presumption from the undisputed facts for no other independent debt or other liability.”

11. Having regard to the above legal position, coming to the agreement refers the amount are due and it is stipulated as to the mode of discharge and cheques and pro-notes given in this regard with post dates and by which dates the payments to be made and

if paid the pro-notes to be returned so also if at all the cheques even leave about no specific mention for return of cheques. The agreement speaks thereby the cheques and pro-notes given as security. It is not a case like in **Indus Airways supra** as observed at Para 20 of **Nusen supra** for the difference therein of **Indus supra** is cheques given in advance for the goods to be supplied and goods when not supplied question of liability or debt for nothing in existence thereby does not arise and the case on hand is as referred supra some what different.

12. Having regard to the above, any such contention is also left open to the accused for disputed factual aspects, the trial Court can decide. No doubt in **Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited and Others**⁶ it is observed in Para 22 that ordinary defence of an accused although appears to be plausible should not be taken into consideration for exercise of jurisdiction under section 482 Cr.P.C and High Court at that stage would not ordinarily enter into a disputed question of fact, it however does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuation of criminal proceedings would amount to abuse of process of Court or that complaint petition is filed mere causing harassment to the accused. Even from principle laid down in **Suryalakshmi supra** and but for the agreement, the accused filed no material to show the amount covered by the agreement in question/liquidated are nothing but payable, this Court cannot discuss anything further but for left open all defences to raise during trial. Even coming

⁶ (2008) 13 SCC 678

expression of another Single Judge of this Court in **R. Chennakesava Rao Vs. P. Laxmi Narasaiah and Another**⁷ a person lending amount or advance loan to other on payment of interest basis would fall within the meaning of money lender under section 2(7) of AP (TA) money lenders Act concerned that defence is also left open to the accused to raise during trial for the trial Court to consider. As the 4 cheques in question between same parties post dated cheques issued at the time pursuant to the agreement and also within the meaning of Sections 223 r/w 219 Cr.P.C., the trial Court is directed to club all the four cases and try by common evidence without any need of simultaneous proceedings and separate disposal of one after other as even Section 219 Cr.P.C. limits to three offences of same kind, Section 223(d) lifts the limit in its saying persons accused of different offences if committed in the course of same transaction can be tried in one trial and herein all the cheques post dated given are at a time pursuant to the transaction covered by the agreement dated 18.06.2011.

13. With these observations, the four Criminal Petitions are disposed of. Needless to say there is no resjudicata or estoppel for the present proceedings from earlier criminal case filed for some other cheques filed and the case for the offences under Section 138 of the Act ended in conviction and in appeal reversed if any for not relating to the cheques in question, even copies of the cheques in question referred in the earlier case, but for to say the trial Court can consider the findings in the trial Court and appellate Court judgments of the earlier cases between the parties viz., Crl.A.Nos.387 & 388 of 2013. It is also made clear that all

⁷ 2017 (4) ALT 488

defences of accused are available before the trial Court including on maintainability of the complaint cases for want of authorization by the individual to represent the complainant entity. Needles to say further if at all any NBWs are pending as also ordered in Crl.R.C.No.981 of 2017, the petitioner is at liberty to surrender before the learned Magistrate and execute bonds with or without sureties as per section 88 Cr.P.C for his future due appearance to face trial in the cases.

Consequently, miscellaneous petitions, if any shall stand closed.

Date: 25.10.2017
Note: L.R. Copy to be marked
(B/o)
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JUSTICE Dr. B.SIVA SANKARA RAO

