

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL APPEAL No.1190 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) Cr.P.C. challenging the judgment dated 11.07.2006 passed in C.C.No.46 of 2005 on the file of the Court of I Additional Munsif Magistrate, Tenali, wherein whereby the accused was found not guilty for the offence under Section 138 of Negotiable Instruments Act (for short 'the Act') and was consequently acquitted of the said offence.

2. The factual matrix that led for filing of the present appeal is as follows: On 30.10.2001, the accused borrowed an amount of Rs.38,000/- from the complainant and executed a promissory note in his favour agreeing to repay the same with interest. On 12.08.2014, the accused issued a cheque bearing No.150261 for an amount of Rs.50,000/- in favour of the complainant drawn on State Bank of India, Tenali. When the complainant presented the cheque in Andhra Bank, Gandhi Chowk Branch, Tenali, on 14.08.2014 for collection, the same was returned with an endorsement 'insufficient funds' as per the memo dated 26.08.2014. The complainant got issued a notice dated 27.08.2014 to the accused directing him to repay the amount within fifteen days. The notice sent to the accused was returned on 13.09.2014 with an endorsement that the accused is not in

the village and left without instructions. The complainant having no other go filed the complaint under Section 200 Cr.P.C. against the accused for the offence punishable under Section 138 of NI Act on the file of the Court of I Additional Munsif Magistrate, Tenali. The learned Magistrate, having satisfied with the material placed before him, has taken cognizance of the offence under Sec.138 of Negotiable Instruments Act and issued summons to the accused. On appearance of the accused, copies of all documents were supplied to him under Sec.207 Cr.P.C. and the accused was examined under Sec.251 Cr.P.C. for which he denied the commission of offence and claimed to be tried.

3. In order to prove the guilt of the accused, the complainant examined himself as P.W.1 and got marked Exs.P1 to P5. On behalf of the accused, no oral or documentary evidence was adduced. Basing on the oral, documentary evidence and other material available on record, the trial Court dismissed the complaint on the ground that no notice was served on the accused. Feeling aggrieved by the judgment of the trial Court, the complainant preferred the present appeal.

4. Heard Sri N.Harinadh, learned counsel representing Sri Ch.Ravindra Babu, learned counsel for the appellant, learned Public Prosecutor, appearing for the second respondent-State and perused the material on record.

5. The learned counsel for the appellant strenuously submitted that the trial Court dismissed the complaint on erroneous grounds. He further submitted that the trial Court has misconstrued the provisions of Sections 138 and 142 of the Act and dismissed the complaint on assumptions and presumptions. He further submitted that the findings recorded by the trial Court are not sustainable either on facts or in law.

6. Before advertng to the findings of the Court below, it is not out of place to refer the following decisions.

(i) **State of Rajasthan vs. Mohan Lal**¹, wherein the Hon'ble Apex Court held at Para No.34 as follows:

34. From the above decisions, in Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

¹ AIR 2009 SC 1872

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

(ii) **State of Maharashtra v Dnyaneshwar Laxman Rao**

Wankhede², wherein the Hon'ble apex Court held at Para Nos.15, 21 and 22 as follows:

15. Before embarking on the rival contentions raised before us, it is our duty to remind ourselves that we are dealing with a judgment of acquittal and, thus, it is absolutely essential to keep in mind the well-settled principles of law that in the event two views are possible to be taken, this Court shall not interfere with a judgment of acquittal. There cannot be any doubt that in the event, having regard to the materials brought on record, the Court comes to the conclusion on the basis thereof that only one view is possible, a judgment of acquittal may be interfered with. (See *Shivappa v. State of Karnataka*, (2008) 11 SCC 337, *State of Maharashtra v. Rashid B. Mulani*, (2006) 1 SCC 407 and *State v. K. Narasimhachary*, (2005) 8 SCC 364.)

21. Even in a case where the burden is on the accused, it is well known, the prosecution must prove the foundational facts. (See *Noor Aga v. State of Punjabi*, (2008) 16 SCC 417 and *Jayendra Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104.)

22. It is also a well-settled principle of law that where it is possible to have both the views, one in favour of the prosecution and the other in favour of the accused, the latter should prevail. (See *Dilip v. State of M.P.*, (2007) 1 SCC 450 and *Gagan Kanojia v. State of Punjab*, (2006) 13 SCC 516.)

7. As per the principle enunciated in the cases cited supra, where it is possible to have two views – one in favour of the Prosecution and the other in favour of the accused – the latter view should prevail. Let me consider the facts of the case on

² (2009) 15 SCC 200

hand in the light of the principles enunciated in the cases cited supra.

8. As seen from the testimony of P.W.1(complainant), the accused borrowed an amount of Rs.38,000/- from him on 30.10.2001 and executed a promissory note in his favour. Ex.P1 is the certified copy of promissory note. His evidence further reveals that the accused issued a cheque bearing No.150261 for an amount of Rs.50,000/- drawn on State Bank of India, Tenali, in his favour. P.W.1 presented the cheque for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P3 is the cheque returned memo. The oral testimony of P.W.1 coupled with Exs.P1 to P3 clearly demonstrates that the cheque issued by the accused was not honoured for want of sufficient funds.

9. The crucial question that falls for consideration is whether the appellant has followed the procedure as contemplated under the NI Act before filing of the complaint.

10. A perusal of the record reveals that the complainant (P.W.1) got issued a legal notice dated 27.08.2004 directing the accused to pay the amount covered under Ex.P1. Ex.P5 is the returned registered notice dated 13.09.2004. As per the postal endorsement on Ex.P5, the accused left the village without instructions. A perusal of the same reveals that the accused was not in the village at the relevant point of time.

Basing on Ex.P5, P.W.1 filed the complaint under Section 200 Cr.P.C. against the accused for the offence punishable under Section 138 of NI Act.

11. It is needless to say that when the notice was returned with an endorsement that the accused was not in the village, the complainant has to take steps to serve the notice on the accused for second time. If the accused is not residing in the given address, then the complainant has to serve the notice on him by way of substitute service. In the instant case, the complainant did not choose to send notice to the accused. For one reason or other the complainant has not filed any application before the trial Court seeking permission to serve the notice on the accused by way of substitute service. The complainant filed the complaint knowing fully well that the statutory notice issued by him was not served on the accused. Section 138 of the Act mandates that the complainant before filing a complaint, has to issue statutory notice to the accused directing him to pay the amount covered under the cheque within 30 days. If the accused having received the notice, failed to pay the amount within fifteen days from the date of receipt of notice that gives a cause of action to the complainant to file a complaint under Section 138 of the Act. It is needless to say that no complaint is maintainable without cause of action.

12. It is not in dispute that statutory notice was not served on the accused as contemplated under proviso 'b' of Section 138 of NI Act. No cause of action arose in favour of the complainant in this case to file complaint. The complainant has not followed the procedure as contemplated under Section 138 of the Act.

13. The material placed before the Court clinchingly establishes that the complainant approached the trial Court without any cause of action. The trial Court dismissed the complaint on the sole ground that the complainant has not served the statutory notice on the accused. I am fully agreeing with the findings recorded by the trial Court. The findings recorded by the trial Court are based on material much less legally admissible material. The trial Court has considered the material available on record as per the procedure envisaged under Sections 138 and 142 of NI Act and dismissed the complaint. There are no grounds much less valid grounds to interfere with the findings recorded by the trial Court. The appeal lacks merits and *bona fides* and the same is liable to be dismissed.

14. In the result, the Criminal Appeal is dismissed. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

T. SUNIL CHOWDARY, J.

Date:31.01.2018

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