THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1377 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 07.07.2006 in C.C.No.483 of 2002 on the file of the Court of the X Additional Chief Metropolitan Magistrate, Secunderabad, wherein and whereby the first respondent-accused was found not guilty for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and consequently, acquitted of the said offence.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: The complainant is the father-in-law of one Srikanth, who is none other than own brother of accused and who died in a road accident that occurred on 19.11.2000. During lifetime of Srikanth, the accused approached the complainant for hand loan of Rs.1,25,000/- for business purpose. The complainant lent an amount of Rs.1,25,000/- to the accused in the presence of Mrs.Prasanna, Harinder, Anjaiah and Srikanth. The accused promised to repay the same within one week, but failed to repay the same. The accused issued a cheque bearing No.086545 dated 15.03.2002 for an amount of Rs.1,25,000/- in favour of the complainant drawn on Bank of Baroda, Chilakalaguda Branch. The complainant presented the cheque for collection through his bank i.e., State Bank of Hyderabad, New Bhoiguda Branch,

Secunderabad on 15.03.2002. The cheque was not honoured for want of sufficient funds. The complainant got issued a statutory legal notice on 20.03.2002 directing the accused to pay the amount covered under the cheque within the stipulated time. The accused issued a reply notice dated 28.03.2002 denying his liability. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. on the file of the X Additional Chief Metropolitan Magistrate, Secunderabad, against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act'). The learned Magistrate, after satisfying himself with the material placed before the Court, has taken the case on file and numbered it as C.C.No.483 of 2002 and issued summons to the accused. On appearance of the accused, copies of all documents were furnished to him as contemplated under Section 207 Cr.P.C. The accused was examined under Section 251 Cr.P.C. However, the accused denied the liability and claimed to be tried.

4. To bring home the guilt of the accused, on behalf of the complainant, PWs.1 to 3 were examined and Exs.P.1 to P.5 were marked. After completion of the complainant side evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating evidence deposed against him by the complainant witnesses, which he denied. On behalf of the defence, DWs.1 and 2 were examined and Exs.D.1 to D.6 were marked.

5. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the complainant failed to prove the guilt of the accused for the offence

punishable under Section 138 of the N.I. Act and consequently, acquitted him of the said offence. Hence, the present appeal is filed by the complainant.

6. Sri P.Venugopal, learned counsel for the appellant-complainant, attacked the judgment of the trial Court on the following grounds:

1. Mere minor discrepancies in the testimony of PWs.2 and 3 by itself is not a valid ground to dismiss the complaint.
2. The trial Court failed to consider that the accused failed to rebut the presumption drawn under Section 139 of the N.I. Act, and
3. The trial Court acquitted the accused on assumptions and presumptions, which is not permissible under law and the findings recorded by the trial Court are not based on evidence much less legally admissible evidence; therefore it is a fit case to allow the appeal.

7. Now the points that arise for consideration in this appeal are:

1. Whether the complainant has proved the guilt of the accused for the offence punishable under Section 138 of the N.I. Act beyond all reasonable doubt? and
2. Whether the judgment of the trial Court is sustainable?

8. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

9. Before adverting to the findings of the trial Court, 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:
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> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (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.
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> (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.
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> (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.
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> (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 Wankhede[2],** 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.)

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[1] AIR 2009 SC 1872
[2] (2009) 15 SCC 200

> 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.)
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> 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.)

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

11. As seen from the testimony of PW.1, the accused borrowed an amount of Rs.1,25,000/- from the complainant and failed to repay the same. In discharge of the hand loan, the accused issued Ex.P.1 cheque dated 15.03.2002 for an amount of Rs.1,25,000/- drawn on Bank of Baroda, Chilakalaguda Branch. The complainant presented the cheque in his bank for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.2 is the cheque return memo dated 16.03.2002. On 20.03.2002 the complainant issued Ex.P.3 original of legal notice directing the accused to pay the same within 15 days from the date of receipt of the same. Ex.P.4 is the postal acknowledgment. The accused issued a reply notice on 28.03.2002. Ex.P.5 is the office copy of reply notice. In the cross-examination, DW.1 admitted his signature on Ex.P.1 cheque. In such circumstances, the Court can draw a presumption that the accused issued the cheque in discharge of the legally enforceable debt as contemplated under Section 138 of the N.I. Act. The material placed before the Court clinchingly establishes that Ex.P.1 cheque issued by the accused

dishonoured for want of sufficient funds. The presumption drawn under Section 139 of the N.I. Act is rebuttable one.

12. Let me consider whether the accused has rebutted the presumption drawn under Section 139 of the N.I. Act. A perusal of the record reveals that the accused is none other than the own brother of son-in-law of the complainant. Unfortunately, the son-in-law of the complainant by name Srikanth died in a road accident that occurred in the month of November, 2000. As seen from the testimony of PW.1, the accused borrowed an amount of Rs.1,25,000/- from the complainant during the lifetime of Srikanth. The testimony of PWs.2 and 3 is no way helpful to the complainant with regard to the lending of money by the complainant to the accused. If the testimony of PW.2 is taken into consideration, the accused handed over empty cheque to the complainant on 15.03.2002. As per the testimony of PW.3, the accused handed over the cheque to the complainant in the month of November, 2002. As per the testimony of PWs.2 and 3, the accused signed the cheque. As per the testimony of PW.3, the accused filled the amount column and left the other columns blank. If the testimony of PWs.2 and 3 is taken into consideration, the accused has not filled the entire cheque. Merely because some columns of the cheque were kept blank that itself is not valid ground to discard the case of the complainant.

13. The Court has to consider whether the cheque was issued in discharge of legally enforceable debt as contended by the complainant or the cheque was obtained by the complainant in the police station by force as contended by the accused. There are no

disputes between the complainant and the accused till the death of Srikanth, who is a son-in-law of the complainant. A perusal of the record reveals that the daughter of the complainant filed a suit against the accused for recovery of the money. The testimony of PWs.2 and 3 also reveals that a panchayat was held in the presence of the elders wherein the accused agreed to settle the family disputes. The material placed before the Court clinchingly establishes that ill-feelings prevailed between the complainant and the accused immediately after the death of Srikanth. The testimony of DW.2, who is an expert, clearly indicates that the payee name and the date of the cheque are not tallying with the other writings on Ex.P.1. cheque. As observed earlier, the accused is not denying his signature on Ex.P.1 cheque. As per the testimony of PW.2, the accused handed over Ex.P.1 cheque to the complainant without filling the columns. As per the testimony of PW.3, the accused filled the amount column only. The testimony of PWs.2 and 3 clearly reveals that some columns of Ex.P.1 cheque were filled by the complainant or somebody else. The fact remains that by the time of handing over of Ex.P.1 cheque by the accused to the complainant, the name of the payee was kept blank. It is needless to say that an opinion expressed by an expert is only a weak peace of evidence. The expert opinion must be corroborated by other evidence. In the instant case, the opinion expressed by the expert is supported by the testimony of PWs.2 and 3. If the testimony of PW.2 is taken into consideration, the accused handed over the cheque on 15.03.2002. If the testimony of PW.3 is taken into consideration, the accused handed over the cheque in the month of November, 2002.

14. As rightly pointed out by the learned counsel for the appellant-complainant, the Court shall not magnify the minor discrepancies. The date of issuance of cheque is not a minor discrepancy. On the other hand it is a major discrepancy. A perusal of the record reveals that at the instance of the complainant, police harassed the accused. The accused filed W.P.No.11250 of 2002 on the file of this Court seeking a direction to the concerned police not to interfere with the civil disputes. This Court disposed of the said writ petition directing the police not to interfere with the civil disputes. It is not in dispute that basing on the complaint lodged by the complainant, the police called the accused to the police station for settlement of civil disputes. As seen from the testimony of DW.1, apart from Ex.P.1 cheque, three more cheques were obtained by the complainant in the police station. In view of the family disputes, the possibility of taking Ex.P.1 cheque from the accused in the police station cannot be ruled out completely. Any cheque obtained by the complainant in the police station is not legally enforceable. Apart from that, there is no cogent and convincing evidence to establish that the accused borrowed an amount of Rs.1,25,000/- from the complainant during the lifetime of Srikanth. The complainant did not mention the exact date of borrowing of money by the accused from him. As per the testimony of PW.2, the accused borrowed money from the complainant on 05.11.2000. There is no whisper in the testimony of PW.3 on which date the accused borrowed money from the complainant. When the son-in-law of the complainant died in the month of November, 2000, the possibility of borrowing of money by the accused from the complainant is

somewhat improbable and unbelievable. As observed earlier, bad weather prevailed in the family of the complainant and the accused in the month of November, 2000. The accused rebutted the presumption drawn under Section 139 of the N.I. Act. Then the onus of proof shifts on the complainant to establish that Ex.P.1 cheque was issued in discharge of legal debt. The material placed before the Court falls short to establish that the accused issued Ex.P.1 cheque in discharge of legally enforceable debt. If the Court comes to a conclusion that Ex.P.1 cheque was not issued in discharge of legally enforceable debt, the complaint itself is not maintainable. The trial Court, after considering the material available on record, arrived at a conclusion that the complainant failed to prove the guilt of the accused for the offence punishable under Section 138 of the N.I. Act. The trial Court has assigned reasons much less cogent and valid reasons to its findings. The findings recorded by the trial Court are based on evidence much less legally admissible evidence. I am fully endorsing the findings recorded by the trial Court. There are no grounds much less valid grounds to interfere with the well considered judgment passed by the trial Court.

15. In the result, the Criminal Appeal is dismissed. Consequently, Miscellaneous Petitions, if any, pending in this Criminal Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 07.02.2018
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