

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL APPEAL No.1203 OF 2007

JUDGMENT:

This appeal is filed by the complainant under Section 378(4) of Cr.P.C., challenging the judgment dated 29.1.2007 passed in C.C.No.618 of 2002 on the file of the Court of IV Additional Judicial First Class Magistrate, Kakinada, wherein and whereby the trial Court found the accused not guilty for the offence under Section 138 of the Negotiable Instruments Act, and consequently acquitted him.

2. The facts leading to filing of the present appeal are as follows: The accused has been carrying on iron scrap business at Visakhapatnam. The complainant used to purchase the material from the accused for business purpose. During the month of November, 2001, the complainant paid an amount of Rs.85,000/- to the accused for supply of iron scrap. On 25.11.2001, the accused, in discharge of the debt, issued cheques bearing No.235109, dated 25.11.2001 for Rs.49,000/- and cheque bearing No.235110, dated 26.11.2001 for Rs.36,000/-, drawn on Lakshmi Vilas Bank, Aseelmet Junction, Visakhapatnam. The complainant presented the said cheques in Andhra Bank, Cinema Road Branch, Kakinada on 01.12.2001. On 10.12.2001, the cheques were returned with an endorsement "*insufficient funds*". Again on 11.3.2002, the complainant presented the cheques for clearance, and once again they were returned on 19.3.2002. The complainant got issued legal notice dated 20.4.2002 directing the accused to pay the amount. The accused evaded to receive the notice. Having

no other alternative, the complainant filed the complaint on 03.6.2002 on the file of the Court of the IV Additional Judicial Magistrate of First Class, Kakinada, against the accused for the offence under Section 138 of the Negotiable Instruments Act. The learned Magistrate, after satisfying himself with the material placed before the Court, has taken cognizance of offence under Section 138 of the Negotiable Instruments Act and numbered the complaint as C.C.No.618 of 2002, and issued summons to the accused. On appearance of the accused, the trial Court supplied all the relevant copies of documents under Section 207 Cr.P.C. The accused was examined under Section 251 Cr.P.C., for which he denied the allegations. In order to bring home the guilt of the accused, the complaint examined P.Ws.1 to 3 and marked Exs.P.1 to P.17. After completion of the complaint's side evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating material deposed against him. The accused denied the same. No oral or documentary evidence was adduced on behalf of the accused. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at the conclusion that the complainant failed to prove the guilt of the accused for the offence under Section 138 of the Negotiable Instruments Act and accordingly acquitted him. Hence, the present appeal.

3. Sri Tenneti Prabhudas, learned Advocate, representing Sri E.Sambasiva Pratap, learned counsel for the appellant-complainant submitted that the trial Court has not properly considered the oral testimony of P.W.2. He further submitted that

the oral testimony of P.Ws.1 to 3 coupled with Exs.P.2 and P3 clinchingly establishes that the cheques issued by the accused were dishonoured thereby he committed the offence under Section 138 of the Negotiable Instruments Act. He further submitted that the findings recorded by the trial Court are not based on evidence much less legally admissible evidence; hence it is not a fit case to allow the appeal.

4. Now the points that arise for consideration are:

- (i) Whether the complainant proved the guilt of the accused for the offence under Section 138 of the Negotiable Instruments Act beyond all reasonable doubt? and
- (ii) Whether the judgment of the trial Court is sustainable in law?

5. Both the points are interlinked with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

6. It is the case of P.W.1 that the accused borrowed an amount of Rs.85,000/- from him in the month of November, 2001 and issued Exs.P.2 and P3 cheques in discharge of legally enforceable debt. His testimony further reveals that on 01.12.2001 he presented Exs.P.2 and P.3 cheques for collection, the same were returned with endorsement "*insufficient funds*". Exs.P.5 and P.7 are the cheque returned memos. His testimony further reveals that on 11.3.2002 once again he presented Exs.P.2 and P3 for collection and the same were returned vide Ex.P.6—cheque returned memo dated 19.3.2002. The testimony of P.Ws.2 and 3, Bank officials, categorically reveals that the presentation of cheques for collection by P.W.1. The oral testimony of P.Ws.1 to 3

coupled with Exs.P.2 to P.7 clearly reveals that the cheques issued by the accused were dishonoured for want of sufficient funds. The testimony of P.W.1 reveals that he got issued original of Ex.P.8 legal notice dated 20.4.2002 directing the accused to pay the amount covered under Exs.P.2 and P3 cheques within the time stipulated in the notice. Ex.P.10 is the Certificate of posting of Ex.P.8 legal notice. Ex.P.9 is the returned postal cover.

7. Establishment of non-discharging of the legally enforceable debt is *sine qua non* to convict a person under Section 138 of the Negotiable Instruments Act. To prove that the amount covered under Exs.P.2 and P.3 cheques is legally enforceable debt; P.W.1 mainly relied on Ex.P.1 receipt issued by the accused in his favour. A perusal of Ex.P.1 reveals that the complainant paid an amount of Rs.85,000/- to M/s.Royal Steels, Kakinada. The material placed before the Court clinchingly established that the complainant did not pay Rs.85,000/- to the accused in his personal capacity. The complainant (P.W.1) is not disputing the recitals of Ex.P.1. If the recitals of Ex.P.1 are taken to be true and correct, the complainant paid the amount to M/s.Royal Steels, Kakinada. It is not in dispute that Ex.P.8 statutory notice was not given in the name of M/s.Royal Steels, Kakinada. The complainant issued statutory notice, the original of Ex.P.8, to the accused in his individual capacity. Exs.P.2 and P3 are the cheques alleged to have been issued by the accused. It is not the case of the complainant that the accused borrowed money from him. The complainant failed to prove the nexus between the accused and M/s.Royal Steels, Kakinada. In the cross-examination, P.W.1 in unequivocal terms

deposed that he did not file any document to show that the accused is the Proprietor of M/s.Royal Steels, Kakinada. Placing reliance on the decision of this Court in **Sangothu Narasimhachari v V.Raghunath**¹ the trial Court arrived at a conclusion that the complaint is not maintainable. As per the principle enunciated in the said case, a complaint under Section 138 of the Negotiable Instruments Act is not maintainable without impleading the company, which is liable to discharge the legally recoverable debt. In the instant case, the complainant is entitled to recover the debt amount, if any, from M/s.Royal Steels, Kakinada. For the reasons best known to him, the complainant did not file complaint against M/s.Royal Steels, Kakinada.

8. The testimony of P.W.2, Bank officer, clearly reveals that there are over-writings in Ex.P.2 cheque as to figures. He further deposed that specimen signature of the accused is not tallying with the alleged signature of the accused on Ex.P2. If the testimony of P.W.2 is taken into consideration, there is material alteration in Ex.P.2. If there is any material alteration in a negotiable instrument, the same cannot be enforceable in law.

9. In the light of the foregoing discussion, I have no hesitation to hold that the complainant failed to prove that Exs.P.2 and P.3 cheques were issued by the accused in discharge of legally enforceable debt. The trial Court considered the oral and documentary evidence in right perspective and arrived at the conclusion that the complainant failed to prove the guilt of the accused for the offence under Section 138 of the Negotiable

¹ 2005 (1) ALD 205

Instruments Act. I am fully endorsing the findings of the trial Court. There is no flaw much less legal flaw in the findings recorded by the trial Court; hence, they cannot be interfered with.

10. In the result, the appeal is dismissed. Miscellaneous petitions if any pending in this appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 31.1.2018

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