HON'BLE SRI JUSTICE P. KESHAVA RAO

CRIMINAL REVISION CASE No.875 of 2018

ORDER:

Heard the learned counsel for the petitioner. Though notice is served on the 1st respondent on 21.06.2018 as per the tract consignment report filed vide USR.No.38375 of 2018, she has not chosen to appear either in-person or by engaging any counsel.

The present revision case is filed questioning the judgment dated 23.03.2018 passed in Crl.A.No.359 of 2016 on the file of the XIII Additional District and Sessions Judge (FTC), Krishna at Vijayawada, confirming the judgment dated 31.10.2016 passed in C.C.No.684 of 2015 on the file of the II Special Magistrate, Vijayawada, convicting the petitioner for the offence under Section 138 of the Negotiable Instruments Act (for short, "the Act") and sentencing him to pay a fine amount of Rs.8,00,000/-. In default, to suffer simple imprisonment for six months. Out of the fine amount of Rs.8,00,000/-, an amount of Rs.7,90,000/- is awarded as compensation to the 1st respondent under Section 357 Cr.P.C.

The facts in brief are that the petitioner is the proprietor of the 1st accused company. The petitioner borrowed an amount of Rs.20,00,000/- on 04.08.2014 from the 1st respondent's husband for the purpose of business needs agreeing to repay the same with interest @ 18% per annum.

After receipt of the said amount, the petitioner, in the capacity of Proprietor of the 1st accused concern, executed four demand promissory notes in favour of the 1st respondent, her husband, daughter and son. In spite of several demands made by the 1st respondent, the petitioner postponed the same on one pretext or the other. Ultimately, the petitioner issued a cheque bearing No.252966 dated 01.11.2014 for an amount of Rs.5,00,000/- drawn on State Bank of Hyderabad, Patamatalanka Branch, Vijayawada, towards part payment of the legally enforceable debt. When the said cheque was presented for realization in the 1st respondent's bank i.e., Axis Bank, Bhavanipuram Branch, Vijayawada, the same was returned with an endorsement "funds insufficient". Immediately, thereafter on 25.01.2014, the 1st respondent got issued a legal notice to the petitioner demanding to pay the dishonoured cheque amount within 15 days from the date of receipt of the notice. After receipt of the notice, the petitioner got issued reply dated 13.11.2014 admitting the legal enforceable debt, but he had not given instructions to present the said cheque. In those circumstances, the 1st respondent was constrained to file the complaint on the file of the II Special Magistrate, Vijayawada. The Court below, after perusing the material on record including the sworn statement of the 1st respondent, found prima facie case satisfying the ingredients under Section 138 of the Act and accordingly the case was taken on file under Sections 138 and 142 of the Act against the petitioner.

In order to prove the case, the 1st respondent examined herself as PW.1 and marked Exs.P1 to P7. On behalf of the petitioner, no one is examined and no documents are marked.

After hearing, the learned Magistrate by judgment dated 31.10.2016 found that the 1st respondent successfully proved her case under Section 138 of the Act against the petitioner and found guilty for the said offence and convicted him sentencing to pay fine of Rs.8,00,000/-. In default, to suffer simple imprisonment for six months. Out of the fine amount of Rs.8,00,000/-, an amount of Rs.7,90,000/- is awarded as compensation to the 1st respondent. Aggrieved by the said judgment, the petitioner filed Crl.A.No.359 of 2016 on the file of the XIII Additional District and Sessions Judge (FTC), Krishna at Vijayawada. After hearing, the lower appellate Court by judgment dated 23.03.2018 dismissed the appeal. Against the said judgment, the present revision case is filed.

Learned counsel appearing for the petitioner would contend that both the Courts below committed material irregularity in convicting the petitioner, since there is no legally enforceable debt for the offence under Section 138 of the Act. As per letter dated 11.09.2014 which was marked as Ex.P9 in another case, the subject cheques were issued as security and therefore based on them the conviction is not sustainable in law. Filing of four complaints by the 1st respondent's family members shows that there are no bona fides in their cases. In fact, there is no rebuttal evidence on behalf of the 1st respondent to disprove the total contents of the said letter i.e., Ex.P9. When once Ex.P9 is proved and not disputed by the 1st respondent the cheques issued are only towards security and therefore conviction for the offence under Section 138 of the Act is not sustainable. In fact, basing on the pro-notes civil suits are filed between the parties and the same are pending consideration.

Having heard the learned counsel and from the perusal of the material on record, it is reveled that the 1st respondent filed C.C.No.684 of 2015 against the petitioner for the offence under Section 138 of the Act on the file of the II Special Magistrate, Vijayawada. The specific case of the 1st respondent is that the petitioner, being the proprietor of the 1st accused firm, borrowed an amount of Rs.20,00,000/- on 04.08.2014 from her husband for the purpose of business needs agreeing to repay the same with interest @ 18% per annum and in that context executed four promissory notes in her favour as well as in favour of her husband, son and daughter. In spite of several demands made by the 1st respondent the petitioner postponed payment of the said amount and ultimately issued a cheque bearing No.252966 dated 01.11.2014 for an amount of Rs.5,00,000/- drawn on State Bank of Hyderabad, Patamatalanka Branch, Vijayawada, towards part payment of the legally enforceable debt. When the said cheque was presented for encashment, the same was returned with an endorsement "funds insufficient'. After complying with the necessary formalities such as issuance of legal notice, the 1st respondent filed a complaint. It is also relevant to mention here that as per the recitals of Ex.P4, reply notice, and as per the suggestions made to PW.1, the petitioner borrowed an amount of Rs.20,00,000/- from the husband of the 1st respondent and issued four blank cheques. However, the said cheques were presented without his instructions and thereafter got filed the present case and three other similar cases in the name of her family members and as such in the present case the ingredients of Section 138 of the Act are not attracted. In the light of the said reply, it can be safely presumed that the petitioner disputed the legally enforceable debt between himself and PW.1.

In order to prove the initial burden cast on the 1st respondent, she relied on Ex.P7, pro-note dated 04.08.2014, alleging that the same is in the hand writing of the petitioner. The petitioner never disputed the same. In fact, the petitioner is totally silent about the said pro-note. When the petitioner failed to deny and dispute the hand writing on Ex.P7, it can be safely presumed that he himself scribed the said pro-note. The said pro-note evidence the 1st respondent as a lender and the petitioner, being the Proprietor of the 1st accused firm, as executant having its stamp. The 1st respondent clearly stated that the petitioner borrowed Rs.5,00,000/- and executed the pro-note in her name and thereafter issued the subject cheque. The fact remains that Ex.P7, pro-note and Ex.P1, cheque, are in the hand writing of the petitioner which falsifies his case that he issued blank cheques as security to the husband of PW.1. That apart, from a further perusal of the material on record, it is evident that the petitioner received Rs.20,00,000/- from the husband of the 1st respondent on 04.08.2014 and admitted receipt of the said amount in his written statement under Section 313 examination in C.C.No.661 of 2015 and the reply notice sent by him and the said receipt is also marked. When once the petitioner has admitted receipt of the said amount and the writing on the promissory note and the subject cheque are in his hand writing, the 1st respondent discharged the initial burden of proving the ingredients of Section 138 of the Act. Thus, the complaint is maintainable under the provisions of Section 138 of the Act. In fact, both the Courts below have also discussed the said aspect of receipt of the amount and issuance of four promissory notes and cheques by the petitioner, which are in his hand writing. As far as the other contention made by the petitioner that he has not given any instructions to the 1st respondent to present the cheque in her account is concerned, PW.1 in her cross-examination has categorically stated that the petitioner gave instructions to her to present the cheque given by him. In such a case, the above contention of the petitioner is not tenable.

Even, otherwise, the contention raised by the petitioner that the 1st respondent is not the holder in due course is also not tenable in the light of the fact that in the present case though Nune Nageswara Rao, husband of the 1st respondent, gave an amount of Rs.20,00,000/- to the petitioner, but the cheques are given to four persons, including the 1st respondent, for a sum of Rs.5,00,000/- each and separate promissory notes are also executed by the petitioner against the said four persons, which are admittedly in his hand writing, establish that they are the holders in due course. The other three complaints are C.C.Nos.690, 661 and 739 of 2015. Therefore, once the holder in due course is considered as payee, she is entitled to file the complaint against the petitioner.

In the case on hand, it is an admitted fact that the cheque has been issued by the petitioner and the same was dishonoured. As such, the 1st respondent being the holder in due course can maintain the complaint. Viewed from any angle, this Court is of the opinion that there is no irregularity or illegality in the judgments passed by both the Courts below. There are no merits in the revision case and the same is liable to be dismissed.

Accordingly, the criminal revision case is dismissed.

Miscellaneous petitions, if any, shall also stand dismissed.

However, learned counsel appearing for the petitioner requested this Court to consider the sentence of imprisonment awarded against the petitioner in each calendar case to run concurrently. As all the four complaints are arising out of the same transaction between the same parties, the said cases are also tried together on the same set of evidence. In order to substantiate his contention, he relied on the judgment of the Apex Court in **Shyam Pal vs. Dayawati Besoya and another**[1]. The relevant paras are as under:

> "Reverting to the facts as obtained in the present appeal, we are of the comprehension, on an appreciation thereof as well as the duration of the appellant's custody, as is evidenced by the certificate to that effect, that the appellant is entitled to the benefit of the discretion contained in Section 427 of the Code. In arriving at this conclusion we have, as required, reflected on the nature of the transactions between the parties thereto, the offences involved, the sentences awarded and the period of detention of the appellant as on date.
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> It is thus ordered that the substantive sentences of 10 months simple imprisonment awarded to the appellant in the two complaint cases referred to hereinabove would run concurrently. Needless to say, the appellant would have to serve the default sentences, if the fine by way of compensation, as imposed, has not been paid by him. The appeals are thus allowed to this extent. The appellant would be entitled to all consequential reliefs with regard to his release from custody as available in law based on this determination."

Taking in to consideration the submission of the learned counsel and in the light of the law laid down by the Apex Court in the above judgment, this Court is of the opinion that

[1] 2017 (1) ALD (Crl.) 177 (SC)

the substantive sentence of six months simple imprisonment awarded to the petitioner in each complaint would run concurrently.

P. KESHAVA RAO, J

Date: 09.08.2018.
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