THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1610 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 13.02.2006 in C.C.No.873 of 2000 on the file of the Court of the IX Additional Chief Metropolitan Magistrate at Hyderabad, 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 a company registered under the Companies Act, 1956 dealing with chit fund business and finance. Ex.P.1 is the copy of Company Registration Certificate. On 16.02.1999 the accused borrowed an amount of Rs.1,00,000/- from the complainant company agreeing to repay the same together with interest at the rate of 24% per annum. On 01.08.2000 the accused issued a cheque bearing No.867978 for an amount of Rs.1,28,350/- in favour of the complainant drawn on Andhra Bank, S.R.Nagar, Hyderabad, in discharge of legally enforceable debt. Ex.P.3 is the cheque. The complainant presented the cheque for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.4 is the cheque return memo dated 15.09.2000. The complainant got issued a

legal notice original of Ex.P.5 on 16.09.2000 directing the accused to pay the amount covered under Ex.P.3. Ex.P.7 is the postal acknowledgment and Ex.P.8 is the returned postal cover. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. on the file of IX Additional Chief Metropolitan Magistrate at Hyderabad, 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.873 of 2000 and issued summons to the accused. After appearance, the accused was examined under Section 251 Cr.P.C. However, the accused denied the allegations.

4. To bring home the guilt of the accused, on behalf of the complainant, PW.1 was examined and Exs.P.1 to P.26 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 PW.1 which he denied. On behalf of the defence, DW.1 was examined and Exs.D.1 to D.4 were marked.

5. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the complaint is not maintainable for want of the money lending licence and consequently, acquitted the accused for the offence punishable under Section 138 of the N.I. Act. Hence, the present appeal is filed by the complainant.

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

1. Mere non-production of money lending licence that itself is not a valid ground to dismiss the complaint filed against the accused for the offence punishable under Section 138 of the N.I. Act.
2. The findings recorded by the trial Court are not sustainable either on facts or in law; therefore it is a fit case to allow the appeal.

7. None appeared on behalf of the first respondent-accused.

8. 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?

9. 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.

10. 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 <u>Chandrappa and Ors. v. State of Karnataka</u>, (2007) 4 SCC 415, the following general principles regarding powers of the appellate court while

[1] AIR 2009 SC 1872

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.

(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 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.)

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.

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[2] (2009) 15 SCC 200

(See *Dilip* v. *State of M.P.,* (2007) 1 SCC 450 and *Gagan Kanojia* v. *State of Punjab*, (2006) 13 SCC 516.)

11. 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.

12. A perusal of Ex.P.2 reveals that the complainant company authorized PW.1 to depose evidence, therefore, he is a competent person to speak about facts of the case. As seen from the testimony of PW.1, the accused borrowed an amount of Rs.1,00,000/- on 16.02.1999 from the complainant company. His testimony further reveals that the accused executed a promissory note in favour of the complainant company on 16.02.1999. Ex.P.6 is the promissory note. A perusal of Exs.P.12 to P.26 clearly reveals that the accused is one of the subscribers of the chit. The accused is also not disputing the same. The material placed before the Court clinchingly establishes that there are some financial transactions between the complainant and the accused. As per the testimony of PW.1, the accused issued Ex.P.3 cheque for an amount of Rs.1,28,350/- in favour of complainant. The oral testimony of PW.1 coupled with Ex.P.4 cheque return memo clearly reveals that the cheque issued by the accused returned with an endorsement 'insufficient funds'. The accused is not denying his signature on Ex.P.3 cheque. Once the accused admits his signature on the cheque, the Court can draw a presumption under Section 139 of the N.I. Act that the cheque was issued in discharge of legally enforceable debt. The presumption drawn under Section

139 of the N.I. Act is rebuttable presumption. If the accused rebuts such a presumption, then the onus of proof shifts on the complainant to establish that the debt in question is legally enforceable.

13. The trial Court mainly acquitted the accused on the sole ground that the complainant failed to produce the money lending licence. As seen from the testimony of PW.1, the complainant company has been carrying on chit as well as the money lending business. As observed earlier, the accused is one of the subscribers of the chit. If the averments made in the complaint are taken into consideration, the accused borrowed an amount of Rs.1,00,000/- from the complainant on 16.02.1999. In discharge of such debt, the accused issued Ex.P.3 cheque. In such circumstances, the accused issued the cheque for discharge of the amount covered under the chit transaction is somewhat improbable and unbelievable. If really the accused had issued the cheque in connection with the chit transaction, what prevented the complainant to take such a plea in the complaint? As rightly pointed out by the learned counsel for the appellant, mere non-mentioning of some fact that itself is not a valid ground to dismiss the complaint filed against the accused for the offence under Section 138 of the N.I. Act without taking into consideration the other attending circumstances. Basing on the material available on record, the only inference that can be drawn is that the accused issued the cheque in discharge of the debt borrowed from the complainant company. The transaction between the complainant and the accused is purely a money transaction. To put it in a different way, the complainant lent money to the

accused while carrying on finance business. It is needless to say that no one is entitled to carryon money lending business without obtaining licence from the competent authority. It is not in dispute that the complainant company has not produced the licence issued by the competent authority enabling it to carryon the finance business. At this juncture, this Court is placing reliance on the decision in **Krishnam Raju Finances, Hyderabad v. Abida Sultana and another**[3], wherein para 18 reads thus:

> "18. I am in complete agreement with the submissions made by the learned counsel for the appellant. But, as seen above, admittedly, the appellant-complainant claimed that it is a money lender, but has not produced any licence as required under law and further the amount alleged to have been advanced by the complainant cannot be said to be a loan as defined under the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli. Since the appellant had no money lending business licence, it cannot be said that there was a legally enforceable liability of the respondent in view of Section 9(2) read with Section 2(4) of the A.P. (T.A.) Money Lenders Act, 1349 Fasli. Once an Act declares that a particular transaction is illegal, it cannot be made legal for the purpose of any other Act. The sheet-anchor of Section 138 of the Act is as to legally enforceable liability against the respondent, which is conspicuously absent in the case on hand. Therefore, there was no legally enforceable liability against the respondent. I am of the opinion that the Judgment of the Court below is a well reasoned one and does not suffer from any irregularity or illegality. There are no grounds to interfere with the judgment of the lower Court."

14. The facts of the case on hand are almost identical to the facts of the case cited supra.

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[3] 2004 (1) ALD (Crl.) 546 (AP)

15. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the complaint filed by the complainant against the accused for the offence punishable under Section 138 of the N.I. Act is not maintainable for want of money lending licence. The findings recorded by the trial Court are based on evidence much less legally admissible evidence. There is no flaw much less legal flaw in the findings recorded by the trial Court, which warrants interference of this Court. There are no grounds much less valid grounds to interfere with the well considered judgment passed by the trial Court.

16. 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: 01.02.2018
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