

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.79 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. assailing the judgment dated 25.10.2003 in CrI.A.No.94 of 2005 on the file of the Court of Special Judge for the trial of offences under Scheduled Castes and the Scheduled Tribes (POA) Act – cum- VI Additional Metropolitan Sessions Judge – cum – XX Additional Chief Judge, Secunderabad, wherein and whereby the conviction and sentence imposed against the accused on 17.03.2005 in C.C.No.969 of 2001 on the file of the Court of X Metropolitan Magistrate, Secunderabad, for the offence punishable under Section 138 of Negotiable Instruments Act (for short 'the Act') was set aside.

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 accused approached the complainant, who is a gold merchant, on 21.09.2000 and had purchased gold bangles studded with diamonds worth of Rs.4.00 lakhs and issued a cheque bearing No.957120 dated 21.09.2000 drawn on Canara Bank, Gandhinagar Branch. The complainant presented the cheque for collection and the same was not honoured. The complainant again presented the said cheque for collection and the same was not honoured for want of sufficient funds. The complainant issued a notice directing the accused to pay the

amount. The notice was returned with an endorsement 'addressee left'. Having no other alternative, the complainant filed a complaint under Section 200 Cr.P.C. against the accused on the file of the Court of X Metropolitan Magistrate, Secunderabad, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

4. 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.969 of 2001 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 allegations and claimed to be tried.

5. In order to bring home the guilt of the accused, on behalf of the complainant, PWs.1 and 2 were examined and Exs.P.1 to P.13 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, which he denied. On behalf of the defence, no oral or documentary evidence was adduced.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the accused issued Ex.P2 cheque in discharge of legally enforceable debt and found guilty for the offence under Section 138 of N.I. Act, convicted and sentenced him to undergo Simple Imprisonment for a period of three months and to pay a fine of Rs.3000/-, in default of payment of fine, to suffer Simple Imprisonment for a period of

one month. Feeling aggrieved by the conviction and sentence imposed against him in C.C.No.969 of 2001, the accused preferred CrI.A.No.94 of 2005 on the file of the Court of Special Judge for the trial of offences under Scheduled Castes and the Scheduled Tribes (POA) Act – cum- VI Additional Metropolitan Sessions Judge – cum – XX Additional Chief Judge, Secunderabad. The learned District Court after reconsidering the material available on record, arrived at a conclusion that the complaint is not maintainable as that the GPA holder is not entitled to file a complaint and allowed the appeal setting aside the conviction and sentence imposed against the accused. Hence, this appeal.

7. Heard Sri Anand Chandrana, learned counsel representing Sri S.Balchand, learned counsel for the appellant-complainant, learned Public Prosecutor for the State of Telangana, appearing for the second respondent and perused the material on record.

8. Learned counsel for the appellant strenuously submitted that the finding of the first appellate Court that the complaint is not maintainable is not sustainable either on facts or in law. He further submitted that the first appellant Court having come to a conclusion that the accused issued a cheque in discharge of legally enforceable debt ought not to have allowed the appeal on technical grounds.

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

1. Whether the complainant proved the guilt of the accused for the offence punishable under Section 138 of NI Act beyond all reasonable doubt? and
2. Whether the judgment of the first appellate Court is sustainable?

10. Both points are interlinked to each other. Hence, this Court is inclined to answer both the points simultaneously to avoid recapitulation of facts.

11. Basing on the oral testimony of P.Ws.1 and 2 and Exs.P1 to P13 the trial Court arrived at a conclusion that the accused issued Ex.P2 cheque in discharge of legally enforceable debt. The appellate Court after reappraising the oral and documentary evidence, without being influenced by the findings of the trial Court, arrived at a conclusion that the accused issued Ex.P2 cheque in favour of the complainant in discharge of legally enforceable debt.

12. A perusal of the record clearly reveals that both courts concurrently held that the accused issued Ex.P2 cheque in favour of the complainant in discharge of legally enforceable debt. This Court shall not lightly interfere with the concurrent finding of fact recorded by the Courts below. Basing on the material available on record, I am of the considered view that the accused issued Ex.P2 cheque in discharge of legally enforceable debt. The first appellate Court allowed the appeal on the sole ground that the GPA holder is not entitled to file the complaint under Section 138 of the Act.

13. To substantiate his argument, the learned Counsel for the appellant has drawn the attention of this Court to the decision in **A.C.Narayanan v. State of Maharashtra**¹. Paragraph No.21 reads thus:

21. While holding that there is no serious conflict between the decisions in *MMTC Limited v Medchal Chemicals and Pharma (P) Ltd.*, (2002) 1 SCC 234 and *Janki Vashdeo*

¹ AIR 2014 SC 630

Bhojwani v Indusind Bank Ltd., (2005) 2 SCC 217, we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I. Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of Section 145 of N.I. Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

14. As per the principle enunciated in the case cited *supra*, a person who is well acquainted with the transaction in question can file a complaint, as GPA Holder on behalf of the complainant. In the instant case, on behalf of the complainant, GPA holder (P.W.1) filed the complaint. P.W.2 is the proprietor of M/s.Lalchand Hastimal Jewellers. It is needless to say that GPA holder is entitled to depose evidence, provided, he has personal knowledge of the transaction.

15. I have carefully perused the testimony of P.W.1(GPA Holder) and P.W.2 (Proprietor). There is no whisper in the testimony of

P.W.1 that he has personal knowledge about the transaction, i.e. issuance of cheque by the accused in favour of the complainant in discharge of legally enforceable debt. There is no whisper in the testimony of P.W.2 that P.W.1 has personal knowledge of the transaction in question. The testimony of P.Ws.1 and 2 clearly reveals that P.W.1 filed the complaint as GPA holder without having personal knowledge of the transaction in question. As rightly pointed out by the learned counsel for the appellant that P.W.2, who is the proprietor of M/s.Lalchand Hastimal Jewellers, is the competent person to speak about the transaction.

16. This Court carefully perused the complaint copy meticulously in order to ascertain whether the complainant made a specific assertion in the complaint as to the knowledge of the power of attorney holder with regard to the transaction in question. As observed earlier, there is no whisper in the testimony of P.W.1 that he has personal knowledge about the transaction in question. Likewise, there is no whisper in the testimony of P.W.2 that P.W.1 prior to filing of the complaint has personal knowledge of the transaction in question. Basing on the evidence available on record, the presumption that can be drawn is that the complaint is filed by GPA holder (P.W.1) without personal knowledge of the facts pleaded in the complaint.

17. In the instant case, the complaint was filed by GPA holder of the complainant (P.W.1) without personal knowledge. The facts of the case on hand are almost identical to the facts of the case cited supra.

18. 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 is not maintainable and the first appellate Court rightly set aside the conviction and sentence imposed against the accused by the trial Court for the offence punishable under Section 138 of NI Act. Therefore, there are no grounds much less valid grounds to interfere with the findings recorded by the first Appellate Court and hence, the appeal is liable to be dismissed.

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

Date: 07.02.2018
Rns

T. SUNIL CHOWDARY, J

