

MRS.JUSTICE T. RAJANI

CRIMINAL APPEAL NO: 1499 OF 2007

JUDGMENT :

This Criminal Appeal is preferred by the complainant assailing the judgment dated 16-08-2007 passed in C.C.No. 334 of 2003 by the Judicial Magistrate of First Class, Alamuru, East Godavari district, by virtue of which, the learned Magistrate acquitted the first respondent-accused for an offence under section 138 of the Negotiable Instruments Act.

2. The facts of the case, briefly, are that the first respondent-accused borrowed an amount of Rs.33,000/- from the complainant in the month of January, 2002 as hand loan. After several demands, the accused issued a cheque for the said amount on 17/09/2002 bearing No. 009731, drawn on Global Trust Bank, Service Branch, Secunderabad. When the cheque was presented for collection, the same was dishonoured on the ground of insufficient funds. The cheque was again presented on 18/12/2002 and again dishonoured. A notice was issued to the first respondent-accused but the first respondent-accused did not pay the amount in spite of notice. Hence, the complaint.

3. The Court below by considering the evidence of the complainant as PW-1 observed that the evidence of PW-1 is inconsistent. It observed that at one instance, PW-1 stated that the amount was lent with interest and in the cross-examination he stated that the amount was lent without any interest. The Court also observed that there is no supporting document for the said hand loan and the dates pertaining to the hand loan were not mentioned. The other ground on which the acquittal was recorded is that the notice which was

sent to the first respondent-accused was not received by the first respondent-accused. The appeal is preferred on the ground that the Court below failed to see that under section 139 of Negotiable Instruments Act, there is a presumption that the cheque is issued for the legally enforceable debt and it is always open to the first respondent-accused to rebut the presumption. The first respondent-accused did not examine any person and did not adduce any evidence for the dispute between himself and his brother. In the absence of any proof either oral or documentary, rebutting the statutory presumption of legally enforceable debt by the first respondent-accused, there is no requirement on the complainant to prove the hand loan taken by the first respondent-accused. The Court below failed to see that the first respondent-accused neither gave any notice nor any police complaint, that his brother is misusing blank cheques. On the above grounds, the appellant seeks to set aside the judgment of the court below.

4. Heard the learned counsel for the appellant-complainant and the learned Public Prosecutor, appearing for the first respondent-accused.

5. The notice sent to the first respondent-accused was returned on the ground of insufficient address. The counsel for the appellant contends that the notice sent to the first respondent-accused is on the address which is given by him and which is given in the lower court. Hence, it has to be deemed that there is proper service. However, coming to the facts of the case, observation of the lower court is that the signature on the acknowledgement and the signature of the first respondent-accused, available in the court record do not tally and the name is also different.

6. The counsel for the appellant relies on a ruling of the Hon'ble Apex Court in **C.C. ALAVI HAJI V/s. PALAPETTY MUHAMMED AND**

ANOTHER ¹. The Apex Court at paragraph No. 17 of the said judgement observed as under :

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person, who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case-2 if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

7. In this case, the counsel for the appellant is not in a position to contend that copy of the complaint was sent along with summons served on the first respondent-accused. Hence, when there is no such proof that summons were sent to the complainant, the plea of the appellant that notice is not served cannot be dismissed. Apart from that, the observations made by the lower court with regard to the proof of legally enforceable debt also cannot be said to be erroneous. The inconsistent evidence of PW-1 would throw a doubt with regard to the alleged debt towards which the cheque is issued. The Court also recorded that's there was not much acquaintance between the first respondent-accused and the complainant.

8. Hence, considering all the above circumstances, the trial Court acquitted the accused. The law is well-settled that the Courts should be slow in

¹) [2007] 3 SUPREME COURT CASES [Cri] 236

interfering with the judgment of acquittal though there is another view that can be possibly taken the view which is in favour of the first respondent-accused has to be taken.

9. Hence, in view of the above, this Court opines that the judgment of the trial court needs no interference.

10. In the result, this Criminal Appeal is dismissed.

11. As a sequel, miscellaneous applications if any, pending in this Criminal Petition shall stand dismissed.

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(RESULT : DISMISSED)

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