THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1559 OF 2007

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 10.09.2007 in C.C.No.2423 of 2003 on the file of the Court of the XI Additional Chief Metropolitan Magistrate at Secunderabad, wherein and whereby respondent Nos.2 and 3-accused Nos.1 and 2 were found not guilty for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881(for short 'the Act') 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 Finance Company having its registered office at Minerva Complex, S.D.Road, Secunderabad. Accused No.1 borrowed an amount of Rs.3,80,000/- from the complainant and executed a promissory note in favour of the complainant agreeing to repay the same with interest and accused No.2 stood as guarantor. In discharge of the legal debt, accused No.1 issued a cheque bearing No.372056 dated 11.09.2003 for Rs.2,00,000/- in favour of the complainant drawn on Karnataka Bank Limited, General Bazar Branch, Secunderabad. Accused No.2 issued a cheque bearing No.214815 dated 11.09.2003 for Rs.1,80,000/- drawn on Vijaya Bank, M.G.Road Branch, Secunderabad. The accused also agreed to pay monthly interest.

In spite of requests made by the complainant, the accused failed to repay the due amount and accused No.1 has issued a letter dated 15.09.2003 admitting the liability. At the request of both accused, the cheques were presented by the complainant for collection and those cheques were not honoured for want of sufficient funds. The complainant's bank issued a cheque return memo dated 03.10.2003. The complainant got issued a legal notice on 08.10.2003 directing the accused to pay the amount covered under the cheques within stipulated time. The accused failed to pay the amount and to issue reply notice. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. on the file of the Court of the XI Additional Chief Metropolitan Magistrate at Secunderabad, against the accused 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.2423 of 2003 and issued summons to the accused. On appearance of the accused, copies of all documents were furnished to them as contemplated under Section 207 Cr.P.C. The accused were 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, PW.1 was examined and Exs.P.1 to P.15 were marked. After completion of the complainant side evidence, the accused were examined under Section 313 Cr.P.C. with reference to the incriminating evidence deposed against them, which they

denied. On behalf of the defence, DW.1 was examined and Ex.D.1 was marked.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the complainant failed to prove the guilt of the accused for the offence punishable under Section 138 of the N.I. Act and consequently, acquitted them.

7. Sri J.Sridhar, learned counsel, representing Sri D.Madhava Rao, learned counsel for the appellant-complainant attacked the judgment of the trial Court on the following grounds:

1. Accused Nos.1 and 2 have admitted their signatures on Ex.P.3 cheques; therefore, it is a fit case to draw a presumption under Section 139 of the N.I. Act and the same was not considered by the trial Court.
2. The trial Court failed to consider that the accused acknowledged the debt amount by way of receipt Ex.P.7.
3. The trial Court ought not to have placed reliance on Ex.P.13 legal notice, and
4. The findings recorded by the trial Court are perverse as the same are not based on evidence much less legally admissible evidence; therefore, it is a fit case to allow the appeal.

8. *Per contra*, Sri M.S.Rao, learned counsel for respondent Nos.2 and 3 – accused Nos.1 and 2 submitted that the complainant filed the complaint by suppressing the material facts and the same was considered by the trial Court in right perspective. He further submitted that non-production of the

statement of account by the complainant itself is a sufficient ground to dismiss the complaint. He further submitted that the findings recorded by the trial Court are based on evidence much less legally admissible evidence; therefore, it is not a fit case to interfere.

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

1. Whether the complainant proved the guilt of the accused beyond all reasonable doubt?
2. Whether the findings recorded by the trial Court are sustainable?

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

11. Before adverting to the findings of the Court below, 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 Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out:
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> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (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.

[1] AIR 2009 SC 1872

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

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[2] (2009) 15 SCC 200

12. 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.

13. P.W.1, who is the Director of the complainant, is competent to speak the facts of the case. As per the testimony of P.W.1, accused No.1 borrowed an amount of Rs.3,80,000/- from the complainant and executed a promissory note dated 24.01.2003 in favour of the complainant agreeing to repay the same with interest. Ex.P6 is the promissory note. Accused No.2, who is the wife of accused No.1, stood as guarantor. As per the testimony of P.W.1, accused No.2 issued a cheque bearing No.214815 for an amount of Rs.1,80,000/- and accused No.1 issued a cheque bearing No.372056 for an amount of Rs.2,00,000/- in favour of the complainant. Ex.P3 is the cheques. The complainant presented the two cheques for collection and the same were returned for want of 'sufficient funds'. Exs.P4 and P5 are the cheque returned memos dated 03.10.2003. The complainant got issued a legal notice on 08.10.2003 under original of Ex.P8 directing the accused to pay the amount within the stipulated period. For one reason or other, the accused did not issue any reply. The oral testimony of P.W.1 coupled with Exs.P3, P4, P5 and P8 clearly reveals that the cheques issued by accused Nos.1 and 2 were dishonoured for want of sufficient funds.

14. As seen from the testimony of D.W.1, he is admitting his signature on the cheque bearing No.372056. He also admitted the signature of his wife on the cheque bearing No.214815. As rightly pointed out by the learned counsel for the appellant, once the accused admits the signature on cheques (Ex.P3), the Court can draw a presumption under Section 139 of the Act that the cheques in question were issued by accused Nos.1 and 2 in discharge of legally enforceable debt. There is no dispute with the proposition of law submitted by the learned counsel for the appellant. The presumption drawn under Section 139 of the Act can be rebutted by the accused. Once the accused rebut the presumption drawn under Section 139 of the Act, again the onus of proof shifts on the complainant to establish his case beyond all reasonable doubt.

15. Let me consider the facts of the case on hand in touch stone with the provisions of Sections 138 and 139 of Negotiable Instruments Act. It is not in dispute that the accused issued legal notice Ex.P13 on 27.09.2003 directing the complainant not to present the cheques and also with a request to produce the statement of account. The concerned bank issued cheque returned memos under Exs.P4 and P5 dated 03.10.2003.

16. The learned counsel for the appellant submitted that the complainant presented the cheques before receiving Ex.P13 notice. If really the complainant had received the legal notice Ex.P13 after presentation of the cheques (Ex.P3) for collection, what prevented him to produce the evidence much less cogent and convincing evidence. There is no whisper in the testimony of P.W.1 that the complainant presented the cheques before receiving Ex.P13 legal

notice. There is no mention in the complaint on what date Ex.P3 cheques were presented for collection. There is no whisper in the testimony of P.W.1 the date on which Ex.P3 cheques were presented in the bank for collection. It is the duty of the complainant to adduce oral or documentary evidence to establish the date of receipt of Ex.P13 notice and the date of presentation of Ex.P3 cheques. For one reason or other, the complainant did not choose to clarify the above said two aspects by way of oral or documentary evidence. The court shall not lost sight of this factual aspect in order to appreciate the rival contentions.

17. As per the case of the complainant, accused No.1 executed the promissory note Ex.P6 on 24.01.2003. Accused No.1 also issued a cash receipt Ex.P7 dated 24.01.2003. Any ordinary prudent man basing on the testimony of P.W.1 and Exs.P6 and P7 will come to a conclusion that the transaction between the accused and the complainant commenced on 24.01.2003. A perusal of complaint at a glance gives an impression as if there was no prior financial transaction between the complainant and accused No.1. Mere non-mentioning of certain aspects in the complaint that itself is not a valid ground to doubt the version put forth by the complainant. Suffice it to say, the complainant had to plead the material facts in his complaint. For the reasons best known to him, the complainant did not mention the date of Ex.P6 promissory note and Ex.P7 receipt either in the complaint or in Ex.P8 legal notice dated 08.10.2003. There is no explanation in the testimony of P.W.1 the reasons for non-mentioning of the date of promissory note and receipt either in the complaint or in the legal notice. It is elicited from the testimony of P.W.1 that Exs.P6

and P7 are typed copies. The possibility of filling up Ex.P6 promissory note and Ex.P7 receipt taking advantage of the signatures of accused 1 and 2 cannot be ruled out completely.

18. On 27.09.2003, accused No.1 issued a legal notice directing the complainant not to present the cheques. For one reason or other, the complainant did not choose to issue reply to original of Ex.P13 notice or furnished the statement of account. As per the recitals of the complaint and Ex.P13 legal notice, the accused failed to pay the first installment commencing from September 2003 (25.09.2003). The question of instalments does not arise if the complainant's case is based on Ex.P6 promissory note. It is not the case of the complainant that as per the recitals of Ex.P6 promissory note, the accused agreed to pay the amount covered in it by way of installments. If not directly, by necessary implications, it gives an impression that Ex.P3 cheques were issued by the accused for proper payment of instalments. The testimony of D.W.1 reveals that he paid various amounts by way of cheques to the complainant. This fact is not being disputed by the complainant. Ex.D1 is the balance sheet of the complainant dated 30.08.2001. As per the recitals of Ex.D1, accused No.1 owe an amount of Rs.1,18,100/- to the complainant. In the cross-examination, P.W.1 admitted that there are some financial transactions between the accused and the complainant since 1999. Non-mentioning of these material facts in the complaint creates a doubt with regard to the version put forth by the complainant.

19. Even assuming but not conceding as pointed out by the learned counsel for the appellant that there is no time for the

complainant to issue reply to Ex.P13, the complainant has not assigned the reasons for not supplying the statement of account to the accused. During the pendency of the trial also, the complainant did not choose to produce the statement of accounts before the trial court to establish the exact amount owe by the accused to the complainant. If the recitals of Ex.D1 are taken into consideration, the accused owe an amount of Rs.1,18,100/- to the complainant. In such circumstances, how the complainant had obtained a promissory note for Rs.3,80,000/- and cheques for Rs.3,80,000/-. It is not the case of the complainant that the statement of account is not available with it. For the reasons best known, the complainant did not produce the statement of account. When the party to the proceedings fails to produce the documents in his/her custody, the Court can draw an adverse presumption under Section 114 of the Indian Evidence Act. Had the complainant produced the statement of account before the trial Court, that will threw some light on the issue involved in this case. The stand of the accused is that the complainant has taken their signatures on empty promissory note (Ex.P6) and cheques (Ex.P3) at the time of loan transaction. As per the recitals of Ex.P13, the accused paid almost entire amount to the complainant. If really the accused has not paid any amount, what prevented the complainant to produce the statement of account to negate the stand taken by the accused.

20. The material placed before the Court clinchingly establishes that the complainant did not produce the statement of account for the reasons best known to it. Suffice it to say that presumption drawn under Section 139 of NI Act can be rebutted either by direct

or indirect or circumstantial evidence. In the instant case, the accused by putting suggestions to P.W.1 elicited the facts, which eventually supported his case. Non production of statement of account also creates a doubt with regard to which transaction Ex.P6 promissory note and Ex.P7 receipt were issued.

21. As observed earlier, both the documents are typed one. The possibility of filling up of Ex.P6 and P7 after receipt of Ex.P13 notice from the accused cannot be ruled out completely. The various factual aspects proved by the accused probablising the stand of the accused eventually improbablising the stand of the complainant. The accused successfully rebutted the presumption drawn under Section 139 of NI Act. The complainant failed to prove that the accused issued Ex.P3 cheques in discharge of legally enforceable debt. The trial Court after considering various aspects arrived at a conclusion that Ex.P3 cheques were not issued in discharge of legally enforceable debt. The trial Court assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the trial Court. There is no flaw much less legal flaw in the findings of the trial Court, which warrants interference of this Court.

22. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, there are no grounds much less legal grounds to interfere with the findings recorded by the trial Court and the appeal is liable to be dismissed.

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

T. SUNIL CHOWDARY, J.

Date:07.02.2018
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