THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1213 OF 2007

JUDGMENT:

This appeal is filed under Section 374(2) of Cr.P.C. by the complainant assailing the judgment dated 11.01.2007 in C.C.No.294 of 2004 on the file of the Court of the Judicial Magistrate of First Class, Nandyal, 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 him 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 the Managing Partner of M/s. New Sri Vijaya Lakshmi Agencies, having its office at Balaji Complex at Nandyal Town. M/s. New Sri Vijaya Lakshmi Agencies has been carrying on fertilisers and pesticides business. Since 1999, the complainant had supplied fertilisers and pesticides to the accused to an amount of Rs.2,10,000/-. In discharge of the said debt, the accused issued a cheque bearing No.916841 dated 02.02.2004 for an amount of Rs.2,10,000/- in favour of the complainant drawn on Karur Vysya Bank Limited, Nandyal and the same was returned on 04.05.2004 with an endorsement 'insufficient funds'. On 19.05.2004 the complainant issued a statutory notice directing the accused to pay the amount covered under the cheque within stipulated time. For one reason or other, the accused did not choose to pay the amount. Having no other alternative, the

complainant filed a complaint under Section 200 of Cr.P.C. on the file of the Judicial Magistrate of First Class, Nandyal, 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.294 of 2004 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 allegation and claimed to be tried.

4. To bring home the guilt of the accused, on behalf of the complainant, PWs.1 to 3 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 material available against him, which he denied. On behalf of the defence, DW.1 was examined and Exs.D.1 to D.33 were marked.

5. 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 him of the said offence. The trial Court also made an observation that the complaint is not maintainable under law. Hence, the present appeal is filed by the complainant.

6. Sri B.S.Reddy, learned counsel for the appellant-complainant, submitted that the findings of the trial Court that the

complaint is not maintainable is not sustainable either on facts or in law. He further submitted that the trial Court has not properly appreciated the recitals of Exs.P.12 and P.13, which clearly demonstrates that the accused owed an amount of Rs.2,10,000/- to the complainant. He also submitted that the trial Court ought not to have placed reliance on Exs.D.1 to D.33. He further submitted that 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. 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?

8. 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.

9. 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 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.

[1] AIR 2009 SC 1872

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

10. As per the principle enunciated in the cases cited supra, where it is possible to have two views – one in favour of the

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[2] (2009) 15 SCC 200

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.

11. As seen from the testimony of PW.1, the accused issued Ex.P.1 cheque in his favour. His testimony further reveals that he presented the cheque in Karur Vysya Bank Limited, Nandyal, for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.2 is the cheque return memo. The testimony of PW.2 clearly reveals that the cheque issued by the accused returned with an endorsement 'insufficient funds'. DW.1 is not denying his signature on Ex.P.1. The oral testimony of PWs.1, 2 and DW.1 coupled with Exs.P.1 and P.2 clearly reveals that Ex.P.1 cheque issued by the accused in favour of the complainant was dishonoured for want of sufficient funds. Once the cheque issued by the accused is dishonoured, the Court can draw a presumption under Section 139 of the N.I. Act that the accused issued the cheque in discharge of the legally enforceable debt. It is needless to say that the presumption drawn under Section 139 of the N.I. Act is a rebuttable one. If the accused rebutted the presumption drawn under Section 139 of the N.I. Act, the onus of proof shifts on the complainant to establish that the debt in question is a legally enforceable debt.

12. As seen from the testimony of PW.1, he got issued statutory notice original of Ex.P.3 directing the accused to pay the amount covered under Ex.P.1 cheque within the stipulated period. Ex.P.4 is the returned postal cover. Ex.P.5 is the certificate of posting. Exs.P.6 and P.7 are the authorization letters issued by the Bank

Manager. For one reason or other, the accused did not choose either to pay the amount covered under Ex.P.1 or issue reply notice. The material placed on record clinchingly establishes that the complainant has meticulously followed the procedure as contemplated under the N.I. Act.

13. The trial Court made an observation that that the complaint is not maintainable in view of the decision of the Division Bench of this Court in **Amit Desai and another v. Shine Enterprises and another[3].** At this this juncture, learned counsel for the appellant has drawn the attention of this Court to the decision in **Dr.A.V.Ramanaiah and another v. M.Shekhar and others[4]**, wherein the Full Bench this Court held at paragraph Nos.23 and 24 as follows:

> "23. Therefore, the statute maker would have never intended that by a mere indorsement, a prosecution could be lunched, which could not have been otherwise launched, if the bar contained under Section 69 of the Partnership Act, is to be stretched to cover the offences under Section 138 of the Act. We are, therefore, of the view that the Division Bench has not correctly appreciated the distinction between the right of enforcing contractual obligations arising out of business transactions carried out by an unregistered partnership firm, as contemplated and covered under Section 69 of the Partnership Act, in contrast to the penal action rendering dishonor of cheque as an offence contained under Section 138 of the Act. Therefore, we hold that the Division Bench in *Amit Desai v. M/s. Shine Enterprises (2000(1) ALD (Crl.) 587 (AP))* has not laid down correct law.
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> 24. The reference is, accordingly, answered holding that the bar contained under Section 69 of the Partnership Act

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[3] 2000 (1) ALD (Crl.) 587 (AP)
[4] 2009(1) ALT (Crl.) 395 (FB)(A.P.)

> would not get attracted for initiating action by or against an unregistered partnership firm for the offence committed under Section 138 of the Act. The matter be listed before the appropriate Bench."

14. As per the principle enunciated in the case cited supra, an unregistered partnership firm can initiate criminal proceedings against the accused under Section 138 of the N.I. Act.

15. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, the finding of the trial Court that the complaint is not maintainable is not sustainable either on facts or in law.

16. As per the testimony of PW.1, the accused cleared the debt amount upto the year 2000. As per the testimony of PW.1, he supplied goods to the accused worth of Rs.1,50,000/- in the year 2001. His testimony further reveals that at the time of settlement of account, the accused issued Ex.P.1 cheque on 02.02.2004. The oral testimony of DW.1 coupled with Exs.D.1 to D.33 clearly establishes that the accused cleared the debt amount to the complainant. The burden of proof lies on the complainant to establish that he supplied goods worth of Rs.1,50,000/- to the accused in the year 2001. In the cross-examination, PW.1 in unequivocal terms deposed that he did not file any document to show that the transaction went on between him and the accused upto 2001. He further deposed that he did not file any document to prove that he supplied goods to the accused in the year 2001 worth of Rs.1,50,000/-. A perusal of the record clearly reveals that the complainant closed the business in the year 2001. A perusal of the record reveals that the accused made last payment under

Ex.D.31 on 10.04.2000. The complainant did not file even a single scrap of paper to show that he supplied goods or pesticides to the accused after 10.04.2000. As per the testimony of PW.1, the accused paid the entire amount upto the year 2000. Ex.P.1 is the cheque bearing No.916841, alleged to have been issued on 02.02.2004. It is the contention of the accused that he handed over cheque to the complainant at the time of entering into the business transaction with the complainant. In order to appreciate the rival contentions, it is not out of place to extract the cross-examination of PW.1.

> "It is not true to suggest that the accused never settled any account and issued the said cheque, after settling the accounts. I have taken the amount due on the cheque bearing No.916840 dated 15.03.2000, cheque bearing No.916843, dated 28.03.2000 issued by the accused to me. It is not true to suggest that I had retained the cheque bearing No.916842 with me only."

17. The testimony of PW.1 clearly reveals that he presented the cheque bearing No.916840, dated 15.03.2000 and cheque bearing No.916843, dated 28.03.2000 and collected money covered under the above cheques.

18. As observed earlier, Ex.P.1 cheque number is 916841. When the cheque bearing No.916843 was given to the complainant in the year 2000 itself as admitted by him, the possibility of handing over the cheque bearing No.916841 in the year 2004 by the accused to the complainant is very much doubtful. Basing on the admissions made by PW.1, the logical conclusion that can be drawn is that the accused might have handed over that Ex.P.1 cheque to the complainant in the year 2000 itself. As observed earlier, even as

per the testimony of PW.1, accused cleared the debt amount upto the year 2000. Taking advantage of handing over of cheque by the accused to the complainant, the possibility of filing of complaint cannot be ruled out completely. Exs.P.8 and P.10 are no way helpful to the complainant to establish that he supplied goods to the accused in the year 2001. On the other hand, these documents if not directly by necessary implication support the version of the accused. The complainant failed to establish that the accused issued Ex.P.1 cheque in discharge of legally enforceable debt. The complaint filed basing on the cheque, which is not legally enforceable, is not maintainable under law. The trial Court considered the oral and documentary evidence in right perspective and arrived at a conclusion that Ex.P.1 cheque is not legally enforceable. The findings recorded by the trial Court are based on oral and documentary evidence. There is no illegality or irregularity in the findings recorded by the trial Court, which warrants interference of this Court. I am fully endorsing 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. There are no grounds much less valid grounds to interfere with the well considered judgment passed by the trial Court. Hence, the appeal is liable to be dismissed.

19. 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: 14.02.2018
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