THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1161 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 28.03.2005 in C.C.No.729 of 2002 on the file of the Court of the III Metropolitan Magistrate at Visakhapatnam, wherein and whereby the second 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 accused borrowed an amount of Rs.1,20,000/- from the complainant in the month of November, 2001 agreeing to repay the same with interest at the rate of 24% per annum. In discharge of the hand loan, the accused issued a cheque bearing No.284304 on 17.02.2002 in favour of complainant for an amount of Rs.1,24,800/-drawn on the Karur Vysya Bank Limited at Rajahmundry. The complainant presented Ex.P.1 cheque through his banker i.e., Vysya Bank Limited, Cancer Hospital Extension Counter, Seethammadhara, Visakhapatnam, for collection and the same was returned on 09.08.2002 with an endorsement 'funds insufficient' and the said fact was intimated to the complainant on 10.08.2002. On 23.08.2002 the complainant got issued a legal notice original of Ex.P.3 directing the accused to pay the amount

within 15 days. The accused issued a reply notice Ex.P.4 denying the averments made in the legal notice. Ex.P.5 and Ex.P.6 are the authorisation letters of PWs.2 and 3 respectively. Exs.P.7 is the statement of account and Ex.P.8 is the cheque return register. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. before the learned III Metropolitan Magistrate, Visakhapatnam, against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act (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.729 of 2002 and issued summons to the accused. After appearance, the accused was examined under Section 251 Cr.P.C. However, the accused denied the transaction.

4. In order to prove the guilt of the accused, on behalf of the complainant, PWs.1 to 3 were examined and Exs.P.1 to P.18 were marked. After completion of the complainant side evidence, the accused was examined under Section 313 Cr.P.C. with reference to incriminating evidence deposed against him. On behalf of the defence, DW.1 was examined and Ex.D.1 was 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. Hence, the present appeal is filed by the complainant.

6. Learned counsel for the appellant-complainant strenuously submitted that the trial Court ought not to have placed any reliance on Ex.D.1 letter. He further submitted that the oral testimony of PWs.1 to 3 coupled with Exs.P.1 to P.3 clearly reveals that the debt in question is legally enforceable. He also submitted that the findings recorded by the trial Court are not sustainable either on facts or in law.

7. *Per contra,* the learned counsel for the second respondent-accused submitted that the trial Court considered the oral and documentary evidence in right perspective and acquitted the accused. He further submitted that the oral testimony of DW.1 coupled with Ex.D.1 clearly reveals that the debt in question is not legally enforceable. He also submitted that the findings recorded by the trial Court are based on evidence much less legally admissible evidence. Hence, the appeal is liable to be dismissed.

8. 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 the N.I. Act? 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 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.
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> (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.
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> (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.
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> (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.)

[1] AIR 2009 SC 1872
[2] (2009) 15 SCC 200

> 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.)
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> 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.)

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. The complainant examined himself as PW.1 and got marked Exs.P.1 to P.8. PW.2 is the Branch Head in ING Vysya Bank, Visakhapatnam. PW.3 is the Bank Official of Karur Vysya Bank Limited, Rajahmundry. As seen from the testimony of PW.1, the accused issued Ex.P.1 cheque in discharge of the legal debt. His testimony further reveals that he presented Ex.P.1 cheque in Vysya Bank Limited, Visakhapatnam, for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.2 is the cheque return memo. The oral testimony of PW.2 reveals that the complainant presented Ex.P.1 cheque in Vysya Bank, Visakhapatnam, for collection and the same was returned for want of sufficient funds. The testimony of PW.3 reveals that the accused was not having sufficient funds in his account. The oral testimony of PWs.1 to 3 coupled with Exs.P.1 and P.2 clearly reveals that Ex.P.1 cheque issued by the accused was returned for want of sufficient funds. PW.1 got issued legal notice Ex.P.3 directing the accused to pay the amount within 15 days. The accused issued Ex.P.4 reply notice denying the averments made in the complaint.

It is needless to say that the burden of proof lies on the complainant to establish that Ex.P.1 cheque was issued by the accused in discharge of legally enforceable debt. Once the complainant established the said fact, the onus of proof shifts on the accused to prove the stand taken by him.

13. As per the version of the complainant, the accused borrowed an amount of Rs.1,20,000/- from him in the month of November, 2001. In discharge of the hand loan, the accused issued Ex.P.1 cheque. It is the stand of the accused that he issued the cheque to one Apparao at the instance of one Gnaneswararao. A perusal of the record reveals that the accused is the tenant of Apparao. The material placed before the Court clinchingly establishes that during the course of negotiations, the accused handed over Ex.P.1 cheque to one Gnaneswararao. If the averments made in the complaint are taken to be true and correct, the complainant paid the amount to the accused at Visakhapatnam. In the cross-examination, PW.1 stated that he paid the amount to the accused at Rajahmundry in the shop of Gnaneswararao. PW.1 categorically deposed that he cannot say the exact place of shop of Gnaneswararao. PW.1 has taken two different versions with regard to place of lending of money to the accused. The testimony of PW.1 clearly reveals that he is the close friend of one Gnaneswararao. As per the testimony of PW.1, he opened the account in Karur Vysya Bank, Cancer Hospital Extension Counter, Seethammadhara, Visakhapatnam. PW.1 is not in a position even to give particulars of his account number. In the cross-examination, PW.1 stated that he has no prior acquaintance with the accused. The trial Court made an observation that nobody will

lend such huge amount to the unknown person. PW.1 did not deny the rental agreement between the accused and Gnaneswararao. Admittedly the complainant has been residing in Visakhapatnam, in such circumstances, the possibility of lending an amount of Rs.1,20,000/- to the accused without obtaining any document is somewhat improbable and unbelievable.

14. In the cross-examination, PW.1 admitted his signature on Ex.D.1 letter. However, he pleaded that he is not aware of recitals of Ex.D.1 letter. As per the recitals of Ex.D.1 letter, there is no financial transaction between the complainant and the accused. It is needless to say that a person, who admits the signature on a letter, has to explain the circumstances under which he executed the letter. PW.1 has not assigned reasons much less cogent and valid reasons how he subscribed his signature on Ex.D.1 letter. It is not the case of PW.1 that the accused obtained Ex.D.1 letter by threat or coercion. PW.1 in unequivocal terms deposed that the accused initiated criminal proceedings against him, Gnaneswararao and Apparao much prior to filing of this case. In order to avoid the consequences of the criminal case, the possibility of giving Ex.D.1 letter by PW.1 cannot be ruled out completely. The material placed before the Court clinchingly establishes that the complainant did not lend money to the accused, in such circumstances, the possibility of issuing the cheque in favour of the complainant is highly improbable and unbelievable. Establishment of legally enforceable debt is *sin qua non* to convict a person under Section 138 of the N.I. Act. The material placed before the Court clinchingly establishes that Ex.P.1 cheque was not issued in favour of the complainant in discharge of

legally enforceable debt. The complainant failed to prove the ingredients of Section 138 of the N.I. Act. The possibility of handing over Ex.P.1 cheque by Gnaneswarrao to the complainant is more probable and believable. The trial Court considered the oral and documentary evidence in right perspective and 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. The trial Court has assigned reasons much less cogent and valid reasons to its findings. I am fully agreeing with the findings recorded by the trial Court. There are no grounds much less valid grounds to interfere with the well considered judgment passed by the trial Court.

15. 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: 31.01.2018
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