HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No. 1206 OF 2008

JUDGMENT:

This Criminal Appeal, under Section 378(4) of Cr.P.C., is filed questioning the judgment dated 30.07.2008 in Criminal Appeal No.92 of 2008 on the file of the Additional Metropolitan Sessions Judge for trial of Communal Offence Cases-cum-VI Additional Metropolitan Sessions Judge, Hyderabad (for short, 'the first appellate court'), wherein the first appellate court set aside the conviction and sentence recorded against the accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I.Act') *vide* judgment dated 11.03.2008 in C.C. No.417 of 2004 on the file of the XI Additional Chief Metropolitan Magistrate, Secunderabad (for short, 'the trial Court').

2. The appellant herein is the complainant, and respondent Nos.1 and 2 herein are accused, before the trial Court. Foe better appreciation of facts, the parties are herein referred to, as arrayed before the trial Court.

3. Heard Sri A. Hari Prasad Reddy, learned counsel for the appellant-complainant, Sri A. Sudarshan Reddy, learned counsel for respondents-A.1 and A.2 and the learned Additional Public Prosecutor, apart from perusing the material on record.

4. Sri A. Hari Prasad Reddy, learned counsel for the appellant-complainant would submit that there is well considered

judgment of the trial Court, wherein the respondents-accused were convicted and sentenced for the offence under Section 138 of the N.I.Act; the first appellate court failed to see that the accused have fallen due an amount of Rs.10,06,211/- and to discharge the said liability, A.1 issued three cheques covered under Exs.P.8 to P.10; the cheques were returned for want of sufficient funds in the account of the respondents-accused; respondent-A.1 being the Managing Director of A.2 firm issued the cheques in discharge of the debts due by respondent-A.2 firm as well as M/s. SJB Marketing; the first appellate court failed to draw the presumption under Section 139 of the N.I.Act in favour of the appellant-complainant; even the respondent-A.1 did not enter into the witness box to substantiate the defence taken by him; the first appellate court erred in setting aside the conviction and sentence recorded against the respondents-accused to suffer simple imprisonment for one year and to pay fine of Rs.10,000/- for the offence under Section 138 of the N.I.Act; and ultimately, prayed to restore the judgment of the trial Court in C.C. No.417 of 2004 dated 11.03.2008 by setting aside the judgment of the first appellate court in Crl.A. No.92 of 2008 dated 30.07.2008. In support of the contentions, he relied on the judgment of the Hon'ble Supreme Court in **Anil Sachar and another v. Shree Nath Spinners Private Limited and others**[1].

5. Sri A. Sudarshan Reddy, learned counsel appearing for the respondents-accused would submit that the first appellate

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[1] (2011) 13 Supreme Court Cases 148

court analyzed the facts and circumstances of the case and held that there was no legally enforceable debt and presumption under Section 139 of the N.I.Act is not available to the complainant; there are no circumstances to interfere with the judgment delivered by the first appellate court in Crl.A. No.92 of 2008 dated 30.07.2008; and ultimately, prayed to dismiss the appeal. In support of his contentions, he relied on a decision of the Hon'ble Supreme court in **Kumar Exports v. Sharma Carpets**[2].

6. In view of the contentions putforth by both sides, the point for determination is, whether the judgment rendered by the first appellate court in Crl.A. No.92 of 2008 dated 30.07.2008 is liable to be set aside restoring the judgment dated 11.03.2008 passed by the trial Court in C.C. No.417 of 2004, wherein the respondents-accused were convicted and sentenced for the offence under Section 138 of the N.I.Act?

7. **POINT**: Case of the complainant is as follows:

Complainant firm is an authorized dealer and distributor of Tata Steel and C.R. Products, etc. A.1 is the Managing Director of M/s. SJB Marketing and partner of A.2 firm. The accused used to purchase material from the complainant. As and when the material is required by the accused, A.1 used to obtain bills in the name of M/s. SJB Marketing or A.2 firm, and used to make payments on behalf of both the concerns through cheques from the account of A.2 firm. The payments made by A.1 through

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[2] 2009(1) ALD (Crl.) 468 (SC)

cheques issued from the account of A.2 firm were being adjusted in respect of the transactions made in the name of both the concerns. If the bills were not cleared within 30 days from the date of supply, the accused are liable to pay interest @ 36% per annum on the credit invoices. In spite of the same, the accused used to make delayed payments. A sum of Rs.8,69,174/-, which is inclusive of interest, remained unpaid by the accused in respect of business transactions in the name of M/s. SJB Marketing, and a sum of Rs.75,480-50 ps was due in respect of transactions in the name of A.2 firm.

The accused issued three post-dated cheques, viz., bearing No.315814, dated 21.07.2003 for Rs.20,000/-; bearing No.315809, dated 13.09.2003 for Rs.2,26,211-50 ps; and bearing No.315808, dated 03.11.2003 for Rs.7,60,000/-; all drawn on Canara Bank, SSI Branch from the account of A.2 firm to the complainant towards part payment in respect of the amount due under business transactions made by him on behalf of both the concerns. When the said cheques were presented in the first week of November, 2003, the same were returned with endorsement 'funds insufficient' *vide* cheques return memo dated 04.11.2003. Thereafter, the complainant got issued statutory notice dated 12.11.2003 by RPAD on 14.11.2003. Since the complainant did not receive either the postal acknowledgment or the returned cover, it lodged a complaint with the postal authorities. Since the notice was sent by registered post to correct address, it is a deemed service.

Thereafter also, the accused did not pay the amount covered under the dishonoured cheques to the complainant within the period stipulated under Section 138 of the N.I.Act. Hence, the present complaint was filed by the complainant for the offence punishable under Section 138 of the N.I.Act, which was taken cognizance by the learned Magistrate for the offence punishable under Section 138 of the N.I.Act.

8. On appearance of the accused, the learned Magistrate complied with the provisions of Section 207 Cr.P.C. When the accused were examined under Section 251 Cr.P.C., they denied the accusation levelled against them, pleaded not guilty and claimed to be tried.

9. In order to prove the guilt of the accused, the complainant got himself examined as P.W.1 and marked Exs.P.1 to P.18 on its behalf.

10. After closure of prosecution side evidence, the accused were examined under Section 313 Cr.P.C. They denied the incriminating circumstances appearing against them in the evidence of prosecution witnesses. On behalf of the accused, no oral or documentary evidence was adduced.

11. The trial Court, after considering the entire evidence on record, *vide* the impugned judgment dated 11.03.2008, found the accused guilty of the offence punishable under Section 138 of the N.I. Act, accordingly convicted them of the said offence

and sentenced to undergo simple imprisonment for a period of one year and to pay fine of Rs.10,000/-, in default, to suffer simple imprisonment for a further period of six months. Challenging the said judgment, the accused preferred Criminal Appeal No.92 of 2008 on the file of the first appellate court, which, *vide* the impugned judgment, allowed the appeal setting aside the conviction and sentence recorded by the trial Court. Challenging the same, the present appeal is preferred by the complainant.

12. P.W.1, who is one of the partners of the complainant M/s. Ajay Enterprises, has supported the complaint averments specifically stating that A.1 used to purchase material from M/s. Ajay Enterprises on behalf of A.2 firm as well as M/s. SJB Marketing units. In the course of business transactions between the parties, M/s. SJB Marketing industry fallen due an amount of Rs.12,80,652/- and A.2 firm became due an amount of Rs.75,480-50 ps. In order to pay the said amount, A.1 has given three cheques, viz., bearing No.315814 dated 21.07.2003 for Rs.20,000/-; bearing No.315809 dated 13.09.2003 for Rs.2,26,211-50 ps; and bearing No.315808 dated 03.11.2003 for Rs.7,60,000/-. Those cheques were issued by A.1 to repay the above outstanding amounts. When those cheques were presented, they were returned for want of sufficient funds in the account. Then a statutory notice was given. Even then, A.1 did not pay the due amount. Through the evidence of P.W.1, Exs.P.1 to P.18 were marked. Ex.P.1 is the original firm

registration certificate, Exs.P.2 to P.7 are the account ledgers of M/s. SJB Marketing and A.2 for the years from 2001 to 2004, Exs.P.8 to P.10 are the original cheques bearing Nos.315814, 315809 and 315808 drawn on Canara Bank, SSI Branch, respectively, Exs.P.11 and P.12 are the original returned cheque memos dated 04.11.2003 and 05.11.2003 respectively, Ex.P.13 is the office copy of legal notice dated 12.11.2003, Ex.P.14 is the original letter of authorization dated 12.01.2004, Ex.P.15 is the original Form No.1 issued by Registrar of Firms, Ex.P.16 is the postal receipt, Ex.P.17 is the original complaint given to Post Master, Kings Way, Secunderabad and Ex.P.18 is the original postal letter issued by GPO dated 09.01.2004. The accused did not choose to depose to substantiate his defence. The defence set up by the accused is that none of the Companies was due any amount to the complainant. Those cheques were given as advance for the supply of the goods. The complainant had misused those cheques and field a false complaint before the learned Magistrate. There is record to show that notices issued in this case were served on the respondents-accused. A communication received from the General Post Office was filed to substantiate the same. Moreover, there was no contest with regard to non-service of notice in the instant case. As seen from the material on record, A.1 is the Managing Director of A.2 firm. The evidence of P.W.1 and the pleadings shows that A.2 firm has due an amount of Rs.75,480-50 ps only. The total value of the cheques given in the instant case is Rs.20,000/- +

Rs.2,26,211/- + Rs.7,60,000/- = Rs.10,06,211/- and those cheques were drawn on Canara Bank, SSI Branch from the accounts of A.2 firm. The contention putforth on behalf of the complainant is that he used to supply goods to A.2 firm as well as M/s. SJB Marketing and the accused used to pay money from the account of A.2 firm. The cheques were issued to pay the outstanding money of Rs.10,06,211/-. In view of the language given under Section 139 of the N.I.Act, a presumption is available in favour of the complainant to hold that the cheques were given in discharge of legally enforceable debt. Analyzing the entire oral and documentary evidence on record, the trial Court has rightly convicted and sentenced the respondents-accused for the offence under Section 138 of the N.I.Act. Since the presumption is available in favour of complainant that the subject cheques were given in discharge of the debt in whole or in part of debt due between the parties, the Court of Session has taken a contra view in this matter, which is erroneous, the learned counsel for the complainant relied on a decision in **Anil Sachar's** case (1 supra), wherein it is held as follows:

> "We may also refer to the judgment delivered by this Court in the case of ICDS Ltd. (supra). In the said judgment this Court has referred to the nature of liability which is incurred by the one who is a drawer of the cheque. If the cheque is given towards any liability or debt which might have been incurred even by someone else, the person who is a drawer of the cheque can be made liable under Section 138 of the Act. The relevant observation made in the aforestated judgment is as under:

> 'The words "any cheque" and "other liability" occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt that for whatever reason it may be, the liability under Section 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature. The High Court got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The language, however, has been rather specific as regard the intent of the legislature. The commencement of the section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" - the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.'

Looking to the facts of the case and law on the subject, we are of the view that all the four cheques referred to in both the complaints are presumed to have been given for consideration. The presumption under Section 139 of the Act has not been rebutted by the accused and, therefore, we are of the view that the trial court wrongly acquitted the accused by taking a view that there was no consideration for which the cheques were

> given by Munish Jain to the complainants. The aforesaid incorrect view was wrongly confirmed by the High Court. We, therefore, set aside the acquittal order and convict accused Munish Jain under Section 138 of the Act."

13. In the light of the above facts and circumstances of the case and the material on record, it is required to be seen whether there is any legally enforceable debt which binds the respondents-accused for payment of outstanding amount as claimed by the appellant-complainant. Exs.P.8 to P.10 are the three cheques issued by A.1 belonging to A.2 firm. The total amount mentioned in the cheques is Rs.10,06,211/-. As per the record, A.2 firm is due only Rs.75,480-50 ps. The debt of A.2 firm is much less the amounts mentioned in the cheques. Now the point is that M/s. SJB Marketing is due an amount of Rs.10,06,211/- figuring in Exs.P.8 to P.10 cheques. The complainant has to prove that the amount of Rs.10,06,211/- is due for the supply of goods to M/s. SJB Marketing. The complainant has not filed any invoices or delivery vouchers except filing ledger entries, which are self-styled entries made by the complainant and his staff members. To establish the outstanding amount, the complainant has to place the best evidence available with him. He has not done so. Even he did not give the details of the goods as well as the rates of the goods and the manner in which M/s. JSB Marketing company had fallen due an amount of Rs.10,06,211/-. There are no pleadings and oral evidence to that effect. Initial burden lies on the complainant to invoke the presumption under Section 139 of the N.I.Act.

P.W.1 was also not in a position to state that which cheque was issued to discharge due amount by A.2 firm as well as M/s. SJB Marketing. As on 13.06.2003, an amount of Rs.8,67,172/- was due by M/s. SJB Marketing and Rs.75,480/- by A.2 firm. The amounts mentioned in Exs.P.8 to P.10 are much more. The contention putforth on behalf of the respondents-accused is that those cheques were given in advance towards the supply to be made to the A.2 firm. There is also specific admission of P.W.1 that the employees of his industry have filled up the dates. P.W.1 admitted that the dates were written by the accused on Exs.P.8 to P.10 cheques by his staff. It is apt to refer the decision rendered by the Hon'ble Supreme Court relied on by the learned counsel for the respondents-accused in **Kumar Exports's** case (2 supra), wherein the complainant did not produce any books of accounts or stock registers maintained by him in the course of his regular business or any acknowledgment for delivery of the goods, to establish the fact that the woolen carpets were sold by him to the appellant on August 6, 1994 for a sum of Rs.1,90,348-39 ps. The contention advanced by the respondent therein was that those cheques were given in advance towards the supply of woolen carpets. The respondent-accused examined the employees of income tax department to show that there was no such supply of woolen carpets. The High Court convicted and sentenced the accused and the Hon'ble Supreme court allowed the appeal filed by the accused holding not guilty of the accused for the offence under Section 138 of the N.I.Act.

14. In the instant case, the accused may also rely upon the presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the N.I.Act. In view of the defence set up by the accused when there is no clear evidence on the part of the complainant to hold that the three cheques covered under Exs.P.8 to P.10 were given towards legally enforceable debt, had A.1 given the cheque belonging to A.2 firm to discharge the outstanding amount of M/s. SJB Marketing, certainly, he is liable to be convicted under Section 138 of the N.I.Act. Whereas, in the instant case, there is no evidence to hold that M/s. SJB Marketing had fallen due an amount of Rs.10,06,211/- covered by Exs.P.8 to P.10. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. When there is a doubt with regard to the subject transactions and the amount outstanding, the proceedings under Section 138 of the N.I.Act are required to be terminated in favour of the accused. Under these circumstances, no presumption can be drawn in favour of the complainant to convict and sentence the accused for the offence under Section 138 of the N.I.Act. The Court of Session while dealing with this appeal had elaborately dealt with all the contentions raised on behalf of the complainant and negated the same assigning

reasons. The Court of Session rightly allowed the appeal by setting aside the conviction and sentence recorded against the respondents-accused for the offence under Section 138 of the N.I.Act. There is no infirmity in the finding of the Court of Session in Crl.A. No.92 of 2008. Accordingly, this point is answered.

15. In the result, the appeal is dismissed and the judgment dated 30.07.2008 passed by the first appellate Court in Crl.A. No.92 of 2008 is confirmed. As a sequel, miscellaneous petitions, if any pending in this appeal, shall also stand dismissed.

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Dr. SHAMEEM AKTHER, J

Date: 19th February, 2018
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