THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1109 OF 2006

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 26.06.2006 in C.C.No.154 of 2002 on the file of the Court of the IV Additional Chief Metropolitan Magistrate at Hyderabad, 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.

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 joined as subscriber in M/s. Divyambika Associate Chits and Finance Private Limited for a total amount of Rs.50,000/- payable in 40 monthly instalments at Rs.1,250/- per month commencing from October, 1997. After completion of the chit transaction, Divyambika Associate Chits and Finance Private Limited issued a cheque bearing No.051040 for a sum of Rs.48,100/- in favour of the complainant on 28.03.2001. The complainant presented the cheque Ex.P.3 for collection and the same was returned with an endorsement 'insufficient funds' under Ex.P.4 cheque return memo dated 10.05.2001. The complainant got issued a legal notice dated 30.05.2001 original of Ex.P.7 directing the accused to pay the amount within 15 days. In spite of service of notice, the accused did not choose to repay the

amount. Ex.P.8 is the registered postal receipt and Ex.P.9 is the postal acknowledgment. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. before the learned IV Additional Chief Metropolitan Magistrate at Hyderabad 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 him, has taken the case on file and numbered it as C.C.No.154 of 2002 and issued summons to the accused. On appearance of the accused, the learned Magistrate examined the accused under Section 251 Cr.P.C.

4. In order to prove the guilt of the accused, the complainant examined himself as PW.1 and got marked Exs.P.1 to P.9. 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. To demolish the case of the complainant, the accused examined himself as DW.1.

5. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the accused was found not guilty 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 findings recorded by the trial Court are not based on any evidence much less legally admissible evidence. He further submitted that the finding of the trial Court that the complaint is not maintainable without impleading the Divyambika

Associate Chits and Finance Private Limited is not legally sustainable. He further submitted that the finding of the trial Court that the complaint is barred by limitation is also contrary to the provisions of the N.I. Act. Hence, 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 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?

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.
>
> (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

[1] AIR 2009 SC 1872

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 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.

[2] (2009) 15 SCC 200

11. The oral testimony of PW.1 clearly reveals that he presented Ex.P.3 cheque for collection. A perusal of Ex.P.4 reveals that the cheque presented by the complainant returned for want of sufficient funds. Ex.P.6 is the cheque return letter. The complainant got issued a legal notice original of Ex.P.7 dated 30.05.2001 directing the accused to pay the amount within 15 days from the date of receipt of the notice. A perusal of Ex.P.8 postal receipt and Ex.P.9 postal acknowledgement clearly reveals that the accused received the copy of legal notice. For one reason or other, the accused did not choose either to pay the amount or issue a reply. It is the case of the accused that the cheque was issued in the name of the company and not in his individual capacity. PW.1 being the complainant and DW.1 being the accused, the possibility of distortion of the facts by them in order to suit their version cannot be ruled out completely. On the other hand, PW.1 and DW.1 are the interested witnesses. It is needless to say that the Court has scrutinized the testimony of the interested witnesses in order to eliminate the exaggerations.

12. The learned counsel for the appellant strenuously submitted that Divyambika Associate Chits and Finance Private Limited is only a proprietary concern and not a private company; therefore, there is no need to implead the chit fund company. In order to appreciate the contention of the learned counsel for the appellant, this Court carefully perused the complaint. The averments made in the complaint clearly indicate that the Divyambika Associate Chits and Finance Private Limited is a Private Limited Company. It is not in dispute that Ex.P.3 cheque pertains to Divyambika Associate Chits and Finance Private Limited. The savings bank

account was also opened in the name of Divyambika Associate Chits and Finance Private Limited. As per the cause title also, the accused is shown as Managing Director of Divyambika Associate Chits and Finance Private Limited. If really Divyambika Associate Chits and Finance Private Limited is a proprietary concern where is the necessity for the complainant to show the accused as Managing Director? This itself negates the contention of the learned counsel for the appellant. Section 141 of the N.I. Act mandates that the complaint has to be filed against the company represented by the concerned person. For one reason or other, the complainant did not choose to implead the company viz., Divyambika Associate Chits and Finance Private Limited as a party. The complaint is filed in the individual capacity of the accused. The trial Court considered the material available on record in touch stone with Section 141 of the N.I. Act and arrived at a conclusion that the complaint is not maintainable under law. I am fully agreeing with the findings recorded by the trial Court that the complaint is not maintainable in view of Section 141 of N.I. Act.

13. The trial Court also came to a conclusion that the complaint is not maintainable as the statutory notice was not issued within a period of limitation. A perusal of the record reveals that the cheque was returned on 10.05.2001. In order to appreciate the contention of the learned counsel for the appellant, it is not out of place to extract hereunder the relevant portion of the cross-examination of PW.1.

> "Ex.P.4 bears date 10.5.2001 and that I came to know about insufficient funds in the account of the accused on 10.05.2001."

14. Basing on the statement made by the complainant in the cross-examination, the trial Court arrived at a conclusion that the complainant received the cheque return memo Ex.P.4 on 10.05.2001. As per the provisions of Section 138 of the N.I. Act, the complainant has to give a notice within 15 days from the date of receipt of the cheque return memo. The material placed before the Court reveals that the complainant received the cheque return memo on 10.05.2001. As per the recitals of Ex.P.7, the complainant got issued the legal notice on 30.05.2001. The material available on record clinchingly established that the complainant has not issued the legal notice within 15 days from the date of receipt of the cheque return memo. Viewed from this angle also, the complaint is not maintainable.

15. As per the testimony of DW.1, the complainant received the amount under Ex.D.1 receipt dated 10.06.2001. The trial Court basing on the RFSL report believed Ex.D.1 receipt. The material placed before the Court clinchingly establishes that the complaint is not maintainable on two grounds. 1) Non-impleading of the company viz., Divyambika Associate Chits and Finance Private Limited as one of the party and (2) The complainant has not meticulously followed the procedure as contemplated under Section 138 of the N.I. Act. The findings recorded by the trial Court are based on material much less legally admissible material. There is no flaw much less legal flaw in the findings recorded by 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.

16. 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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