

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.1555 OF 2007

JUDGMENT:

This appeal is filed under Section 378(4) of Cr.P.C. by the complainant assailing the judgment dated 22.02.2007 in C.C.No.67 of 2004 on the file of the Court of the Judicial Magistrate of First Class, Badwel, 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: On 13.03.2002 the accused borrowed an amount of Rs.25,200/- and executed a promissory note Ex.P.3 in favour of the complainant agreeing to repay the same with interest at 24% per annum. The accused also borrowed an amount of Rs.5,000/- from the complainant and executed a promissory note Ex.P.5 on 09.05.2003 agreeing to repay the same with interest at 24% per annum. On 21.09.2003 the accused borrowed an amount of Rs.5,200/- from the complainant and executed a promissory note Ex.P.7 agreeing to repay the same with interest at 24% per annum. The accused also issued receipts Exs.P.4 and P.6 acknowledging the receipt of the money. On 21.09.2003 the accused issued Ex.P.1 cheque bearing No.190911 for an amount of Rs.50,700/- in favour of the accused drawn on Rayalaseema

Grammena Bank, Porumamilla. The complainant presented the cheque for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.2 is the cheque return memo. On 02.04.2004 the complainant got issued a statutory notice original of Ex.P.8 directing the accused to pay the amount covered under Ex.P.1 cheque within the stipulated time. The accused having received the legal notice, did not choose to pay the amount. Ex.P.9 is the postal receipt and Ex.P.10 is the receipt issued by the Sub-Postmaster, Porumamilla. Having no other alternative, the complainant filed a complaint under Section 200 of Cr.P.C. before the learned Judicial Magistrate of First Class, Badvel, 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.67 of 2004 and issued summons to the accused. On appearance of the accused, the learned Magistrate examined the accused under Section 251 Cr.P.C. However, the accused denied the allegations.

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.10. After completion of the complainant side evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating evidence deposed against him by PW.1 for which the accused denied. 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. Sri M.Jayram Reddy, learned counsel for the appellant-complainant attacked the judgment of the trial Court on the following grounds:

1. The trial Court has not properly considered Exs.P.3, P.5 and P.7 pronotes and Exs.P.4 and P.6 slips, which clearly establishes that the accused borrowed money from the complainant.
2. The trial Court failed to consider that the accused issued Ex.P.1 cheque in discharge of legally enforceable debt.
3. The finding of the trial Court that the statutory notice was not served on the accused is not sustainable either on facts or in law.
4. 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. *Per contra*, Sri M.S.P. Kama Raju, the learned counsel for the first respondent-accused submitted that the complaint is not maintainable without proof of service of statutory notice on the accused and that aspect was considered by the trial Court rightly. He further submitted that the findings recorded by the trial Court

are based on material much less legally admissible material; therefore, it is a fit case to dismiss the appeal.

8. 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 reasonable doubt? 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 Lal¹**, 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:

- (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 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.

¹ AIR 2009 SC 1872

(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**

Wankhede², 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.)

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 oral testimony of PW.1 coupled with Exs.P.3, P.5 and P.7 clearly reveals that the accused borrowed money on different dates from the complainant and executed promissory notes agreeing to

² (2009) 15 SCC 200

repay the same with interest at the rate of 24% per annum. Exs.P.4 and P6 slips *prima facie* reveals that the accused borrowed money from the complainant.

13. It is not in dispute that the accused issued Ex.P.1 cheque bearing No.190911 on 21.09.2003 in favour of the complainant. The complainant presented the cheque for collection and the same was returned with an endorsement 'insufficient funds'. Ex.P.2 is the cheque return memo dated 03.03.2004. The oral testimony of PW.1 coupled with Ex.P.2 cheque return memo clearly reveals that the cheque issued by the accused was not honoured for want of sufficient funds. The complainant issued original of Ex.P.8 statutory notice dated 02.04.2004 directing the accused to pay the amount covered under Ex.P.1 cheque within the stipulated time. Ex.P.9 is the postal receipt and Ex.P.10 is the receipt issued by Sub-Postmaster, Porumamilla. Once the accused admits his signature on the cheque, the Court can draw a presumption under Section 139 of the N.I. Act that the cheque was issued for legally enforceable debt unless the contrary is proved. To demolish the stand of the complainant, the accused examined himself as DW.1 and got marked Ex.D.1. It is the case of the accused that Ex.P.1 was not issued in discharge of the legally enforceable debt. The amount covered under Exs.P.3, P.5 and P.7 are not tallying with the amount mentioned in Ex.P.1. The complainant has not properly explained the reasons for variation with regard to the exact amount borrowed by the accused. The trial Court made an observation that Exs.P.4 and P.6 slips are not properly prepared. The trial Court after considering the material available on record rightly discarded Exs.P.4 and P.6 slips. The complainant failed to

prove that the accused issued Ex.P.1 cheque in discharge of the debts covered under Exs.P.3, P.5 and P.7 as rightly pointed out by the trial Court. I am fully agreeing with the findings recorded by the trial Court.

14. The next question that falls for consideration is whether the complainant has strictly adhered to the procedure as contemplated under Section 138 of the N.I. Act or not?

15. The oral testimony of PW.1 coupled with Ex.P8 reveals that he issued the legal notice on 02.04.2004. His testimony further reveals that the accused received the legal notice and kept quite. Ex.P.9 is the postal receipt and Ex.P.10 is the receipt issued by the Sub-Postmaster, Porumamilla, dated 16.04.2004. As seen from the testimony of DW.1, he was on leave at the relevant point of time. To substantiate the same, he placed reliance on Ex.D.1 Attested copy of School Attendance Register Sheet for the month of April, 2004. The oral testimony of DW.1 coupled with Ex.D.1 clearly reveals that the accused was on leave at the relevant point of time. In such circumstances, the postal authority ought to have returned the postal cover with an endorsement 'addressee was on leave'. To prove the service of notice, the complainant mainly placed reliance on Ex.P.10. Ex.P.10 is silent with regard to the address to which the statutory notice was sent. Apart from that there are some corrections on Ex.P.10 with regard to the date. Basing on Ex.P.10 it is not possible to draw a presumption that the complainant sent the statutory notice to the address of the accused where he has been ordinarily residing. In the absence of address in Ex.P.10 coupled with correction on it, it is not safe to

place reliance on it. The complainant failed to prove that statutory notice was served on the accused before filing of the complaint as contemplated under Section 138 of the N.I. Act. No cause of action accrues in favour of the complainant without service of statutory notice on the accused. Strictly speaking no cause of action accrued in favour of the complainant to file the complaint under Section 138 of the N.I. Act basing on Ex.P.8. In such circumstances, the complaint is not maintainable. The trial Court considered the oral and documentary evidence available on record in right perspective and arrived at a conclusion that the complainant failed to prove that the debt covered under Ex.P.1 is legally enforceable and the complaint is not maintainable for want of service of statutory notice on the accused. The findings recorded by the trial Court are based on material much less legally admissible material. I am fully agreeing with the findings recorded by the trial Court. 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: 01.02.2018
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