IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF DECEMBER 2020

BEFORE

THE HON'BLE MRS. JUSTICE K.S.MUDAGAL

CRIMINAL REVISION PETITION No.803/2011

BETWEEN:

H.D.SUDHEENDRA RAO
AGED ABOUT 51 YEARS
PROPRIETOR
M/S.ASHIRWAD TRADING CORPORATION
NO.398, SERVICE ROAD
1ST STAGE, OPP: POWER HOUSE
III STAGE, MANJUNATHANAGAR
BENGALURU- 560 010

PRESENTLY R/AT FLAT NO.009
SUBHIKSHA APARTMENTS
NO.832, 20TH CROSS, IDEAL HOMES
RAJARAJESHWARI NAGAR
BENGALURU- 560 098 …PETITIONER

(BY SRI PRASHANT N.HEGDE, ADVOCATE)

AND:

M/S.N.G.E.F. LTD.
REGIONAL SALES OFFICER
CHANDRAKIRAN, 5TH FLOOR
NO.10/A, KASTURBA ROAD
P.B.NO.5190, BENGALURU- 560 001
REP. BY ITS SUPERINTENDENT
MR.S.BASAVARAJ

AMENDMENT AS
M/S.N.G.E.F LTD. (IN LIQUIDATION)
REP. BY OFFICIAL LIQUIDATOR
ATTACHED TO THE HIGH COURT
OF KARNATAKA, 12TH FLOOR

RAHEJA TOWERS, M.G.ROAD
BENGALURU …RESPONDENT

(BY SMT.B.RAJASHREE FOR SRI SAJI P.JOHN, ADVOCATE)

THIS CRIMINAL REVISION PETITION IS FILED UNDER SECTION 397 READ WITH SECTION 401 OF CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE DATED 23.03.2011 PASSED BY FAST TRACK SESSIONS COURT XVII, BENGALURU IN CRL.A.NO.78/2010 AND TO SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE DATED 02.01.2010 PASSED BY XXI ADDITIONAL CHIEF METROPOLITAN MAGISTRATE, BENGALURU IN C.C.NO.33201/2000.

THIS CRIMINAL REVISION PETITION COMING ON FOR FURTHER HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

O R D E R

"Whether the impugned orders of conviction and sentence passed against the petitioner by the Courts below for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 suffer any illegality, impropriety or incorrectness"? is the question involved in this case.

2. The petitioner was prosecuted in C.C.No.33201/2000 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short) on the basis of the complaint filed by the

respondent company. The said complaint was filed by one S.Basavaraj, Superintendent of the respondent company.

3. The respondent presented the cheque Ex.P2 dated 04.07.2000 said to have drawn by the petitioner for a sum of Rs.11,00,000/- in it's favour, through Bank of India, Bangalore (Main) branch for realization. The said cheque was returned with endorsement 'funds insufficient' as per the return memo Ex.P3. The respondent issued notice Ex.P4 dated 14.07.2000 to the petitioner imputing cheating for not making arrangement for realization of the cheque and calling upon him to pay the cheque amount or else to face the prosecution.

4. The notice issued under registered post acknowledgement due was returned as per postal cover and acknowledgement Ex.P5 with intimation 'left not known'. Ex.P6 was postal receipt for having sent the notice under certificate of posting. Since the cheque amount was not paid within the specified time, the respondent through its Superintendent S.Basavaraj filed the complaint against the petitioner in PCR No.1210/2000 before XV Additional

Chief Metropolitan Magistrate, Bengaluru to prosecute him for the offence punishable under Section 138 of the Act.

5. The trial Court on taking cognizance registered the case in C.C.No.33201/2000 and summoned the petitioner. Since the petitioner declined to plead guilty, the trial Court proceeded with the case. In support of the claim of the respondent company, S.Basavaraj was examined as PW.1.

6. At that stage, the company went into liquidation and the company petitions were filed before this Court. It appears that under such circumstance, said S.Basavaraj did not appear before the trial Court to prosecute the matter. Therefore, the trial Court by order dated 31.01.2005 dismissed the complaint and acquitted the petitioner.

7. According to the respondent, the petitioner was dealer under it for sale of its motors and alternators and for that transaction he used to purchase the said machineries on 45 days credit basis. It was further case of

the respondent that in that transaction, the petitioner was due to pay Rs.20,34,000/- and towards discharge of such debt, he issued cheque Ex.P2 without making arrangement for its realization. It was further case of the respondent that though the petitioner evaded the notice sent under registered post, the notice sent under certificate of posting was served on him and despite that he did not make payment.

8. The defence of the petitioner was that since he was not able to furnish bank guarantee for continuing his agency for selling motors or alternators of the respondent company, the respondent took several blank cheques as substitute for bank guarantees. It was his further defence that the company went into liquidation because of the misappropriation committed by its staff, therefore to cover up their own misdeeds, they misused those cheques and got filed the complaint. He denied that the cheque was issued towards discharge of liability.

9. This Court vide order dated 03.08.2004 in Company Petition No.154/2002 accepted the

recommendation of the Board of Industrial Financial and Reconstruction for winding up of the company and appointed the official liquidator. This Court in the said order directed the liquidator to take charge of the affairs of the company, its property and effects forthwith.

10. Then the Official liquidator filed Crl.A.No.922/2007 before this Court challenging the order of the Trial Court dated 31.01.2005 dismissing the complaint and acquitting the petitioner. The petitioner appeared in the said case and contested the matter. This Court vide order dated 02.01.2008 allowed Crl.A.No.922/2007 and set aside the order of acquittal and remanded the matter to the trial Court for fresh disposal.

11. On such remand, the Official liquidator under Ex.P1 authorisation letter authorized T.Venkateshaiah to appear and give evidence in the case on behalf of the company. Then T.Venkateshaiah was examined as PW.1 and got marked Exs.P1 to P13. The petitioner was examined as DW.1 and got marked Exs.D1 to D3.

12. The trial Court on hearing both parties, by the judgment and order dated 02.01.2010 rejected the defence of the petitioner and convicted him for the offence punishable under Section 138 of the Act and sentenced him to fine of Rs.12,00,000/- and in default to pay fine, to undergo simple imprisonment for six months. Out of the fine amount, the trial Court awarded Rs.11,75,000/- to the respondent as compensation.

13. The petitioner challenged the said judgment and order before the Fast Track (Sessions) Court-XVII, Bengaluru in Crl.A.No.78/2010. The First Appellate Court on hearing the parties, by the impugned order dismissed the appeal and confirmed the order of the trial Court.

14. Sri Prashant.N.Hegde, learned Counsel for the petitioner reiterating the grounds of the revision petition seeks to assail the impugned orders of conviction and sentence on the following grounds:

(i) The respondent failed to prove that the cheque was issued towards discharge of debt payable to it;

(ii) The account extract produced by the respondent was not proved;

(iii) The respondent had not taken sanction of the High Court to prosecute the matter;

(iv) The person who filed the complaint was not competent to file the same and no Board resolution authorizing him to file the complaint was produced;

(v) Passing of the consideration under Ex.P2 was not proved.

15. In support of his contentions, he relies upon the following judgments:

1. ***Canara Workshops Ltd. v. Mantesh***[1]
2. ***CREF Finance Limited Vs. Sree Shanthi Homes Private Limited***[2]
3. ***M/s. Kumar Exports v. M/s. Sharma Carpets***[3]
4. ***Anss Rajashekar v. Augustus Jeba Ananth*** [4]
5. ***Joseph Vilangadan v. Phenomenal Health Care Services Ltd.***[5]
6. ***Shiva Murthy vs. Amruthraj***[6]
7. ***Rangappa v. Mohan***[7]

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[1] II (2014) BC 367 (KAR)
[2] 2014 (4) KCCR 3032
[3] AIR 2009 SC 1518
[4] AIR 2019 SC 942
[5] 2011 CRI.L.J 531
[6] ILR 2008 KAR 4629
[7] AIR 2010 SC 1898

16. Per contra, Smt.B.Rajashree, learned Counsel for the respondent seeks to justify the impugned orders of conviction and sentence on the following grounds:

(i) The complainant S.Basavaraj being Superintendent of respondent company and by virtue of authorization issued by the Chairman and Managing Director of the company under the document delegation of power was competent to file the complaint;

(ii) The petitioner did not challenge the authority of Basavaraju or the competence of the Official liquidator continuing prosecution of the case, when the matter came up before this Court in Crl.A.No.922/2007.

(iii) Since this Court in Crl.A.No.922/2007 remanded the matter, permitting the Official liquidator to continue the proceedings, such contention is not open at this stage.

(iv) The petitioner admitted that Ex.P2 cheque pertains to his account. Such admission coupled with other material on record proved that the cheque was issued towards discharge of liability.

(v) The Courts below on appreciation and re-appreciation of the evidence have held that the cheque was issued towards discharge of legal liability. There are no grounds to interfere with such concurrent findings of the Courts below.

17. In support of her contentions, she relies upon the following judgments;

1. ***Associated Cement Co. Ltd. vs. Keshvanand***[8]
2. ***M.M.T.C. Ltd. and another vs. MEDCHL Chemicals and Pharma (P) Ltd. and another***[9]
3. ***National Small Industries Corpn. Ltd. v. State (NCT of Delhi)***[10]
4. ***M/s. Cheminova India Limited vs. M/s. Jajee Pesticides and others***[11]
5. ***Nageshwaro Rao v. Pradeep Krishnarao Kulkarni***[12]

18. This being revision petition under Section 397 of Cr.P.C., unless it is shown that the impugned orders of conviction and sentence passed by the Courts below suffer patent illegality, impropriety or incorrectness, they cannot be interfered.

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[8] (1998) 1 SCC 687
[9] (2002) 1 SCC 234: 2002 SCC (Cri) 121
[10] (2009) 1 SCC 407
[11] ILR 2013 KAR 5395
[12] 2018 (1) AKR 760

Reg. Issuance of Ex.P2 towards discharge of liability:

19. The petitioner admitted that the cheque Ex.P2 pertains to his account and that bears his signature. He further admitted that he was dealer under the respondent company for sale of the respondent's motors and alternators. But his contention was that there was no liability as claimed by the respondent and the respondent had collected blank cheques in lieu of bank guarantees.

20. Under Section 139 of the Act once if it is admitted that the cheque pertains to the account of the accused and that it bears his signature, the statutory presumption is that the holder of the cheque received the cheque for discharge of whole or part of the debt/liability. In such case, it was for the accused to rebut the said presumption.

21. The Hon'ble Supreme Court in ***APS Forex Services Private Limited vs. Shakti International Fashion Linkers & Ors.***[13] in similar circumstances held that once if the accused admits that the cheque pertains to his account

[13] [2020] AIR (SC) 945

and it bears his signature unless the lending capacity of the accused is disputed, the presumption is that the cheque was issued towards legally enforceable debt and it was for the accused to rebut the presumption by leading acceptable evidence.

22. Under such circumstances, it was for the petitioner to lead evidence to prove that Ex.P2 was issued in lieu of bank guarantee for his dealership contract. The petitioner/DW.1 in his cross-examination admitted that he was carrying on his business in the address shown in the complaint. He himself appeared and contested Crl.A.No.922/2007. The order in Crl.A.No.922/2007 shows that the address shown in the complaint and the address mentioned in Ex.P5 were the same.

23. It was the contention of the respondent that the notice Ex.P5 was served on the petitioner under certificate of posting. As already pointed out that, it is admitted that the petitioner was residing in the said address. Under such circumstances as per Section 27 of the General Clauses Act, 1897 and Section 114 of the

Indian Evidence Act, 1872, a presumption arises that the notice was served on the petitioner. In such scenario, at the earliest point of time he should have denied the liability under Ex.P2 by issuing reply. He did not do that.

24. Exs.P9 to P11 were the letters addressed to the respondent by the petitioner. They were marked in evidence confronting them to the petitioner. He admitted that he had issued those letters. In Ex.P9 dated 28.03.1998 petitioner himself admitted that the bills pertaining to the supplies made by the respondent in 1998 was outstanding and he undertook to make the payments. In Ex.P10 also he pleaded his financial difficulties.

25. In page 2 of Ex.P10 petitioner has admitted that there is a longstanding due of Rs.20,00,000/- payable to the respondent. In that, petitioner pleaded that the payment was outstanding due to stagnation of the money with the customers. He also pleaded his financial inability to pay the amount and the interest. In Ex.P11 he has pleaded his financial difficulty and he placed further orders

with an undertaking that the payment will be made after dispatch of the agreement.

26. Under such circumstances and having regard to the aforesaid judgment, in the absence of rebuttal of the presumption under Sections 139 and 118 of the Act, the respondent had no burden to prove each and every entry in Ex.P7. Except the self serving testimony, the petitioner did not adduce any evidence to show that the cheque was issued in lieu of bank guarantee. Therefore, this Court does not find any patent illegality, impropriety or incorrectness in the findings of the Courts below that the cheque Ex.P2 was issued by the petitioner towards discharge of his liability.

Reg. Authority of Basavaraj to file the complaint:

27. It was contended that Basavaraj was not competent to file the complaint without resolution of the Board of the Directors of the company and no such resolution was produced. The petitioner did not dispute that Basavaraj who filed the complaint was Superintendent of the respondent company. In Ex.P10, the petitioner

himself stated that he had discussed with Ramesh Saraf and Basavaraj recently and he sought apology for not attending the meeting called by the General Manager and Director of Finance. That itself goes to show that the petitioner was also aware that Basavaraj was in charge of the matters pertaining to this case.

28. Further under the document of delegation of power, Sri Vijay Gore, IAS Chairman and Managing Director of NGEF, on the basis of power of attorney executed by the company authorized S.Basavaraj Superintendent, Regional Sales Officer to sign the *vakalat* and other papers and to depose before Court in the case on hand and before the trial Court.

29. The Hon'ble Supreme Court in ***National Small Industries Corpn. Ltd.'s*** case referred to supra referring to Sections 132, 138 and 142 of the Act in para 14 held as follows:

> "14. The term `complainant' is not defined under the Code. Section 142 of the NI Act requires a complaint under section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour

> of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of section 142 of the NI Act that the payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. ***Section 142 of the NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney***.
>
> (Emphasis supplied)

The same view was reiterated in para 16 of the said judgment which reads as follows:

> "16. Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will

represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and ***where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf.*** As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus in every complaint, where the complainant is an incorporeal body, there is a complainant -- de jure, and a complainant -- de facto. Clause (a) of the proviso to section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the de facto complainant and in signing and presenting the complaint, he acts in the discharge of his official duties. Therefore, it follows that in such cases, the exemption under clause (a) of the first proviso to section 200 of the Code will be available."

(Emphasis supplied)

30. Thus it was clearly held that Section 142 of the Act does not specify who should represent the company, if a company is the complainant. A company can be

represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney

31. The aforesaid judgment of the Supreme Court fully dispel the objection raised by the petitioner regarding the competence of Basavaraj to file the complaint. Though several other judgments were relied by the learned Counsel for the petitioner, in the light of the aforesaid judgment of the Supreme Court, the said judgment has to be followed. Therefore, the other judgments relied upon by learned Counsel for the petitioner in that regard do not advance his case.

Reg. Want of approval of the company for filing the complaint:

32. It was argued that Section 457 of the Companies Act, 1956 requires the liquidator to get the sanction of the Court for filing the complaint. Section 457(a) which is relevant for the purpose of this case reads as follows:

> 457. Powers of liquidator.-(1) The ***liquidator*** in a winding up by the Tribunal shall ***have power, with the sanction of the*** Tribunal.-

> (a) ***to*** institute or defend any suit, ***prosecution***, or other ***legal proceeding***, civil or criminal, in the name and on behalf of the company.

33. Thus, Section 457 of the Companies Act says that the liquidator shall have to power which is an enabling provision and not debarring provision. Apart from that such contention was not raised before the trial Court. Even when the matter was taken up by this Court in Crl.A.No.922/2007, the petitioner had not whispered anything about sanction of the Court to file that case.

34. In para 28 of Ex.P8 the order of this Court in Company Petition No.154/2002 this Court directed the liquidator to take charge of the affairs of the company, its property and effects forthwith, thereby the general permission was granted to him to act on behalf of the company. The petitioner's own document Ex.D2 shows that in OLR No.483/2005, the Official liquidator sought permission to defend/prosecute/continue the cases already filed or to be filed by or against the company in liquidation. This Court took the report on record.

35. As already pointed out under the revisional jurisdiction, this Court cannot interfere with the concurrent findings of the Court unless there is patent illegality in the order. As already pointed out, no grounds were raised either in the complaint or in the proceedings in Crl.A.No.922/2007 about the competence of the liquidator for want of sanction by this Court. Therefore, this Court does not find any force in the said contention raised for the first time in this petition.

36. The orders of the trial Court and the First Appellate Court show that they considered all the materials placed by the parties before them and on appreciation the trial Court convicted and sentenced the petitioner. The First Appellate Court on re-appreciation of the material placed before it and the applicable law has confirmed the order of conviction and sentence. This Court does not find any illegality, impropriety or incorrectness in the orders of the Courts below. Therefore, the petition is dismissed.

Sd/-
JUDGE

KSR