

THE HON'BLE Dr. JUSTICE G. RADHA RANI

CRIMINAL APPEAL Nos.139 and 140 of 2021

COMMON JUDGMENT:

Crl.A. No.139 of 2021 is filed by the appellant-complainant aggrieved by the judgment dated 31.03.2020 passed in CC No.46 of 2018 and Crl.A. No.140 of 2021 is filed by the appellant-complainant aggrieved by the judgment dated 31.03.2020 passed in CC No.47 of 2018 by the XXV Special Magistrate, Hyderabad in acquitting the respondent-accused in both the cases for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act').

2. Since the issue arises out of dishonour of two cheques issued by the accused in favour of the complainant and the parties are also common, both the appeals are disposed of by this common judgment.

3. The case of the complainant was that the son of the accused was his friend and due to the said acquaintance, the accused requested the complainant to lend a sum of Rs.20.00 lakhs as hand loan to meet the urgent financial necessity of her son's business. As per the request of

the accused, the complainant arranged an amount of Rs.20.00 lakhs on 23.07.2014. The accused promised through an agreement dated 23.07.2014 to repay the said hand loan by 26.07.2014 by 3.30 PM, but she could not pay the same within the time and had taken a further time of three years and pledged the documents of her land bearing patta No.1000 issued by the Tahsildar, Shameerpet. After lapse of the said period, the complainant demanded the accused to repay the hand loan. The accused issued two cheques bearing Nos.588750 and 588751, each for an amount of Rs.10.00 lakhs dated 20.10.2017 drawn on Indian Bank, Narayanaguda branch, Hyderabad. The complainant presented the said cheques through his banker State Bank of India, NRI Branch, Koti, Hyderabad on 20.10.2017. The said cheques were returned dishonoured on the ground of 'funds insufficient'. The complainant informed the same to the accused. The accused initially responded and promised to make good the dishonoured cheques amount but subsequently, stopped responding. As such, the complainant got issued a statutory legal notice on 08.11.2017 in terms of Section 138 (b) of NI Act. The said notice was received by the accused on 13.11.2017, but she did not respond to the

notice. Hence, he filed the complaints before the II-Additional Chief Metropolitan Magistrate, Hyderabad. Subsequently, the said cases were transferred to the XXV Special Magistrate, Hyderabad and tried before the said court. The complainant examined himself as PW.1 and Exs.P1 to P8 were marked on his behalf in both the cases. No defence evidence was adduced by the accused.

4. The trial court observed that as the accused had not denied her signatures on the cheques - Ex.P.1 and the undertakings (Ex.P.6 in CC No.46 of 2018 and Ex.P.5 in CC No.47 of 2018), the burden would lie on the accused to rebut the presumption under Section 139 of the NI Act and no probable defence was taken by the accused as to why she issued the subject cheques and noted that in the 313 Cr.P.C. examination, the accused had submitted a signed statement that she kept signed blank cheques and signed bond paper in her house for college purpose in which she was working as a Lecturer along with pattadar passbook and her son took away the said documents without her knowledge and gave them to the complainant, but the accused had not stepped into the witness box to depose about the said averments made in 313 Cr.P.C. statement and unless the said averments were

tested by way of cross-examination, the truth or otherwise of the same would not come out, held that the defence taken by the accused was unsubstantiated. The trial court observed that the averments of the accused in her 313 Cr.P.C. statement that her son took away the valuable documents and handed over to the complainant in collusion with the complainant could not be taken into consideration on their face value.

5. But, considering the arguments of the learned counsel for the accused that the claim of the complainant was barred by limitation, as the subject cheque was issued on 20.10.2017 after a period of more than three years from the date of giving hand loan on 23.07.2014, the trial court observed that the cheque was issued towards a time barred debt and there was no acknowledgment of debt by the accused within the period of limitation and no contract between both the parties in terms of Section 25(3) of the Indian Contract Act, considered that the cause of action for the complainant would not survive and acquitted the accused.

6. Aggrieved by the said acquittal, the complainant preferred these appeals contending that the trial court failed to appreciate the admitted facts that the accused admitted her signatures on both the cheques and deeds of undertaking, as such the presumption under Section 139 of NI Act would come in favour of the complainant and the burden to rebut the presumption would lie upon the accused and the accused failed to discharge the said burden. The trial court also failed to appreciate the admitted facts of receipt of legal notice by the accused and no reply was given by her. The trial court also failed to consider that the accused had also deposited the original pattadar passbook of her and the limitation period under the said circumstance would be for 12 years under Article 62 of the Limitation Act, 1963 as the same would fall under equitable mortgage, but not three years and that the debt was not barred by time. Non-consideration of the material facts was illegal and prayed to allow the appeals.

7. Heard learned counsel for the appellant – complainant and the learned counsel for the 1st respondent – accused.

8. As per the facts of the case, the complainant lent a sum of Rs.20.00 lakhs to the accused on 23.07.2014 for the purpose of business development of her son and executed an undertaking on a non-judicial stamp paper of Rs.100/- that she would be giving a sum of Rs.20.00 lakhs by 26th July by 3.30 PM failing which the complainant would be at liberty to take legal action against her. The same was signed by her and her son also signed as a witness, which was not denied by her. It was noted by the trial court that no year was mentioned in the undertaking executed by the accused and the accused on 26.07.2014 expressed her inability to repay the amount and deposited the pattadar passbook standing in her name with the complainant and undertook to repay the amount within three years. The certified copy of the pattadar passbook was also marked as Ex.P.7 before the court. As per the complainant, after three years period, he demanded the accused for repayment of the amount taken as hand-loan and the accused issued two cheques, each for Rs.10.00 lakhs by mentioning the date as 20.10.2017 on the said cheques, drawn on Indian Bank, Narayanaguda Branch, Hyderabad. The complainant deposited the said cheques and both the cheques were returned on the

ground that funds were insufficient. The complainant issued a statutory legal notice to the accused and no reply was given by the accused.

9. The defence taken by the accused during the cross-examination of PW.1 was that her son and the complainant were friends and they knew each other very well and due to something that had happened between them, she was unnecessarily harassed. At the stage of 313 Cr.P.C. examination, the accused submitted a signed statement that she kept the blank cheques and signed bond papers in her house for college purpose in which she was working, along with the pattadar passbooks and her son, without her knowledge took away the said documents and given them to the complainant. This defence was not taken by the accused while cross-examining PW.1 and the accused went on improving her case.

10. At the stage of arguments, the counsel for the accused had raised the issue of time barred debt, which was not raised at any stage earlier nor PW.1 was questioned with regard to the same. Thus, the facts of the case would disclose that the accused had not denied her signatures

on the cheques as well as on the deeds of undertaking and had not given any satisfactory explanation as to how the cheques, the deeds of undertaking and her pattadar passbook came into possession of the complainant. Thus, a presumption exists in favour of the complainant under Sections 118 (a) and 139 of NI Act and burden lies upon the accused to rebut the said presumptions and the accused failed to examine herself or by adducing any satisfactory explanation, failed to probabalise the defence raised by her. Only on the aspect of the time barred debt, the trial court acquitted the accused. No reply was given by the accused to the legal notice given to her or there was no cross examination of PW.1 on the said aspect, so that the complainant or his counsel would have a chance to countenance the said aspect.

11. The learned counsel for the respondent-accused relied upon the judgment of the High Court of A.P. in **Giridhari Lal Rathi v. P.T.V. Ramanujachari and another**¹, wherein a learned single Judge held that:

7. The alleged loan was advanced in the year 1985 and the cheque was issued in the year 1990. By the time the cheque was issued, the debt appears to have been barred by limitation because no acknowledgment is alleged to have been obtained by the appellant from the first respondent-accused before expiry of

¹ 1997 (1) ALT (Cri.)509 (S.B.)

three years from the date of loan. Thus it is crystal clear that the debt was not legally enforceable at the time of issuance of the cheque and, therefore, vide Explanation to section 138 of the Negotiable Instruments Act, which reads as under:

"Explanation. - Until the debt is legally recoverable the drawer of the cheque cannot be fastened with the liability under section 138 of the Act."

There appears to be no force in the contention of learned counsel for the appellant that by issuance of the cheque, the limitation for realising the loan amount was extended, because at the time of issuance of the cheque the debt should be a legally recoverable debt. In case a cheque is issued for a time-barred debt and it is dishonoured, the accused cannot be convicted under section 138 of the Negotiable Instruments Act simply on the ground that the debt was not legally recoverable."

12. Learned counsel for the appellant-complainant, on the other hand, relied upon the judgment of a Division Bench of the Kerala High Court in **Ramakrishnan v. Parthasaradhy**² wherein it was held that:

"15. For the purpose of the present case, it does not appear to be necessary to go into this matter in detail. It may, however, be mentioned that under Section 25(3), a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such a promise has to be in writing. It can be in the form of a cheque. When a cheque is delivered to the payee, the person is entitled to present the cheque to the bank and seek payment. In such an event, if the cheque is dishonoured, the liability under Section 138 would arise. It would not be permissible for the accused to contend that the liability was not legally enforceable."

² 2003 (LawSuit) (Ker) 196

13. He also relied upon the judgment of a single Judge of Kerala High Court in **P.N. Gopinathan v. Sivadasan and another**³ while referring to the judgment of the Division Bench of the Kerala High Court in **Ramakrishnan**'s case (2 supra), observed that:

7. The cheque, as held by the Division Bench, can certainly be held to contain a promise to pay a liability, which is time barred. Such a promise, Section 25(3) of the Contract Act makes it crystal clear, cannot be held to be invalid on the ground that the liability is barred and the cheque is not supported by consideration.

8. I shall, for the purpose of arguments in this case, assume that the liability is time barred. I say so because no such specific plea is raised before the courts below. Even assuming it to be time barred, when the cheque is written and signed, there is a promise to pay the amount to the payee, through the drawee of course. Such promise, even if the liability is barred, is valid and enforceable under law in view of S.25(3) of the Contract Act. Thereafter when the delivery takes place, the drawal is completed. Such cheque drawn is issued for the discharge of a liability, which is promised under the cheque itself. That being so, I do not find any reason to refer the matter to a Division Bench for further consideration. The argument of the learned counsel for the petitioner that there must be another agreement - other than the cheque - in order to reckon the promise in the cheque to be a valid agreement for the purpose of S. 25(3) cannot obviously be accepted. The promise made in the cheque is an enforceable agreement as is declared in Section 25(3) of the Contract Act. The cheque issued (delivered) for the discharge of the said promise/liability is thus perfectly within the sweep of Section 138."

³ 2007 (1) RCR (Criminal) 577

14. He also relied upon the judgement of the Madras High Court (Madurai Bench) in **A.R.M. Nizamathullah v. Vaduganathan**⁴, wherein it was held that:

“8.In view of section 25(3) of the Act, when a debt has become barred by limitation, a written promise to pay, furnishes a fresh cause of action. Section 25(3) of the Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still has the character of legally enforceable debt as contemplated by the explanation under section 138 of the Act. In view of the illustration (e), the cheque becomes a promise made in writing, to pay under section 25(3) of the Act.”

15. He also relied upon the judgment of the High Court of Delhi in **Suresh Kumar Joon v. Mool Chand Motors and others**⁵, wherein it was held that:

“8. It is true that the cheque does not contain an express promise in writing, to pay the amount of the cheque to the payee of the cheque. However, Section 9 of the Indian Contract Act makes it very clear that the promise can be express as well as implied. In my view, when a debtor issues a cheque to his creditor, he makes an implied promise to him to pay the amount of the cheque being issued by him. It is only towards fulfilment of that such promise that a cheque is issued by the debtor to the creditor. Once it is alleged that the relationship between the parties was that of debtor and a creditor and it is further alleged that the cheque was issued by the debtor to the creditor, it would be difficult to dispute that a cheque contains an implied promise, in writing, to pay the amount of the cheque. Since, even a time-barred debt is saved by Section 25(3) of the Indian Contract Act, 1872, the issuance of a cheque towards repayment of a time-

⁴ 2008 (1) RCR (Criminal) 181

⁵ 2012 LawSuit (Del) 2140

barred debt constitutes a contract within the meaning of Section 25(3) of the Indian Contract Act, 1872.”

16. He also relied upon the judgment of the Hon’ble Apex Court in **Sripati Singh (since dead) though his son Gaurav Singh v. State of Jharkhand & another**⁶, wherein it was held that:

“16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. ‘Security’ in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.”

17. As seen from the above judgments of the various High Courts, the law with regard to dishonour of cheques is interpreted considering the cheque itself as a promise to revive a time barred debt under Section 25 (3) of the Indian Contract Act.

⁶ 2021 LawSuit (SC) 677

18. The Hon'ble Apex Court in **Kalamani Tex and another v. P.**

Balasubramanian⁷ also held that:

“The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these ‘reverse onus’ clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant Respondent to explain the circumstances under which the appellants were liable to pay. Such approach of the trial Court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.

No doubt, and as correctly argued by senior counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in *MS Narayana Menon v. State of Kerala* [(2006) 6 SCC 30], which was relied upon in *Basalingappa v. Mudibasappa* [(2019) 5 SCC 418] probable defence needs to be raised, which must meet the standard of “preponderance of probability”, and not mere possibility. These principles were also affirmed in the case of *Kumar Exports v. Sharma Carpets* [(2009) 2 SCC 513, wherein it was further held that a bare denial of passing of consideration would not aid the case of accused.”

19. Thus, the accused failed to raise any probable defence as to how the cheques and deeds and the pattadar passbooks signed by her had gone into the possession of the complainant. She had not given any reply to the legal notice issued by the complainant or taken any probable defence or the issue of the time barred debt either by

⁷ (2021) 5 SCC 283

examining herself or in the cross-examination of PW.1 or at the time of her 313 Cr.P.C. examination. It was only raised at the stage of arguments by her counsel. As rightly pointed out by the learned counsel for the appellants, the accused had also deposited her pattadar passbook as a security for repayment of the debt. As per Article 62 of the Limitation Act, 1963 to enforce payment of money secured by mortgage or otherwise charge upon immovable property, the period of limitation is 12 years. Thus, the claim of the complainant cannot be considered to be a time barred debt, as the transaction would fall under equitable mortgage category. Hence, this Court does not find the judgments of the trial court in acquitting the accused legally sustainable. As such, the judgments of the trial court in CC Nos.46 and 47 of 2018 are set aside and the accused is convicted for the offence under Section 138 of NI Act and sentenced to pay double the cheque amount as per the judgment in **Kalamani Tex's** case (7 supra), wherein it was held that:

“19. As regard to the claim of compensation raised on behalf of the respondent, we are conscious of the settled principles that the object of Chapter XVII of the NIA is not only punitive but also compensatory and restitutive. The provisions of NIA envision a single window for criminal liability for dishonour of cheque as well as civil liability for realisation of the cheque amount. It is also well settled that there needs to be a consistent

approach towards awarding compensation and unless there exist special circumstances, the Courts should uniformly levy fine up to twice the cheque amount along with simple interest at the rate of 9% per annum.”

20. In the result, both the Criminal Appeals are allowed setting aside the judgments dated 31.01.2020 passed in CC Nos.46 and 47 of 2018 by the XXV Special Magistrate, Hyderabad in acquitting the respondent-accused. The respondent-accused is convicted for the offence under Section 138 of the Negotiable Instruments Act and sentenced to pay fine of Rs.20,00,000/- (Rupees twenty lakhs only) i.e. double the cheque amount, in each case and the same shall be paid as compensation to the appellant-complainant under Section 357 (3) Cr.P.C. and in default of payment of fine amount within a period of two months from the date of this judgment, the respondent-accused shall undergo simple imprisonment for a period of two (2) years in each case.

Pending miscellaneous petitions, if any, shall stand closed.

Dr. G. RADHA RANI, J

December 06, 2022
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