HON'BLE SMT.JUSTICE LALITHA KANNEGANTI

CRIMINAL APPEAL No.1512 of 2018

JUDGMENT:-

This criminal appeal, under Section 378 of the Code of Criminal Procedure, 1973 is filed challenging the judgment of acquittal dated 15.03.2018 passed in C.C.No.83 of 2016 on the file of learned Special Magistrate VI at Hyderabad, whereby the trial Court has acquitted the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short "N.I. Act").

2. For the sake of convenience, parties in this criminal appeal are referred to as they were arrayed in C.C.No.83 of 2016.

3. The facts stated in the complaint, in brief, are that complainant is a Banking Company having several branches all over India. Accused approached the complainant bank for sanction of loan for carrying out fish culture business. Complainant has accepted the request and sanctioned loan facility to a tune of Rs.48,00,000/- on 31.03.2011. Accused has executed a loan agreement, demand promissory note etc. in favour of complainant and agreed to clear the loan amount

within 12 months from the date of disbursement as per the agreement. However, accused failed to clear the dues as per the agreement. The accused issued a cheque bearing No.003880 dated 27.11.2013 for an amount of Rs.62,76,7912/- drawn on IDBI Bank, Bheemavaram Branch towards discharge of liability. When the same was presented for collection on 02.12.2013 in IDBI Bank, Basheerbagh Branch, the same was returned for the reason "insufficient funds". Complainant got issued a legal notice dated 27.12.2013 demanding the accused to pay the cheque amount within 15 days. Having received the same, accused issued a reply notice dated 07.01.2014 with all false allegations and failed to pay the cheque amount. Hence, the complaint is filed.

4. The case has been taken on file under Section 138 of N.I.Act against the accused.

5. The complainant got examined P.Ws.1 and 2 and got marked Exs.P-1 to P-9. After closure of complainant evidence, accused was examined under Section 313 Cr.P.C. and he denied the incriminating material available against him and reported no defence. However, he got marked Ex.D-1 on his behalf.

6. The trial Court though observed that there is liability in favour of the complainant, but categorically observed that the subject cheque was not issued in discharge of the liability and that blank security cheque available with the complainant was used to file complaint against the accused, pursuant to filing of writ petition against the complainant bank. It is also observed that no prosecution can be launched on the basis of a security cheque and that remedy of the complainant is on civil side. Since the issuance of subject cheque in discharge of the liability is a mandatory aspect, which is not established by the complainant, accused cannot be convicted under Section 138 of N.I.Act. Accordingly, trial Court found the accused not guilty of the offence punishable under Section 138 of N.I. Act and acquitted him. Assailing the same the present appeal is filed by the complainant.

7. Heard Sri S.Sridhar, learned counsel for appellant/ complainant and Sri P.Durga Prasad, learned counsel for the respondent/accused.

8. Learned counsel for the complainant submits that trial Court ought to have seen that in all the loan transactions of the banks it is quite common that while disbursing the loan

amounts the banks take promissory note and cheques informing the borrower that the same will be deposited whenever there is default in payment of loan amount and in every such case, ingredients of Section 138 of N.I.Act are attracted and the accused is precluded from taking a defence that cheque is issued as a security. He submits that trial Court ought to have seen that there is no evidence on record to show that Ex.P-2 cheque is issued as security to the amount borrowed and finding of the trial Court is perverse. He submits that the trial Court acquitted the accused mainly on the ground that only because accused has filed writ petition, the bank used the blank cheque issued by him as a counterblast for filing the complaint, when there is no nexus between filing of writ petition and subsequent filing of complaint. He submits that trial Court ought to have seen that there is no law which prohibits the bank from using the blank cheque issued by the borrower when it is incumbent upon the bank to use the same whenever the borrower commits default in paying the loan amounts as the said amount becomes a legally enforceable debt. The finding of the trial Court that the entries in Ex.P-8 does not tally with Ex.P-1 and therefore, the complainant misused the available blank cheque issued by the accused is wholly unsustainable, because when there is default in payment of amounts, the complainant is not precluded from claiming the said amount, which is due as on the said date and the same becomes legally enforceable debt. He submits that trial Court failed to notice the scope of Ex.D-1, which is very limited and the said order no way prohibits the complainant bank from collecting the cheque from the borrower. He submits that trial Court failed to notice that Ex.P-1 empowers the complainant to use any instrument signed by the accused towards discharge of liability and thus, the judgment of the trial Court is erroneous and needs to be set aside.

9. Learned counsel for complainant relied on the judgments of the Hon'ble Apex Court in **Sunil Todi. Vs. State of Gujarat** in Criminal Appeal No.1447 of 2021 dated 03.12.2021 and **Bir Singh Vs. Mukesh Kumar**[1].

10. *Per* contra, learned counsel for the respondent submits that there was no liability in favour of the bank and the subject cheque was not issued in discharge of legally enforceable debt. He submits that taking advantage of blank cheque with signature available with them, the complainant

[1] (2019) 4 SCC 197

bank misused the same and filed the complaint. He submits that since the accused could prove his case by preponderance of probabilities, the trial Court rightly held that the issuance of subject cheque in discharge of liability is not established by the complainant and rightly acquitted the accused. He submits that the trial Court has given a cogent and elaborate finding of facts and hence, does not warrant interference of this Court. Therefore, he prays to dismiss the appeal.

11. At this juncture it is not out of place to mention that time and again it has been made clear by the Hon'ble Apex Court that while entertaining an appeal against acquittal, the High Courts should borne in mind the well settled principles of law that where two views are possible, the appellate Court should not interfere with the finding of acquittal recorded by Court below unless some illegality is made out.

12. The principles that govern appellate Court while dealing with an appeal against an order of acquittal are:

(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.

(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.

Chandrappa v. State of Karnataka[2].

13. In the light of the law laid down by the Hon'ble Apex Court it is apparent that while exercising powers in appeal against the order of acquittal the appellate Court would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality which is to be characterized as perverse. Further merely because two views are possible, the appellate Court cannot take the view which would upset the judgment delivered by the trial Court. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived by the Court below is perverse and opines that the trial Court has committed an error of law by ignoring the material evidence on record. In such circumstances, a duty is cast upon the appellate Court, to re-appreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether the accused is connected with the commission of the crime he is charged with.

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[2] (2007) 4 SCC 415

14. It is clear from a perusal of the judgment impugned that the trial Court has elaborately dealt with the evidence and assigned reasons for acquittal by holding that since the issuance of the subject cheque in discharge of the liability is a mandatory aspect, which is not established by the complainant, accused cannot be convicted under Section 138 of N.I.Act, though the other aspects, such as, presentation of the cheque, dishonor thereof, issuance of statutory notice are complied by the complainant.

15. The issue that falls for consideration is whether the judgment of acquittal warrants interference of this Court?

16. It is argued by the learned counsel for the complainant that even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt and this aspect was not considered by the trial Court. In support of his contention, he relied on the judgment of the Apex Court in **Bir Singh** (*supra 1*) wherein it was held thus:

> "37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

17. What is emerging from the material on record is that the issuance of cheque by the accused and the signature of the accused on the said cheque are not disputed by the accused. Hence, basing on the evidence of P.W.1 and documents marked on his behalf, presumption can be drawn under Sections 118 of 139 of N.I.Act in favour of complainant. At this juncture, learned counsel for appellant submits that Section 139 of N.I.Act mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of N.I.Act, is a rebuttable presumption. Section 139

of N.I.Act introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused to prove by cogent evidence that there was no debt or liability. Mere denial or rebuttal by the accused is not enough.

18. The defence of the accused is that there was no liability in favour of the bank and that P.W.1 is not competent either to represent the complainant or to depose on behalf of the complainant. Further, the subject cheque was not issued in discharge of the liability and that blank cheque with signature available with the complainant, was misused and filed this false complaint. In the cross examination of P.W.1, it is suggested that no loan was availed and that on the assurance of sanctioning of the loan, documents were obtained from the accused and they are misused and except that nothing has been elicited to probabilize the case of the accused.

19. The observation of the trial Court in Para No.2 of the complaint, it is stated that on several demands made by the complainant, accused has issued the subject cheque dated 27.11.2013. Nowhere it is mentioned the date on which the subject cheque was issued by the accused to the complainant in discharge of the liability. When the accused has filed a writ

petition against the complainant and an order was passed in September, 2013, it is unbelievable that the accused approached the bank and issued the subject cheque in discharge of the liability. The said observation of trial Court is absolutely perverse, since the trial Court itself has categorically observed in the judgment that as could be seen from the order passed by the High Court, a writ petition was filed when the complainant bank threatened to publish the photos of the accused and an order was passed on 24.09.2013 pending disposal of the writ petition directing the complainant bank not to publish the photo of the petitioner therein and it is made clear that except the publication of photograph, it is open to the bank to proceed and to take action in accordance with law. Therefore, issuance of subject cheque by the accused in favour of complainant bank and filing of writ petition and order passed therein has no nexus with issuance of cheque by the accused to the complainant.

20. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had

been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant complainant, it may reasonably be presumed that the cheque was filled in by the appellant complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act.

In our considered opinion, the High Court patently erred in holding that the burden was on the appellant complainant to prove that he had advanced the loan and the blank signed cheque was given to him in repayment of the same. The finding of the High Court that the case of the appellant complainant became highly doubtful or not beyond reasonable doubt is patently erroneous for the reasons discussed above.

Bir Singh Vs. Mukesh Kumar (*supra* 1)

21. Considering the preposition of law laid down by the Apex Court in **Bir Singh** (*supra 1*), it is clear that when the accused has not disputed issuance of cheque in favour of complainant and his signature on the subject cheque, the onus would be on the accused to prove that the cheque was not issued in discharge of a debt or liability by adducing evidence.

22. The Court below gave a categorical finding that the legal liability of the accused in favour of the complainant bank is to be accepted without any hesitation. The Court having observed the same without going into the merits of the matter is swayed away with the aspect of filing the writ petition and without any basis, without even looking into the aspect for what relief the writ petition is filed, has come to the conclusion that no prudent man will approach and issue the cheque and deviated from the core issue. The Court also observed that the remedy of the complainant is to proceed on civil side for recovery of the amount but not by prosecuting the accused on the basis of the security cheque given on the date of sanctioning

of the loan. In the light of the law laid down by the Apex Court in ***Bhir Singh's case*** (cited supra), this issue needs to be reconsidered by the Court below.

23. In this case, the amount involved being a huge amount, this Court deems it appropriate in the interests of justice to remand the matter to the Court below for fresh consideration.

24. Accordingly, the Appeal is allowed by setting aside the judgment dated 15.03.2018 passed in C.C.No. 83 of 2016 and the matter is remanded to the Court below. The learned Judge shall dispose of the case considering all these aspects within a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs.

25. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

LALITHA KANNEGANTI, J

03.02.2022

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