

THE HONOURABLE DR. JUSTICE G. RADHA RANI

Criminal Revision Case No.186 of 2016

ORDER:

This Criminal Revision Case is filed by the petitioner-accused to set aside the judgment dated 04.01.2016 passed in Crl.A.No.1196 of 2014 by the III-Additional Metropolitan Sessions Judge, Hyderabad.

2. The respondent No.2 was the complainant and the case of the complainant was that the wife of the accused was known to him and due to the said acquaintance, the accused and his wife approached him and requested for a loan of Rs.5,00,000/-. The complainant advanced the said amount on 07.07.2011 and the accused and his wife executed a promissory note and also issued a receipt to that effect and agreed to repay the same within a period of one year. The accused failed to repay the said amount even after one year and on the repeated requests of the complainant, issued a cheque bearing No.484841 dated 24.12.2012 drawn on Syndicate Bank, Kachiguda Railway Station Branch, Kachiguda. When the complainant presented the said cheque on 16.03.2013, the same was returned unpaid by the accused banker by cheque return memo dated 19.03.2013 for the reason 'funds insufficient'. The complainant got issued a legal notice dated

15.04.2013, but the accused failed to give any reply, hence, filed the complaint.

3. The case was tried by the X Special Magistrate, Hyderabad. During the course of trial, the complainant examined himself as PW.1 and got examined the witness to the promissory note as PW.2. Exs.P1 to P8 were marked on his behalf. No defence evidence was adduced by the accused.

4. On considering the oral and documentary evidence on record, the trial court vide judgment dated 13.11.2014 in CC No.146 of 2014 convicted the accused for the offence under Section 138 of the NI Act and sentenced him to undergo rigorous imprisonment for a period of one year and to pay compensation of Rs.7,00,000/- to the complainant under Section 357 (3) Cr.P.C. to be paid within two months from the date of the order.

5. Aggrieved by the said judgment of conviction and sentence, the accused preferred an appeal. The appeal was heard by the III Additional Metropolitan Sessions Judge vide Crl.A.No.1196 of 2014. By the judgment dated 04.01.2016, the lower appellate court dismissed the appeal confirming the judgment passed by the X Special Magistrate, Hyderabad in CC No.146 of 2014, dated 13.11.2014.

6. Aggrieved further, the accused preferred this revision contending that the complainant failed to show the alleged transaction in the income tax returns and that he had not produced any bank statements with regard to withdrawal of Rs.3,00,000/- from SBI, ECIL Branch. The court below had not considered the fact that PW.1 did not state anything about the presence of PW.2 witnessing the execution of PW.1 in his complaint or in his chief examination or in Ex.P.4 legal notice at the time of transaction. The courts below had not properly considered the fact that Ex.P2 cheque was mis-used by the complainant only to extract money from the accused. The courts below failed see that the earning capacity of Rs.5,00,000/- by the complainant was not proved. The courts below erred in awarding Rs.7,00,000/- as compensation to the complainant without considering the ill-health of the accused that he underwent three angiograms and three stunt operations and was facing paralysis and was suffering from uncontrolled hypertension. The complainant failed to serve the legal notice on the accused and prayed to set aside the impugned judgment.

7. There is no representation by the learned counsel for the petitioner-accused as well as the respondent No.2-complainant. As the criminal revision case is pertaining to the year 2016, this Court after granting

sufficient opportunities to both the parties, proceed to decide the matter on merits.

8. Perused the record. The record would disclose that the complainant examined himself as PW.1 and filed the promissory note marked under Ex.P1 and cheque bearing No.484841 dated 24.12.2012 for Rs.5,00,000/- as Ex.P2. The cheque return memo dated 19.03.2013 was marked as Ex.P3. The office copy of the legal notice dated 15.04.2013 was marked as Ex.P4 and the postal receipt and the returned postal cover and the postal acknowledgment were marked as Exs.P5 to P8. The accused had not adduced any evidence.

9. As the borrowal of the amount by the accused from the complainant was proved by the evidence of PW.1 and the documents marked under Ex.P1, and the evidence of PW.2 also would support the evidence of PW.1 with regard to the accused taking hand loan of Rs.5,00,000/- and executing Ex.P1 promissory note, the trial court rightly held that the complainant discharged the initial burden laid upon him and no evidence was adduced by the accused to rebut the presumption under Section 139 of the NI Act and as such, found the accused guilty for the offence under Section 138 of the NI Act.

10. The lower appellate court also observed that the accused had not denied his signature on Ex.P2 cheque, and hence, the presumption arose under Section 139 of the NI Act that the cheque was issued in discharge of the debt or liability and the accused failed to enter into the witness box or failed to rebut the presumption in the cross-examination of PWs.1 and 2, and upheld the judgment of the trial court.

11. The record also would disclose that the accused gave a suggestion that the signature on Ex.P1 did not belong to him. But, except making a bald suggestion, he failed to take any steps to show that the signature on Ex.P1 did not pertain to him. He also contended that the legal notice was not served upon him. But in his 313 Cr.P.C. examination, he admitted receipt of legal notice and that he had not given any reply. Hence, considering the same, the lower appellate court observed that there was proper service of notice on the accused.

12. In this revision, the accused is contending with regard to the financial capacity of the complainant to lend Rs.5,00,000/- as loan to him and that no IT returns were filed in proof of the alleged transaction. The Hon'ble Apex Court in **Kalamani Tex and another v. P. Balasubramanian**¹ held that:

¹ (2021) 5 SCC 283

“13...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 such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat [2019 (18) SCC 106] in the following words:

“In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused.....”

14. 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.

15. 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 Kerela* [(2006) 6 SCC 39], which was relied upon in *Basalingappa v. Mudibasapa* [(2019) 5 SCC 418], a 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.”

13. The three Judge Bench of the Hon'ble Apex Court in the above case held that a bare denial of passing of consideration would not help the case of the accused and the complainant could not be asked to explain the circumstances under which the accused was liable to pay when he admitted his signatures on both the cheque and the promissory note. The presumption under Section 139 of the NI Act had to be drawn that the cheque was issued in consideration of a legally enforceable debt. Hence, this Court does not find any illegality or impropriety in the orders of the courts below to set aside the same.

14. As per the judgment of the Hon'ble Apex Court in **Kalamani Tex's** case (supra), as there need to be a consistent approach towards awarding the compensation and unless there exists 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, it is considered fit to modify the sentence of imprisonment of one year rigorous imprisonment imposed against the accused to that of payment of double the cheque amount as fine.

15. In the result, the Criminal Revision Case is dismissed confirming the conviction recorded against the petitioner-accused for the offence under Section 138 of the NI Act vide judgment dated 04.01.2016 passed in CrI.A.

No.1196 of 2014 by the III-Additional Metropolitan Sessions Judge, Hyderabad, but however, the sentence of rigorous imprisonment for one year and the payment of compensation amount imposed against the petitioner-accused is modified to that of payment of fine of Rs.10,00,000/- i.e. double the cheque amount and the same to be paid as compensation to the respondent No.2-complainant within a period of two (2) months from the date of this order and on failure to pay the said fine amount, the petitioner-accused is directed to undergo simple imprisonment for a period of two (2) years.

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

Dr. G.RADHA RANI, J

December 12, 2022
KTL