THE HONOURABLE SRI JUSTICE N. TUKARAMJI

CRIMINAL APPEAL No.602 of 2016

ORDER:

Challenging the propriety of the judgment of Appeal dated 28.09.2015 in Crl.A.No.162 of 2013 passed by the II Addl. Metropolitan Sessions Judge at Hyderabad whereby the judgment of conviction under Section 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act") and sentence passed in C.C.No.40 of 2011 dated 29.01.2013 on the file of VI Special Magistrate, Hyderabad was inversed, the complainant preferred this appeal.

2. For the facility, the parties are referred as per their array before the trial Court.

3. The brief facts of the complainant's case are that, on 02.06.2007, the accused/DW-3 had borrowed an amount of Rs.1,00,000/- by executing demand promissory note/Ex.P1 with an undertaking to repay the same within a month. The son of the accused stood as surety. The repayment was neglected and on demand, in the month of January, 2008 the accused issued a post dated cheque/Ex. P2 bearing No. 080171 on 28.02.2008 for Rs. 1,00,000/-. On presentment, the

cheque was returned unpaid with an endorsement "Account Closed" vide the cheque return memo/ Ex.P3 dated 29.02.2008. Thereupon, the complainant got issued statutory legal notice/Ex.P-4 dated 13.03.2008 through Registered Post with Acknowledgment Due and the same was returned as door locked. Thus the complaint.

4. The Trial Court took cognizance and the complaint was put up for trial. The complainant got examined himself as PW1 and got marked Exs.P1 to P15. In the defence, the son of the accused/surety was examined as DW1 and got marked Ex.D1 to D14. One Shaik Jahangir neighbour of the accused was examined as DW2 and the accused got examined himself as DW3.

5. Considering the evidence on record, the trial Court arrived at a finding that the accused committed an offence within the scope of Section 138 of the NI Act, accordingly, convicted and sentenced him to pay fine of Rs. 1,00,000/- in two installments by 23.03.2013 and in default to undergo rigorous imprisonment for six months and further, directed to pay entire fine amount as compensation to the complainant.

6. Aggrieved thereby, the accused preferred Criminal Appeal vide Crl.A.No.162 of 2013 wherein the Appellate Court held that the

statutory notice was improperly served and during the relevant period, the complainant had no valid money lenders' license, the transaction would become part of the illegal business, thereby the liability under the cheque is not legally enforceable. Thus, the judgment of the Trial Court was set aside and the accused was acquitted.

7. The complainant challenging the judgment of acquittal, in this appeal contested that the Appellate Court failed to properly appreciate the factual aspects i.e., the money lenders' license was made effective by the endorsement of the proper authority vide proceedings/ Ex.P14. Further, the statutory notice was issued to the accused on the address given by him in the promissory note and the documentary evidence under Ex.P15, memo of appearance filed by the accused in another case proceeding are reflecting the self same address. These aspects are establishing that the statutory notice was properly addressed to the accused. Thus, the observations and conclusions of the Appellate Court ignoring the material on record is unsustainable, so deserves to be set aside and the judgment of the Trial Court has to be restored.

8. In spite of due notice, the accused chose to remain silent.

9. In this context, the points that arise for determination are:

a) Whether the complainant had proved the offence committed by the accused under Section 138 of Negotiable Instruments Act, beyond reasonable doubt?

b) Whether the impugned judgment of the Appellate Court is sustainable in fact of law?

POINT (a):

9. The case of the complainant is that a loan of Rs.1,00,000/- was borrowed by the accused for his business necessities under the promissory note/Ex.P-1 on 02.06.2007. Admittedly, the complainant is licensed to lend money. It is not the case of the complainant that the transaction with the accused is part of money lending business. However as the accused is disputing the transaction and as the complainant is professional money lender and as the considerable amount is involved in the transaction the complainant is bound to establish that he was holding valid money lending licence at relevant time.

10. As per the complainant, his applications for renewal of the money lenders licence for the years 2006 to 2009 were pending before the appropriate authority and by the endorsement/Ex.P14 of the District Revenue Officer/ the Additional District Magistrate,

Hyderabad, which is based on the recommendations of the Tahsildar, Nampally is prima facie establishing that the complainant had valid money lendors' licence for the period between 2006 and 2009 and the transactions of the relevant period are covered under that deemed action.

11. To note, the document/Ex.P14 had remained uncontroverted and except raising contention, the accused failed to take any steps to disprove the contents of the Ex.P14. Thus, the discord regarding the money lending licence for the year 2006 to cover the transaction in the promissory note/Ex.P-1 does not hold up. Therefore, the conclusion/finding of the Appellate Court on this aspect is found incongruous and liable to be set aside.

12. Further, the stand of the accused in defence is that the disputed cheque/Ex.P-2 was issued as security is establishing the case that the cheque was drawn on his account and contains his signature. The pleadings of presentment and the return of the bounced cheque are being established by the cheque return memo/Ex.P3.

13. The complainant pleaded that on 13.03.2008, the statutory notice was sent to the accused through registered post/Ex.P5 and the receipt

is substantiating this fact. In addition, the notice was also sent under certificate of posting/Ex.P6. However, admittedly the notice sent under registered post was returned unserved as in Ex.P7.

14. Against the contention that the statutory notice was not served, the complainant refuted that the notice was sent to the address given by the accused in the promissory note and memo of appearance/Ex.P15 filed by the accused in the other case proceedings which establishing that the accused is resident of the address to which the legal notice was sent. The accused except for denying the receipt of legal notice did not forward the actual address to which the legal notice should have been sent. It is elicited in the examination of DW2/neighbour of the accused that the accused is resident of Tolichowki, Hyderabad and DW3 in the particulars given by him as witness, gave his residential address as Tolichowki, Hyderabad. These aspects are clarifying that the statutory notice was sent to the address given by the accused. Therefore, the presumption of proper service of notice under Section 27 of General Clauses Act shall be drawn.

15. The Hon'ble Apex Court in ***Prem Chand Vijay Kumar Vs. Yashpal Singh***[1] held that the presumption of service in case of receipt of report is invaluable to the effect refusal, unpaid, not available, remains locked, party not at station, arrival not known. In such case, Court may presume receipt of notice by the drawee. However, drawee/accused may prove at trial by producing evidence that the endorsement was not correct.

16. For the aforesaid, it shall be held that the complainant has established the essential aspects of the offence under Section 138 of the NI Act, against the accused. Thus, the presumption under Section 118 (a) and 139 of the NI Act shall come into play in favour of the complainant.

17. The Hon'ble Apex Court in *Basalingappa vs Mudibasappa*[2] held that the principles under Sections 118(a) and 139 of Negotiable Instruments Act were summarized as hereunder:

> *"(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*

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[1] 2005 (4) SCC 417
[2] (2019) 5 SCC 418

> *(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
>
> *(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.*
>
> *(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden."*

18. To rebut the presumptions, the accused has contended that the cheque was issued under coercion towards security, hence the persecution cannot be maintained.

19. By the record, the cheque/Ex.P-2 was issued on 31.01.2009 and the promissory note/Ex.P-1 on 17.12.2008, however, the accused's case is that the cheque was issued post dated. Further the complaint was filed in the year 2010, in the mean time, the accused has not taken up any legal recourse to project the contention that the negotiable instruments were obtained under constrained circumstances. In absence of natural conduct and raising these objections only in the trial are leading to irresistible conclusion that this claim can only be rated as self-serving.

20. In regard to issuance of cheque as security, the accused relied on the pleadings of the complainant that the cheque was issued along with promissory note/Ex.P-1 as security. Further it is not the case that by the expiry date of cheque, the dues that are payable to the complainant were cleared.

21. In a similar context, the Hon'ble Apex Court in ***Sunil Todi vs. State of Gujarat***[3] in para 16 held that "*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*

[3] 2021 SCC Online SC 1174

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."

22. Therefore, even without any undertaking if there is legally enforceable debt and the cheque was issued as a security by referring a future date and by such date of maturity if the dues are not cleared, the drawer of the cheque is entitled to present the same and if the same is dishonoured, the drawee would be liable for prosecution under the provisions of Section 138 of Negotiable Instruments Act.

23. In consequence, it shall be held that the cheque was issued by the accused for realization on the specified date. Therefore, the defences raised by the accused fail on merit.

POINT (b):

24. Resultantly, it shall be held that the theory of defence is falling short to rebut the presumptions which are in favour of the appellant/complainant. However, the Appellate Court failed to properly consider the factual and legal aspects and arrived at improper conclusions. Therefore, the impugned judgment of appeal, acquitting the accused is liable to be set aside and the judgment of the trial Court vide Calendar Case No. 40 of 2011 in Criminal Appeal No. 162 of

2013 is restored on all aspects. In effect, the trial Court is directed to take steps for execution of sentence.

25. In the result, the appeal is allowed.

Miscellaneous petitions, pending if any, shall stand closed.

N. TUKARAMJI, J

Date:30.08.2022
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