THE HON'BLE Dr. JUSTICE G. RADHA RANI

<u>CRIMINAL REVISION CASE No. 2034 OF 2018</u>

<u>ORDER</u>:

This Criminal Revision Case is filed by the petitioner/appellant/ accused aggrieved by the judgment dated 23.04.2018 in Criminal Appeal No.484 of 2013 by the Special Judge for Trial of offences under S.C.s and S.T.s (POA) Act – cum – VI Additional Metropolitan Sessions Judge, Secunderabad in confirming the conviction dated 14.05.2013 in C.C.No.478 of 2011 by the XI Special Magistrate, Hyderabad.

2. The respondent No.1 is the complainant in a case filed under Section 138 of Negotiable Instruments Act.

3. The case of the complainant was that the complainant and accused were known to each other and out of the said acquaintance, the accused had taken a loan of Rs.5,00,000/- from the complainant and issued cheque dated 16.03.2010 for Rs.5,00,000/-. The same was dishonoured *vide* memo dated 03.06.2010 for the reason "Funds Insufficient". Therefore, the complainant issued legal notice dated 26.06.2010. The accused received the same on 01.07.2010 and issued a reply notice on 16.07.2010 with false allegations. As such, he preferred

a private complaint under Section 138 of Negotiable Instruments Act (for short, "NI Act"). The same was numbered as C.C.No.42 of 2011 in the Court of X Additional Chief Metropolitan Magistrate, Secunderabad. Thereafter, transferred to the Court of XI Special Magistrate at Hyderabad and renumbered as C.C.No.478 of 2011.

4. During the course of trial before the said court, PWs.1 and 2 were examined. Exs.P1 to P7 were marked through PW1. Exs.X1 and D1 were marked through PW2. The accused examined himself as DW1 and Exs.D2 and D3 were marked through him.

5. On considering the oral and documentary evidence on record, the learned XI Special Magistrate, Hyderabad found the accused guilty for the offence under Section 138 of NI Act and sentenced him to undergo rigorous imprisonment for a period of (06) six months and to pay fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for a period of (01) one month.

6. Aggrieved by the said conviction and sentence, the accused preferred an appeal. The appeal was heard by the VI Additional Metropolitan Sessions Judge, Secunderabad *vide* Criminal

Appeal No.484 of 2013. The lower appellate court on re-appreciating the evidence confirmed the conviction but modified the sentence to a fine of Rs.4,50,000/- and in default of payment of fine to undergo simple imprisonment for (06) six months, and on such payment of fine, the same to be awarded as compensation to the complainant.

7. Aggrieved further, the accused preferred this revision contending that the courts below failed to appreciate that there was no legally existing debt and failed to consider the various grounds raised by the petitioner in proper perspective. The trial Judge failed to consider the fact that the petitioner had issued notice to PW2 for return of subject cheque much before the same was presented by respondent No.1/complainant. Even in the reply notice issued by the petitioner, he specifically stated that he did not have any transaction with the complainant and the cheque was issued to a third party. The presumption under Section 139 of NI Act was successfully rebutted. But the trial court failed to consider the said circumstances, the conviction order by the trial judge confirmed by lower appellate judge was contrary to the provisions of law, as such, the same were liable to be set aside. The courts below failed to consider that the petitioner had

successfully rebutted the presumptions against him and that he pleaded from the beginning that the said cheque was given to a third party as a security to a loan which he re-paid but the said cheque was misused. There were no transactions between him and the complainant and prayed to allow the revision by setting aside the judgments of the courts below.

8. Heard the learned counsel for the revision petitioner/accused and the learned counsel for the respondent No.1/complainant.

9. Learned counsel for revision petitioner submitted that by issuing Ex.D3, legal notice to PW2 which was prior to the legal notice issued by the complainant to him marked under Ex.P3; and by giving reply to the legal notice issued by the complainant marked under Ex.P7 and also by lodging a criminal complaint against PWs.1 and 2 marked under Ex.D2, the revision petitioner probabilised his defence and relied upon the judgment of the Hon'ble Apex Court in **M.S.Narayana Menon *alias* Mani Vs. State of Kerala and another**[1] on the aspect that the standard of proof to be discharged by the accused is

[1] (2006) 6 SCC 39

preponderance of probabilities. He was not necessarily be required to disprove the prosecution case, wherein it was held that:

> *"….Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden."*

10. He also relied upon the judgment of the common High Court of Telangana and Andhra Pradesh in **Sri Sai Karuna Finance & Enterprises Vs. N. Sandhyarani and Ors.**[2] **w**herein by relying upon the judgments of the Hon'ble Apex Court in **Rangappa Vs. Mohan** and **M.S.Narayana Menon *alias* Mani Vs. State of Kerala and another,** it was held that:

> "*…the presumption under Section 139 of N.I. Act can be discharged by raising preponderance of probabilities and the burden of proof on accused is not heavy and he need not disprove the prosecution case on its entirety, rather, he can discharge his burden through direct or circumstantial evidence, for which, he can also*

[2] Criminal Appeal No.452 of 2006 reported in MANU/HY/0614/2018

rely upon the evidence adduced by the complainant."

11. On perusal of the judgments of the courts below, both the courts had appreciated the evidence of the witnesses and observed that the accused borrowed a sum of Rs.5,00,000/- from PW1. PW1 stated that though he was not having enough money at that time, he borrowed some amount from one Mr.Gourinath to an extent of Rs.2,00,000/- and combined with the amount of Rs.3,00,000/- with him gave Rs.5,00,000/- to the accused on 1st or 2nd of March, 2010. The accused gave Ex.P1-cheque to PW1 on 16.03.2010. The defence taken by the accused was that he did not have any acquaintance with the complainant and one Mr. Gourinath was holding a blank signed cheque of the accused with him and he misused it and got filed the case through PW1 – complainant, who was acting as benami of his friend Gourinath and there was no legally enforceable debt between the accused and the complainant.

12. The said Gourinath was examined as PW2. He stated that he knew both the complainant and the accused. The accused was doing shares business and requested him to lend a sum of Rs.10,00,000/-, accordingly, he transferred a sum of Rs.8,00,000/- from

his bank account to the accused. The accused issued a cheque dated 01.04.2008 for a sum of Rs.5,00,000/- with an understanding not to present the said cheque. Thereafter, the accused transferred Rs.7,97,500/- to his account to discharge the debt, leaving a balance of Rs.2,500/-. During February or March 2010, PW1 approached him and informed that the accused requested for money and asked him to arrange some amount; and that he gave Rs.2,00,000/- to PW1. PW1 paid a sum of Rs.5,00,000/- to the accused in his presence and the accused issued a cheque of Rs.5,00,000/- to PW1 requesting him to present the same in the first week of June, 2010.

13. PW2 admitted in his cross-examination that the accused issued Ex.D1 - legal notice to him on 22.05.2010 to return the blank cheque. PW2 filed the said cheque bearing No.315103 dated 01.04.2008 for Rs.5,00,000/- before the court and the same was marked as Ex.X1. It was suggested to him that as the said cheque marked under Ex.X1 was time barred, PW2 obtained another blank cheque for Rs.5,00,000/- from the accused, which was marked as Ex.P1, but the said suggestion was denied by PW-2.

14. The accused was examined as DW1. The defence taken by him was that he had no acquaintance with PW1. But PW2 was known to him as both were working in the same company. PW2's friend one Mr. Raja was a share broker and PW2 bought shares from him for Rs.8,00,000/- in the year 2007 and requested him to stand as surety. As such, he issued a cheque with date and amount but without name for Rs.5,00,000/-. As PW2 informed him that the validity of the said cheque expired and asked him to give a fresh cheque, then he gave a blank signed cheque for Rs.5,00,000/- which was undated and unnamed. When he asked to return the earlier cheque, PW2 told him that he had torn out the cheque, which he believed. He got issued a notice under Ex.D1 to PW2 demanding to return the cheque signed for Rs.5,00,000/- but PW2 did not give any reply and got filed a case through PW1. He gave reply to the notice issued to PW1. PW1 presented Ex.P1/cheque putting the date as 16.03.2010 after his notice given to PW2 under Ex.D1 and presented the same on 03.06.2010. He lodged a complaint in the SHO, Madhapur Police Station against PWs.1 and 2 for cheating him. It was registered as Crime No.832 of 2012 by Madhapur Police for the offences under Sections 292, 293, 494, 497 and 420 of IPC and got marked the FIR as Ex.D2. The legal notice

given to PW2 dated 22.05.2010 marked through PW-2 as Ex.D1 and the legal notice marked by DW1 as Ex.D3 were one and the same.

15. The trial court observed that the accused had not mentioned in Ex.D3 about giving another cheque to PW2 as the previous cheque expired and not mentioned in Ex.P7/reply notice dated 16.07.2010 to the complainant that he issued undated and unnamed cheque to PW2, and he did not file any document to show that he stood as guarantor to PW2 for shares and admitted that Ex.P1 bore his signature and not mentioned in Ex.D3 about the cheque number, held that the two (02) cheques issued by the accused to the complainant and to PW2 were different. Ex.X1 was issued by the accused to PW2 and Ex.P1 was issued to PW1 by the accused. Hence, the trial court considered that the accused failed to rebut the presumption against him by probable defence and found him guilty.

16. The lower appellate court on re-appreciation of evidence observed that the accused tried to project his case that the cheque in possession of PW2 was handed over to PW1 by him and used the same for filing the present case through PW1, but failed to prove the same as PW2 had filed the cheque in his possession before the court which was

marked as Ex.X1. The accused in his cross-examination admitted that he had knowledge that he issued undated and unnamed cheque to PW1 but did not mention the same in Ex.P7 – reply given by him to the complainant, considered the said defence as an afterthought. It also observed that the admission made by the accused that PW2 transferred Rs.8,00,000/- was contrary to the plea taken by him in his chief examination and in Exs.D1 and D3. It further observed that the accused admitted his signature and also writing the amount of Rs.5,00,000/- in words and figures but denied the writings with regard to "payees' name" on Ex.P1 – cheque, when the signature was admitted, then presumption under Sections 139 and 118(a) of NI Act would come into play and the burden would lie on the accused to rebut the said presumption. The court also observed that the criminal complaint lodged by the accused was an after thought.

17. The lower appellate court also observing that during the pendency of the appeal, the accused transferred an amount of Rs.50,000/- to the account of the complainant on 22.04.2014, to pay the cheque amount, held that the complainant clearly established that Ex.P1 cheque was issued in discharge of legally enforceable debt and

confirmed the judgment of the trial court with regard to the guilt of the accused under Section 138 of NI Act.

18. This court does not find any illegality or impropriety in the observations of the courts below. Both the courts below correctly appreciated the evidence on record and the presumptions available under Sections 139 and 118 of the Negotiable Instruments Act and opined that the accused had not denied his signature on the cheque marked under Ex.P1 but had taken a defence that PW2 with the help of the cheque which was there in his possession, gave it to PW1 and got foisted a false case. But the complainant by examining PW2 and PW2 by filing Ex.X1 established before the court that the cheque which was in the possession of PW2 had nothing to do with the cheque issued to PW1 by the accused. Thus, the accused failed to probablise the defence taken by him. As such, both the courts below rightly convicted the accused for the offence under Section 138 of Negotiable Instruments Act.

19. The lower appellate court modified the sentence of rigorous imprisonment for a period of six months and fine of Rs.5,000/- in default to suffer simple imprisonment for a period of one month

imposed by the trial court to a fine of Rs.4,50,000/- and in default of payment of fine to suffer simple imprisonment for six months and the said fine amount to be paid to the complainant as compensation under Section 357(1) Cr.P.C., by also considering the amount of Rs.50,000/- paid by the accused to the complainant during the pendency of the appeal on 22.04.2014.

20. The Hon'ble Apex Court in **Kalamani Tex and Another v. P.Balasubramanian**[3] held that:

> *"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"*

21. Hence, it is considered fit to modify the sentence of fine of Rs.4,50,000/- to fine of Rs.9,00,000/- (i.e., double the amount of

[3] **(2021) 5 SCC 283**

Rs.4,50,000/-) and the same to be paid as compensation to the complainant under Section 357(1) Cr.P.C. within two months from the date of this order and if the revision petitioner failed to pay the said amount within the time prescribed, he shall undergo simple imprisonment for two years.

Miscellaneous petitions pending, if any, shall stand closed.

Dr. G. RADHA RANI, J

January 19, 2023
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THE HON'BLE Dr. JUSTICE G. RADHA RANI

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