

(2015) 11 AP CK 0011

In the Andhra Pradesh High Court

Case No : Criminal P. No. 6687 of 2015

Rambha Lakshmana Rao and Others

APPELLANT

Vs

The State of A.P.

RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Constitution of India, 1950 — Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 221, 221(1), 221(2), 300
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 420

Citation : (2016) 1 ALT(Cri) 203

Hon'ble Judges : B. Siva Sankara Rao, J.

Bench : Single Bench

Advocate : K.V.L. Narasimha Rao, Counsel, for the Appellant

Final Decision : Allowed

Judgement

Dr. B. Siva Sankara Rao, J.—This Criminal Petition is filed by the petitioners/A.1 and A.2 under Section 482 Cr.P.C. seeking to quash the proceedings in Crime No. 38 of 2015 of Akiveedu Police Station, West Godavari District for the offence punishable under Section 420 IPC, dated 14.01.2015, which is outcome of a report of the 2nd respondent-de facto complainant.

2. The 2nd respondent filed the private complaint dated 8.10.2014 on the file of II Additional Judicial First Class Magistrate, Bhimavaram for the offence punishable under Section 420 IPC against the petitioners/A.1 and A.2 and the learned Magistrate referred the same under Section 156(3) Cr.P.C., for investigation to the Station House Office, Akiveedu Police Station.

3. It is the sum and substance of the complaint that A.1 is the son-in-law of A.2, borrowed Rs. 4,50,000/- on 27.02.2011 from the complainant and executed a demand pronote of even date to repay with interest, and after several demands for its repayment, A.1 postponing the same on one pretext or other for sometime. Ultimately, on 10.07.2011 A.1 issued a cheque bearing No. 667269

for Rs. 4,89,000/- payable at Coastal Local Area Bank Limited, Bhimavaram Branch, for the due covered by pronote with interest and when the same was presented for collection on 12.07.2011, the same was returned dishonoured on 14.07.2011 on the ground of insufficient funds and also of the drawers signature defers from the specimen signature on record. On receiving intimation of even date, notice was issued demanding payment and received reply on 02.08.2011 with false averments saying he never had any account by A.1 and the cheque does not belong to him and not issued and later the complainant filed complaint under Section 138 of Negotiable Instruments Act (for short N.I. Act) for dishonor of cheques before the II Additional Judicial First Class Magistrate, Bhimavaram and the same was numbered as C.C. No. 278 of 2011, and after a detailed enquiry, A.1 was acquitted vide judgment dated 16.12.2013 on the ground that it does not attract the ingredients of Section 138 of N.I. Act, as the cheque under Ex. P2 was not issued by accused from the account maintained by him. Though Ex. P1-pronote debt is proved from the evidence of complainant-PW.1 and the attester of pronote-PW.2, the so called cheque was not issued from the account maintained by the accused (A.1), and for that conclusion, the trial Court placed reliance on the expression of the Apex Court in P.J. Agro Tech Limited and Others Vs. Water Base Limited, and it is averred from the complaint there from that the A.1 & A.2 having been privy for A.2 is brother-in-law-cum-father-in-law of A.1, from the account of A.2 issued a cheque by A.1 that tantamounts to cheating.

4. A perusal of the record reveals that it is from said complaint averments dated 8.10.2014, the learned Magistrate returned the complaint to show how the offence under Section 420 IPC is attracted against the A.2, and it is represented, that on 20.10.2014 it was posted for sworn statement of the complainant to 31.10.2014, and again to 29.12.2014, and again at request of complainant posted to 22.01.2015 and again to 27.02.2015 and on that day, instead of taking sworn statement, the learned Magistrate passed the following order:

"the complainant is present. Heard. Perused the record. The allegations made in the complaint and the material filed along with the complaint are disclosing prima facie cognizable offence which required thorough investigation. Hence this Court feels that complaint can be referred to Police under Section 156(3) Cr.P.C. for investigation as per law. Accordingly.."

5. A perusal of the impugned order of the learned Magistrate in fact shows nothing as to how his judicial conscience called for, having already chosen to proceed on the private complaint by recording the sworn statement of the complainant and witnesses, if any, for the offence under Section 420 IPC to take cognizance or not from merits and that too earlier already having raised objection regarding how the offence attracts, so far as A.2 is concerned, without even answering the same and without even recording the sworn statement, though complainant also has taken time for more than three times to give his sworn statement, and without assigning any further reasons, as to what made,

all of a sudden, posted for sworn statement of complainant many a time, to change the mind and to refer to police for investigation. The fact remains therefrom (supra) that there is mistake committed apparently by the learned Magistrate. From this, the present crime is registered. It is needless to say the learned Magistrate did not apply his mind from the impugned order though stated as if perused the record and the allegations disclosed the prima facie cognizable offence and requires investigation. Before referring to police as can be seen from the above, the learned Magistrate did not consider at all as to any offence made out against A.1 or A.2, and where there is any legal bar like under Section 300 Cr.P.C. It is in the factual back ground of the present quash petition filed in the contentions that there is no offence made out under section 420 IPC in the private complaint filed by 2nd respondent and in-turn for the learned Magistrate to refer to police for investigation and for the police to register the crime and taken up investigation also from the bar under Section 300 Cr.P.C., once on the self same facts, a case was tried in CC No. 278 of 2011 and ended in acquittal.

6. The 2nd respondent-de facto complainant even served with notice ordered by this Court and received acknowledgment, failed to appear, hence taken as heard, and heard the 1st respondent-State represented by Public Prosecutor as well as the learned counsel for the petitioners/A.1 and A.2 of the crime supra and perused the material on record.

7. The trial Court earlier in C.C. No. 278 of 2011 filed by the 2nd respondent against A.1 herein as sole accused therein for the offence punishable under Section 138 of N.I. Act, having conducted trial recording the evidence of PWs.1 and 2 with reference to Ex. P1 pronote held proved, Ex. P2 cheque held not proved, Ex. P3 counter foil, Ex. P4 bank memo, Ex. P5 legal notice issued to the accused covered by Ex. P6 postal acknowledgment and Ex. P7 reply and Ex. P8 cheque returned memo and from the defence evidence of accused by cross-examined the Manager of the Bank, where the said cheque was related, as DW.1 and after said evidence and from hearing arguments, as referred supra, summarily came to the conclusion that the pronote debt even proved, as the cheque was not routed from the account of the first accused (A.1) in C.C. i.e., the first petitioner herein, as it is from the other account of some other persons and from accused disputed the issuance of cheque in saying account does not relate to him, and DW.1 also deposed the same, and even the complainant asked the Court to convict the accused for the offence under Section 420 IPC, though the offence under Section 138 of N.I. Act is not made out, and for that contention, the complainant no doubt placed reliance mainly on the expression in Donthy Reddy Achyuta Reddy Vs. The State of A.P. and N. Rajeshwari, and the Court held that the decision has no application and also the self same facts in the earlier citation of Donthy Reddy Achyuta Reddy Vs. The State of A.P. and N. Rajeshwari, , the judgment also speaks that it is the contention of the accused from the beginning including from the reply notice- Ex. P7 that the cheque does not belong to him and he never issued and he never had any account at the

Coastal Local Area Bank Limited, Bhimavaram branch, where from Ex. B2, cheque routed and when he strongly contends from the beginning, the cheque was not issued and the account does not relate to him and the complainant could have filed the complaint for the offence under Section 420 IPC also, if he felt that the accused cheated him. He did not file the complaint for any such offence under Section 420 IPC, but for the offence under Section 138 of N.I. Act, which is even not made out, and for offence under Section 420 IPC, the claim made to convict is against law to accept, for the offence taken cognizance and tried is only under Section 138 of N.I. Act and not under Section 420 IPC. Thereby it was held that the accused not found guilty for the offence under Section 138 of N.I. Act. It is important to note that so far as the expression in Donthy Reddy Achyuta Reddy Vs. The State of A.P. and N. Rajeshwari, , the factual matrix in nutshell is the following:

"The case of the 2nd respondent is that the petitioner fraudulently induced the 2nd respondent on 10.01.2011 to borrow with cash of Rs. 2,50,000/- to the petitioner as hand loan and that petitioner thus cheated the 2nd respondent. The 2nd respondent further contended that the petitioner fraudulently issued a cheque for Rs. 2,50,000/- in favour of the 2nd respondent after closing the account and that he thus acted with intentional dishonestly the case therefrom is that the petitioner consequently is liable for punishment under Section 420 IPC."

8. Whereas coming to the case on hand from the very complaint averments, the hand loan of Rs. 4,50,000/- covered by demand pronote dated 27.2.2011 borrowed by A.1 from the complainant herein. It is subsequently for several demands while postponing the so-called cheque in question was issued on 10.7.2011 for the pronote debt comprising principal and interest in total Rs. 4,89,000/-. It is not even the case of the complainant that the pronote was returned back even cheque received for the entire pronote debt and thus nothing prevented him to file the suit for recovery of pronote debt. Apart from it, for the cheque dishonoured, notice was issued statutorily demanding to pay by claiming that the 1st accused was drawer of the cheque. The 1st accused issued a reply stating that he never issued the cheque and the account does not belong to him. The complainant having received the reply notice, and it is after reply only for non-payment within the statutory time that accrues cause of action under Section 142 of N.I. Act, he could have also resorted to take recourse for the offences under Sections 138 of N.I Act & 420 IPC, for nothing prevented him pursuant to the reply, to file a private complaint case for the offence under Section 420 IPC also, while filing a case for offence under Section 138 of N.I. Act, as private complaint for both offences. Thus, having opportunity to invoke, and having not invoked, and having adduced evidence for the offence under Section 138 of N.I. Act and faced the contest from the accused through same defence propounded in Ex. P7 reply notice, he was not issued a cheque and the account does not belong to him and it is not even the case that the signature on the cheque belongs to A.1 and it is not even the case that the concerned account holder found from DW1 evidence happened to be father-in-law of A.1, who is A.2

herein, much less by saying with basis as to there is a privy between them. In the absence of saying something, so far as A.2 is concerned, to any privy, their mere relationship does not presume, much less, constitute privy, for no allegations or averments with any basis. In fact Apex Court in G. Sagar Suri and Another Vs. State of U.P. and Others, referring to several expressions concluded on the same line.

9. It is in the factual back ground, coming to the contention of the accused persons herein of the bar under Section 300 Cr.P.C., apart from no ingredients of Section 420 IPC applies in the factual matrix concerned, unless it is shown it is the accused that he issued the cheque and unless it is shown at least the cheque bears signature of the accused, when admittedly the cheque does not relate to the account of the A.1, but proved as belongs to the account of A.2, in the absence of saying privy between A.2 and A.1 even, there could be no offence under Section 420 IPC against A.1 even leave about against A2, that could be made out.

10. Apart from it coming to the bar under Section 300 CrPC and the same facts of once the case for the offence under Section 138 of N.I. Act ended in acquittal, cannot be made liable for second trial to face as per Section 300 CrPC. The Apex Court particularly in State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, held as follows:

"235: The period of the aforesaid activities, as involved in that case, covered the period from 1987 to end of 1991. Section 300 (1) of the Code of Criminal Procedure contains the ban against a second trial of the same offence against the same person. Sub Section (1) reads thus:

300.(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section(1) of Section 221 , or for which he might have been convicted under sub-section(2) thereof.

236. The well-known maxim *nemo debet bis vexari pro eadem causa* (no person should be twice vexed for the same offence) embodies the well-established common law rule that no one should be put to peril twice for the same offence. The principle which is sought to be incorporated into Section 300 of the Criminal Procedure Code is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. When an offence has already been the subject of judicial adjudication, whether it ended in acquittal or conviction, it is negation of criminal justice to allow repetition of the adjudication in a separate trial on the same set of facts.

237. Though Article 20(2) of the Constitution of India embodies a protection against a second trial after a conviction of the same offence, the ambit of the

clause is narrower than the protection afforded by Section 300 of the Criminal Procedure Code. It was held by this Court in *Manipur Administration Vs. Thokchom, Bira Singh*, that if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application. While the clause embodies the principle of *autrefois convict* Section 300 of the Criminal Procedure Code combines both *autrefois convict* and *autrefois acquit*.

238. Section 300 has further widened the protective wings by debarring a second trial against the same accused on the same facts even for a different offence if a different charge against him for such offence could have been made under Section 221(1) of the Code, or he could have been convicted for such other offence under Section 221(2) of the Code. In this context it is useful to extract Section 221 of the Criminal Procedure Code.

221. Where it is doubtful what offence has been committed (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub- section (1), he may be convicted of the offence, which he is shown to have committed, although he was not charged with it.

239. As the contours of the prohibition are so widely enlarged it cannot be contended that the second trial can escape therefrom on the mere premise that some more allegations were not made in the first trial."

11. Thereby from the above proposition, particularly from the observation in paras 237 to 239 *supra* particularly with reference to *Manipur Administration v. Trivom veer sing* (*supra*) debarring that Section 300 Cr.P.C., has further widened the protective means by debarring second trial against some accused on the same facts even for a different offence and the contours are so widely enlarged and that it cannot be contended that the second trial can escape therefrom on the ground premise that some more allegations were not made in the first trial. Same is the proposition referring to the above, laid down by this Court in CrI.P. No. 7868 of 2015 dated 12.11.2015.

12. Having regard to the above, from the bar under Section 300 Cr.P.C., and also for no offence is made out under Section 420 IPC and the crime proceedings against petitioners/A.1 and A.2 are liable to be quashed to sub-serve the ends of justice.

13. Accordingly, this Criminal Petition is allowed and all the proceedings in Crime No. 38 of 2015 of Akiveedu Police Station, West Godavari District against the

petitioners/A.1 & A.2 are hereby quashed. The bail bonds of the petitioners/A.1 & A.2, if any, shall stand cancelled.

Miscellaneous petitions, if any pending in this Criminal Petition, shall stand closed.