

ANDHRA PRADESH HIGH COURT

V. Kutumba Rao

Vs

M. Chandrasekhar Rao

(Dubagunta Subrahmanyam, J.)

20.03.2003

ORDER

(Dubagunta Subrahmanyam, J.)

1. The background facts for Criminal Petition No. 1698 of 2001 and Criminal R.C. No. 761 of 2001 are same. Therefore, both the petitions are being disposed of by a common order.

2. M. Chandrasekhara Rao (hereinafter referred to as 'complainant') subscribed to various chits run by V. Kutumba Rao (hereinafter to be referred as 'accused') in the name of Swapna Priya Chits & Finance Private Limited. Accused was running it benami in the name of his brother V. Satynarayana as Executive Director and Sri G.S. Reddy as Managing Director. Complainant subscribed various amounts to various chits. In all the accused became liable to pay Rs. 6,00,000/- to the complainant. He executed two promissory notes dated 15.8.1998 for Rs. 3,00,000/- each in favour of the complainant promising to repay those amounts with interest @ 24% per annum. Subsequently the accused issued five post-dated cheques for a total sum of Rs. 1,86,750/- to the complainant. Complainant deposited those cheques in his Bank on 8.9.1999 for realisation. All those cheques were returned unpaid by the Bank of the accused with a memo dated 9.9.1999 with an endorsement of "insufficient funds". Thereafter the complainant gave a report to the police stating that the accused induced him to deposit various amounts in the Chit Funds, subsequently issued cheques which bounced and thereby the accused cheated the complainant. After investigation, the police filed a charge-sheet in CC No. 1324 of 1999 on the file of XXII Metropolitan Magistrate, Hyderabad, for the offence punishable under Section 420, I.P.C. After police report, the complainant followed the procedure envisaged under the provisions of Negotiable Instruments Act and as accused did not repay the amount covered by various cheques issued by him, he filed a private complaint in CC.No.737 of 1999 on the file of V Metropolitan Magistrate, Hyderabad. The learned Magistrate had taken cognizance of the said complaint under Section 138 of Negotiable Instruments Act and issued summons to the accused.

In CC No. 1324 of 1999 the prosecution examined four witnesses and marked Exs. P.1 to P.40. On a consideration of evidence adduced by the prosecution, the learned Magistrate held that the charge under Section 420, I.P.C., is not proved against the accused. Aggrieved by the said order of acquittal, the complainant filed a revision in Criminal R.C. No. 761 of 2001 in this Court questioning the order of acquittal. The accused in his turn filed a separate petition under Section 482, Cr.P.C, in Criminal Petition No. 1698 of 2001 requesting this Court to quash the complaint in CC. No. 737 of 1999 on the ground that the accused cannot be prosecuted twice on the same set of facts and in view of the acquittal of the accused in C.C. No. 1324 of 1999, the private complaint under Section 138 of Negotiable Instruments Act is liable to be quashed.

3. At the outset I would consider the revision. The learned Counsel for the Complainant contended that some irrelevant matters were taken into consideration by the learned Magistrate and held that the charge under Section 420, IPC is not proved against the accused. The learned Magistrate in his judgment stated that the Investigating Officer admitted that he has not collected any material from the Registrar of Companies to know the number and names of Directors and status of Swapna Priya Chits. There is no need for the Investigating Officer to collect the names of the directors of Swapna Priya Chits inasmuch as according to prosecution it is the accused who induced the complainant to invest huge amounts in the chit funds and who ultimately deceived the complainant. The complainant undisputedly filed a civil suit against the accused on the basis of two pro-notes executed by the accused. The learned Magistrate in his judgment ignoring the evidence on record observed that the accused is not a party to the said civil suit,

4. The scope of interference in a revision against the order of acquittal is very limited as per the decisions of the Apex Court. In a decision in Vimal Singh v. Khuman Singh, , the Apex Court held as follows :

"7. Coming to the ambit of power of High Court under Section 401 of the Code, the High Court in its revisional power does not ordinarily interfere with judgments of acquittal passed by the Trial Court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the Trial Court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the Trial Court has no jurisdiction to try the case or where the Trial Court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue have been over looked. These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 401 mandates that the High Court shall not convert a finding of acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of

acquittal into one of conviction even if it is convinced that the accused deserves conviction."

5. There is another decision of the Apex Court in K. Chinnaswamy Reddy v. State of Andhra Pradesh. It was held that revisional jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on the point of law and consequently there has been a flagrant miscarriage of justice. The Apex Court placed limitation on the powers of the High Court to set aside the finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. The two errors in the judgment of the Magistrate pointed out by the learned Counsel for the complainant are not grounds to justify interference with the order of acquittal passed by the Magistrate. The Magistrate in his order observed that it is not the case of the complainant that the accused has forcibly obtained prize amounts from him and reinvested for further chits. He also observed that the complainant has categorically stated that the accused promised to pay interest at the rate of 24% p.a. and that being so, it cannot be said that the accused induced P.W. 1 to cheat him. He also observed that there is no evidence to show that the accused induced P.W.1 and cheated him to a tune of Rs. 5,90,350/-. He held that the prosecution has failed to prove its case against the accused. Under any circumstances it cannot be said that these are not relevant matters to be taken into consideration by a Magistrate in a prosecution on a charge under Section 420, IPC. The present case is not an exceptional case. It is not shown that any material evidence was shut out and overlooked. There is no flagrant miscarriage of justice. I, therefore, do not find any justifiable ground to interfere with the order of acquittal passed by the learned Magistrate.

6. I will now take up the petition to quash the proceedings in C.C. 737 of 1999 relating to prosecution of the accused for the offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the Act). It is contended on behalf of the accused that on the same set of facts, the accused was acquitted of the charge under Section 420, I.P.C. and the continuation of the proceedings under Section 138 of the Act is illegal, improper and abuse of process of Court and it is liable to be quashed. It is the contention that the accused has been acquitted of the charge under Section 420, IPC on merits and on the same set of facts the proceedings under Section 138 of the Act is improper and prohibited under Section 300, Cr.P.C. It is also contended that two separate proceedings in respect of the same set of facts is illegal, contrary to law and lead to double jeopardy.

7. The learned Counsel for the accused relied upon only one decision and it is a Full Bench decision of this Court in T.V. Sarma v. R. Meeriah, (FB). This decision deals with the applicability of principle of issue estoppel to criminal proceedings. This principle of issue estoppel is not the same as the plea of double jeopardy of *autrefois acquit*. The principle laid

down by the Full Bench reads as follows :

"The principle of issue estoppel applies to criminal cases also. The rule of issue estoppel is not the same as the plea of double jeopardy of *autrefois acquit*. It does not introduce any variation in the Cr.P.C. either in investigation, enquiry or trial. The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute an estoppel or *res judicata* against the prosecution. But this principle would equally apply to an issue of law also. The principle of issue estoppel has been invoked in criminal cases in order to cover cases where the plea of *autrefois acquit* will not be available because the crime with which the accused is charged in the later proceedings may not be the same crime of which he was acquitted earlier. Yet it may be that the verdict of acquittal in the earlier proceedings might have been based on a finding, the consequences of which is that he must be acquitted of the charge in the later proceedings also. That is not *autrefois acquit* as the accused is not able to show that the crime charge is substantially the same crime on which a finding was given in the first verdict."

8. The learned Counsel for the complainant relying upon some decisions contended that the offences under Section 420, IPC and 138 of the Act are different and distinct offences and either the principles of estoppel or the plea of double jeopardy or *autrefois acquit* pleas do not apply.

9. I will now consider the decisions relied upon by him. The Apex Court in State of Bombay v. S.L. Apte, held that if the offences were distinct there is no question of the rule as to double jeopardy as embodied in Article 20(2) of the Constitution being applicable. It held that rule applies only when both complaints relate to same offence. In that case it held that the offence under Section 409 IPC and under Section 105 of the Insurance Act are not the same. In another decision in *M.P. State v. Veereswar Rao Agnihotri*, 1957 SC 592, the Apex Court held that the offences under Section 409 IPC and Section 5(2) of the Prevention of Corruption Act are not identical offences. In a decision reported in *A.A. Mulla v. State of Maharashtra*¹, the Supreme Court considered the applicability of principle of double jeopardy. The accused were tried for the offence under Section 409 IPC and they were acquitted. Subsequently, they were prosecuted under the provisions of Customs Act and Gold Control Act. The Supreme Court held that the ingredients of the offences for which the appellants were charged in the first trial are different and the factual foundation of the first trial and such foundation for the second trial is also not indented. It held that the second trial was not barred under Section 403, Cr.P.C. (old). Reliance is also placed on a judgment of Full Bench of this Court reported in *Opts Marketing Pvt. Limited v. State of A.P.*² wherein it was held that even after introduction of Section 138 of the Act,

prosecution under Section 420, IPC is maintainable in case of dishonour of cheques or post dated cheques issued for the price of goods purchased. It is pertinent to point out that in this decision the crucial question involved in the present case whether the accused can be tried separately for offences punishable under Section 420, I.P.C. and Section 138, Negotiable Instruments Act did not fall for consideration. The only question that fell for consideration is even after introduction of the penal provision in Section 138, Negotiable Instruments Act, a person can be tried for a charge under Section 420, I.P.C. in a case of bouncing of a cheque. The Full Bench held that the said person can be tried for a charge under Section 420, I.P.C.

10. To attract the principle in T. V. Sarma's case (supra), the accused shall satisfy the Court that in the trial in Section 420, I.P.C. case, the same issues of fact and law on which he was tried and findings are recorded arise for trial and decision in the private complaint under Section 138, Negotiable Instruments Act. In my considered opinion for the reasons being mentioned hereunder, accused has failed to satisfy the test laid down in the above decision.

11. In my considered opinion the offences under Section 420, IPC and Section 138 of the Act are distinct and separate offences. If a person fraudulently or dishonestly induces another person to deliver any property or to do or omit to do anything which he would not do or omit if he were not deceived and such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property commits an offence of cheating. Such a person commits the offence punishable under Section 420, IPC. In a prosecution under Section 138, Negotiable Instruments Act any inducement so as to make the other person to deliver any property etc. as defined in Section 415, IPC, is not an ingredient. If a person issues a cheque and subsequently if the cheque was dishonoured by the Bank for want of funds, etc. and thereafter even after issuance of demand notice, the said person fails to pay the amount covered by the cheque within the time stipulated by Negotiable Instruments Act, that person commits an offence punishable under Section 138 of the Act. The question of inducement to other person to part with any property to do or omit to do anything does not at all arise for a decision in a prosecution under Section 138 of the Act. The offence under Section 138 of the Act is not committed on the date of issuing the cheque. The offence happens after it was dishonoured by the Bank for specified reasons and thereafter even after demand the person concerned fails to pay the amount covered by the cheque to the other person. These facts do not fall for a decision in a prosecution under Section 420, I.P.C. Some times at the time of issuing the cheque a person may induce the other person to part with property, etc. If such inducement is dishonest or fraudulent he may be committing the offence of cheating and thereby he becomes liable for prosecution. If such a person later within the time stipulated under the provisions of Negotiable Instruments Act repays the other person amount covered by the cheque he will not be liable for prosecution for the offence under Section 138 of the Act but still he can be prosecuted for the offence of cheating if

at the time of issuing the cheque he had fraudulently or dishonestly induced the other person to part with property, etc. In a prosecution under Section 138, Negotiable Instruments Act, the mens rea viz., fraudulent or dishonest intention at the time of issuance of cheque need not be proved. However, in a prosecution under Section 420, I.P.C. mens rea is an important ingredient to be established. In the former case the prosecution has to establish that the cheque was issued by accused to discharge a legally enforceable debt or other liability. This ingredient need not be proved in a prosecution for the charge under Section 420, I.P.C. Therefore, the two offences covered by Section 420, IPC and Section 138, Negotiable Instruments Act are quite distinct and different offences even though sometimes there may be overlapping and sometimes the accused person may commit both the offences. The two offences cannot be construed as arising out of same set of facts. Therefore, Section 300, Cr.P.C. is not a bar for separate prosecutions for the offences punishable under Section 420, IPC and Section 138 of the Negotiable Instruments Act. The question of application of the principles of double jeopardy or rule estoppel does not come into play. The acquittal of the accused for the charge under Section 420, IPC does not operate as estoppel or res judicata for a finding of fact or law to be given in prosecution under Section 138 of the Negotiable Instruments Act. The issue of fact and law to be tried and decided in prosecution under Section 420, IPC are not the same issue of fact and law to be tried in a prosecution under Section 138 of the Act. I, therefore, do not find any force in the contentions advanced on behalf of the accused for quashing the proceedings in C.C. No. 737 of 1999. Therefore, both the revision petition and quash proceedings are liable to be dismissed.

12. In the result, the Criminal Petition as well as the Criminal Revision Case are dismissed.

Cases Referred.

11977 ALD (CrL.) 386 SC

2(2001) BC 622 (FB)=2001(1) ALT : (CrL.) 205 (FB)