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IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 30TH DAY OF MAY, 2018

BEFORE

THE HON'BLE MR.JUSTICE K. N. PHANEENDRA

CRL.P. NO.1202/2018

BETWEEN

SRI R LAKSHMINARASIMHA
S/O LATE N RAMAIAH
AGED 50 YEARS
R/AT NO.1, SHIVANNA LAYOUT
HALAGE VADERAHALLI
RAJARAJESHWARI NAGARA
BENGALURU - 560 098 ... PETITIONER

(BY SRI. G. S. VENKAT SUBBA RAO, ADVOCATE)

AND

SRI GOUTHAMCHAND, S/O SRI MOTILAL
AGED 55 YEARS, R/A NO.1, R.T.STREET
AVENUE ROAD CROSS
BANGALORE - 560 053. ... RESPONDENT

(BY SRI. TOMY SEBASTIAN, SENIOR COUNSEL FOR
SMT. RENY SEBASTIAN, ADVOCATE)

THIS CRL.P FILED U/S.482 CR.P.C PRAYING TO QUASH THE IMPUGNED ORDER DATED 01.01.2018 PASSED BY THE LXII ADDITIONAL CITY CIVIL SESSIONS JUDGE (CCH-63), BANGALORE IN CRIMINAL REVISION PETITION NO.244/2016 CONFIRMING THE ORDER DATED 24.03.2016 PASSED BY THE XV A.C.M.M., BANGALORE IN C.C.NO.9562/2012 VIDE ANNEXURE 'A'.

THIS CRL.P COMING ON FOR ADMISSION ALONG WITH IA NO.1/2018 FOR STAY, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The petitioner has called in question the order dated 24.03.2016 passed by the XV Addl. Chief Metropolitan Magistrate, Bengaluru, in C.C.NO.9562/2012 on the application filed under Section 65 of the Indian Evidence Act rejecting the said application which order was confirmed by the LXII Addl. City Civil and Sessions Judge, Bengaluru in Criminal Revision Petition No.244/2016 vide order dated 01.01.2018.

2. The brief factual matrix of the case that emanates from the records is that –

The respondent herein has lodged a private complaint under Section 200 of the Cr.P.C. for an offence under Section 138 of the Negotiable Instruments Act (for short, **'NI Act'**) alleging that, the petitioner has issued several cheques for repayment of the debt taken by him. The accused made appearance before the court and contested the said proceedings. During the course of the evidence, the accused has produced certain Xerox copies of the

documents, originals of which are already marked as Exhibits P-1, P-2 and P-4. It is the contention taken-up by the accused that the complainant has been conducting a chit business and he has been in the habit of obtaining Blank Cheques and On Demand Promissory Notes from each and every successful bidder as security for the repayment of the remaining chit amount. In that process an On Demand Promissory Note and four cheques were taken by the complainant from the accused only as security for the smooth running of the chit business. He has also taken up a contention that the cheques and On Demand Promissory Note were only signed by the accused and the remaining portion of the said documents were blank. In fact, prior to handing over the said cheques and On Demand Promissory Note, the accused had retained photocopies of the said documents which are sought to be produced before the court in order to establish manipulation and also filling up of the excess amount in the said cheques by the complainant.

3. It is also the stand taken by the accused that the accused had made subscription to three chits held by complainant in a total sum of Rs.5,00,000/- and the

accused had been regularly paying the subscription amount to the said chits. The accused submitted that the monthly subscription payable in respect of each chit was in a sum of Rs.20,000/- and the accused was a successful bidder in two chits, and has been paying the subscription amount regularly. Therefore, it is the contention of the accused that, the cheques said to have been dishonored were not issued in respect of any outstanding liability, but it is issued only towards security with regard to the smooth running of the chit transaction. Therefore in order to show that those cheques and On Demand Promissory Note were only taken as a security for the chit transaction and not with reference to any liability as such on the part of the accused, an application was moved under Section 65 of the Indian Evidence Act for getting those documents marked before the court in order to rebut the presumption raised in favour of the complainant that the said cheques were issued for the repayment of whole or any part of the debt, as contemplated under Section 139 of the Act. The said application was seriously contested by the other side by filing objections.

4. After hearing the parties, the court has passed an order rejecting the said application on the ground that, there is no question of leading any secondary evidence, when the primary evidence is very much available before the court by way of Exhibits P-1, P-2 and P-4. The Trial Court has also observed that the said documents sought to be produced are the Xerox copies of Exhibits P-1, P-2 and P-4 and they cannot be marked in the absence of laying any foundation with regard to the secondary evidence.

5. Aggrieved by the said order, in fact, the accused preferred a Revision Petition before the LXII Addl. City Civil and Sessions Judge (CCH 63) in Criminal Revision Petition No.244/2016. The Revisional Court also concurred with the observation made by the trial court and consequently, dismissed the Revision Petition. Against the said two orders, the present petition is filed.

6. It is evident from the records that the complainant wants to establish his case that, the accused is liable to pay the amount as shown in the cheques under Exs. P-1, P-2 and P-4. The said Exs. P-1, P-2 & P-4 are the two cheques and a On Demand Promissory Note,

respectively which are relied upon by the complainant. According to the accused, the said documents produced before the court are said to have been manipulated, as they were later filled-up by the complainant for the purpose of laying a false claim against the accused though there was no existing liability. Further, it is the contention of the accused that, when those cheques and On Demand Promissory Note were given, they were blank and at that particular point of time, the said cheques and On Demand Promissory Note were given not with regard to any liability, but for the purpose of security for smooth running of the chit business. If this is the stand taken by the accused, the accused is entitled to prove that stand taken by him before the trial court and as to how he has to prove the said allegation is left to him. It may be either by means of cross-examining the witnesses and eliciting the truth or falsity of the documents produced before the court or by means of leading evidence or even by means of showing surrounding circumstances in order to rebut the presumption raised in favour of the complainant under Section 139 of the N.I. Act.

7. It is worth to refer Section 139 of the Act. The said Section raises a strong presumption which is mandatory in nature. Accordingly, the court shall raise the presumption in favour of the complainant initially in order to draw an inference that if the cheque issued is signed by the accused, then, it should be construed as the cheque issued for the purpose of repayment of whole or part of a debt. Therefore, the existence of the debt or the liability on the part of the accused is also presumed in favour of the complainant under Section 139 of the N.I. Act. When such a strong presumption is raised, the rebuttal responsibility is on the accused. Therefore, the court has to give fullest opportunity to the accused in order to rebut the said presumption raised in favour of the complainant.

8. It is not the factual aspect that, on the basis of which the presumption is raised. It is a legal fiction on the basis of which the presumption is raised in favour of the complainant. Therefore, it is the duty of the accused to show the existence of factual aspects and the surrounding circumstances to rebut that presumption. Therefore, more responsibility is on the accused person to rebut the presumption. The proof of rebuttal need not be beyond

reasonable doubt but may be by preponderance of probabilities. In this background, the court has to visualize what opportunity should be given to the accused and in what manner, the materials produced by the accused have to be treated.

9. In this particular case, as I have already noted, it is the case of the accused that he has retained the xerox copies of the documents which are already marked as Exhibits P-1, P-2 and P-4. It is quite pertinent to note here that, the documents which are produced by the complainant are similar to the documents which are sought to be produced by the accused. It is the clear case of the accused that the cheques and On Demand Promissory Note though are similar to Exhibits P-1, P-2 and P-4, but Exhibits P-1, P-2 and P-4 are duly filled-up and later sought to be produced which were blank when executed by accused. Therefore, one document cannot be said to be the xerox copy of another. Thus in my opinion, though Section 65 of the Indian Evidence Act is not strictly applicable in the circumstances of this case to lead secondary evidence as these documents themselves act as primary documents in the hands of the accused to show that after issuance of

those documents, some manipulation has been done by the complainant as alleged by the accused in his statement. Therefore, under the above said facts and circumstances, the principles of natural justice demands that the accused should be provided with an opportunity to produce those documents.

10. Now, let me visualize another circumstance in this case. If those documents are not allowed to be marked before the court, the court may not have the documents for comparison with the originals produced by the complainant as per Exhibits P-1, P-2 and P-4 to draw an inference with regard to existence of any other circumstances either in favour of the complainant or in favour of the accused. Therefore, under the above said facts and circumstances, though the provision of Section 65 of the Indian Evidence Act may not be strictly applicable, nevertheless, it is the fundamental duty of the court to provide fullest opportunity to the accused to defend himself by producing documents in his favour and to lead evidence. Though the Xerox copies may not be directly allowed to be marked, but here, as I have said, in view of the allegation that the originals have been manipulated, the xerox copies themselves may act as

primary evidence before the court in favour of the accused when the alleged materially altered originals are available.

11. The view taken by me is for two reasons. The effect of material alteration in a cheque after its issuance also has very great bearing in a criminal case also. Section 87 of the Negotiable Instruments Act reads thus:

> "**87. Effect of material alteration -** *Any material alteration of a Negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto unless it was made in order to carry-out common intention of the original parties*."

Therefore, it is a broad principle of law that any change in a written instrument which causes it to speak a different language in legal effect from that it originally spoke, then it changes the legal identity or business character of the instrument, either in its terms or in the legal relation of the parties to it, is a material change, or technically, an alteration and such a change invalidates the instrument against the persons not consenting to the change. An alteration of a negotiable instrument is material if it changes its legal effect or its scope as means of evidence.

Such material affects the substantial rights of parties, even though the change is abandoned by the party in whose favour it was intended to operate. This principle of law is essential to the integrity and sanctity of contracts, and is founded on sound sense of law, and it is calculated to prevent fraud and deter men from tampering with written securities; and it would be directly repugnant to the policy of such law to permit the holder of a Negotiable instrument to attempt a fraud of this kind with impunity, which would be the case if after being detected in the attempt, he were not in a worse position than he was before. Therefore, any material alteration of a negotiable instrument has to be tested at the touch stone of the documents produced by the parties originally as they stood and the evidence that may be adduced during the course of the trial. Therefore, opportunity should be given, when such specific defence or plea is taken by the accused, particularly in proceedings under Section 138 of N.I.Act.

12. Of course, Section 20 of the N.I. Act under certain circumstances, empowers a holder in due course to fill-up a stamped Negotiable Instrument for any amount specified therein according to the consent of the parties,

but not exceeding the amount covered by the stamp. Therefore, when accused takes up a defence that he was not liable to pay any amount, but the amount filled-up in the cheque is exorbitant, or without there being any liability the cheque has been filled-up, in such an eventuality, the court has to examine whether Section 20 can be still invoked in such cases, only after thorough examination and appreciation of both oral and documentary evidence on record adduced and produced by the parties. Therefore, for that reason also, fullest opportunity should be given to the parties to produce all necessary documents and to lead oral evidence in that context. For this reason also, in my opinion, the petition deserves to be allowed.

13. The learned counsel for the respondent has strenuously contended that accused has taken more than two years to file the application and to prosecute the application.

14. In view of the above said submission, I am of the opinion that, a direction can be issued to the learned Magistrate to expedite the trial and dispose of the matter

preferably within three months from the date of receipt of a copy this order.

15. Therefore, under the above said circumstances, I am of the opinion that the trial court and the revisional court have committed serious legal error in not providing sufficient opportunity to the accused to mark those documents. Hence, both the orders are liable to be set-aside and the accused must be given an opportunity to establish his case as per the stand taken by him before the trial court. Otherwise if such opportunity is not given, it would amount to violation of principles of natural justice. Hence, for the above said reasons, I proceed to pass the following order:

ORDER

The petition is allowed. Consequently, the order dated 24.03.2016 passed by the XV Additional CMM in C.C.No.9562/2012 in rejecting the application filed by the accused under Section 65 of the Indian Evidence Act and the order passed by the LXII Additional City Civil and Sessions Judge in Criminal Revision Petition No.244/2016 vide order dated 01.01.2018, are hereby set-aside.

The application filed under Section 65 of the Indian Evidence Act is misconceived and it should be

treated as an application filed by the accused for the purpose of production and marking the documents in his favour. Hence, the said application is hereby allowed. The accused is permitted to produce those documents before the court and get them marked.

As a matter of caution, it is made clear that mere marking of those documents cannot be said to be the proof of the contents of the documents or proof of the stand taken up by the accused. It should be proved in accordance with law on the basis of other available surrounding circumstances and facts which are pleaded and taken-up by the accused, in accordance with law.

The learned Magistrate is directed to expedite the trial and dispose of the matter preferably within three months from the date of receipt of a copy this order.

In view of the disposal of this case on merits, pending consideration of IA No.1/2018 does not survive for consideration and the same stands dismissed.

Sd/-
JUDGE

KGR*