

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 10.4.2019****Judgment delivered on 25.06.2019****Acquittal Appeal No.163 of 2011**

- Bulakiram Dewangan, son of Shri Balluram Dewangan, aged about 38 years, presently posted at Sisksha Karmi Grade II, Higher Secondary School, Parsatola, R/o. Koudikasa, Post Koudikasa, Tehsil Ambagarh Chowki, District Ranjangaon (CG)

---- Appellant**Versus**

- Rakesh Babu Shriwas, son of Shri Mahavir Prasad Shriwas, aged about 40 years, presently posted at Sisksha Karmi Grade II, High School Aamatola, R/o. Koudikasa, Post Koudikasa, Tehsil Aambagarh Chowki District Rajnangaon (CG)

---- Respondent

For the appellant	: Shri VK Sharma, Advocate
For the respondent	: Shri Punit Ruparel and Shri Kalpresh Ruparel, Advocates

Hon'ble Shri Justice Ram Prasanna Sharma**CAV Judgment**

1. This appeal is preferred against judgment dated 29.6.2011 passed by Judicial Magistrate First Class, Ambagarh Chowki, in Criminal Case No.15/2010 wherein the said Court acquitted the respondent for the charges under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act 1881').

2. As per the appellant, he and the respondent were class mates and neighbours and both are working as Shiksha Karmi Grade-II. In the month of June 2009, when the respondent/accused misused the fees of the students, he

requested the appellant to help him in the peculiar circumstances of his service. Considering the critical position of the respondent, the appellant agreed to give him Rs.80,000/- on 25.6.2009 and on the same date the respondent orally promised to return the amount within three months. After the stipulated period, the amount was not returned but the respondent gave the appellant a cheque bearing No.978282 dated 01.10.2009 issued by Dena Bank Branch at Ambagarh Chowki. When the cheque was presented for clearance, the same was dishonoured due to insufficient fund. The appellant issued a legal notice in relation to dishonour of cheque but after receiving the notice the respondent failed to remit the balance within the stipulated period and there was no such option available to the appellant except to file a complaint under Section 138 of the Negotiable Instrument Act, 1881. However, the trial Court acquitted the respondent from the charges, hence the appeal.

3. Learned counsel for the appellant submits as under:

(i) Finding of the trial Court that no document is written in favour of the appellant by the respondent regarding loan amount, therefore, liability of debt is not proved, is totally perverse, illegal looking to the provisions of the Act, 1881.

(ii) The trial Court has ignored the provisions of the Act 1881, therefore, finding is based on conjecture and surmises which is not sustainable under the law of the land. Judgment passed by the trial Court should be set aside and the respondent should be punished for the offence in question.

4. On the other hand, learned counsel for the respondent submits that the finding arrived at by the trial Court is based on proper marsheling of evidence and the same is not liable to be interfered with.

5. I have heard learned counsel for the parties and perused record of the court below in which impugned judgment is passed.

6. In the present case, the appellant/complainant was examined himself as PW-1, Ramcharan Sahu, Branch Manager of the Gramin Bank was examined as PW-2 before the trial Court. As per the version of Bulakiram Dewangan (PW-1), the respondent borrowed a sum of Rs.80,000/- from him on 25.6.2008 and agreed to return the amount within three months. After three months the amount was not returned but a cheque was issued in favour of the appellant on 01.10.2009 to the tune of Rs.80,000/-. The cheque was presented before the bank for clearance but the same was dishonoured for insufficiency of fund. Version of this witness is unrebutted in cross examination and it is supported by the version of Ramcharan Sahu (PW-2). From the evidence of the complainant (PW-1), it is established that after dishonour of the cheque one notice was issued to the respondent (Ex-P/4) which was received by him, but the amount was not remitted to the appellant that is why complaint was filed. The respondent did not enter into witness box before the trial Court to rebutt the evidence against the appellant, therefore, the evidence laid by the appellant is unrebutted and there is nothing on record to

disbelieve the oral and documentary evidence adduced by the appellant.

7. Learned counsel for the respondent submits that the appellant has not shown his source of income, therefore, it is not established that Rs.80,000/- was given by the appellant to the respondent. He placed reliance in the matters of **Rumi Hazarika vs. Anirban Hatikakoty** reported in **(2016) ACD 885**, **K. Subramani Vs. K. Damodara Naidu** reported in **(2015) ACD 841** and **Basalingappa vs. Mudibasappa** decided in Criminal Appeal No.636 of 2019 by the Hon'ble Apex Court. In the matter of K. Subramani (supra), the amount which was lend is Rs.14 lakh and in the matter of Rumi Hazarika (supra) the loan amount is Rs.5, 20,000/- and in the matter of Basalingappa (supra) the amount of loan is Rs.8 lakh and the source of income was not satisfactory. In the present case, the complainant is working as Shiksha Karmi Grade – II and he is getting regular salary and the amount of loan is Rs.80,000/- cannot said to be beyond the source of the complainant, therefore, arguments advanced on behalf of the respondent and the case law cited on his behalf is distinguishable to the facts and circumstances of the present case.

8. Provisions of Section 118 of the Act, 1881 which reads as under:-

“118. Presumptions as to negotiable instruments –
Until the contrary is proved, the following presumptions shall be made:-

(a) **of consideration** – that every negotiable instrument was made or drawn for consideration, and that every such

instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

(b) **as to date** – that every negotiable instrument bearing a date was made or drawn on such date;

(c) **as to time of acceptance** – that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) **as to time of transfer** – that every transfer of a negotiable instrument was made before its maturity;

(e) **as to order of indorsements** – that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) **as to stamps** – that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) **that holder is a holder in due course** – that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder in due course lies upon him.”

9. As per Section 139 of the Act, 1881, statutory presumption that the cheque issued for discharge, in whole or in part, of any debt or other liability, the presumption is rebuttable but in the present case, the respondent did not appear before the trial Court to rebut the evidence adduced by the appellant. In the present case from the evidence of oral and documentary adduced by the appellant, it is proved that cheque amounting to Rs.80,000/- was issued in favour of the appellant and the same was dishonoured which is punishable under Section 138 of the Act, 1881 and the finding of the trial Court that the appellant has not established the source of income is contrary to the evidence adduced by the appellant. Therefore, finding of the trial Court is liable to be set aside.

10. Accordingly, the appeal is allowed reversing the judgment of acquittal passed by the trial Court. The respondent is convicted for the offence under Section 138 of the Act, 1881 and is awarded sentence of fine to the tune of Rs.1,60,000/- (Rupees One lakh sixty thousand only). The trial Court to take all the steps for recovery. If the amount is not deposited within two months, then interest of 9% shall be leviable on the amount of Rs.1,60,000/-. Upon depositing the entire amount, the whole amount shall be paid to the appellant against the liability of the respondent.

Sd/-

(Ram Prasanna Sharma)

JUDGE