NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 490 of 2009

Order Reserved on : 20/08/2019

Order Delivered on : 19/11/2019

- Monesh Waditwar S/o Arun Waditwar, aged about 29 years, C/o Usha Diagnostic Solu Sons, First Floor B-3, Sector – 1, Devendra Nagar, Police Station Devendra Nagar, Raipur (C.G.), R/o Monesh Waditwar, Sector – 1, D-56, First Floor.

----Petitioner

Versus

1. T. Ishwar Rao S/o Shri T. Ramarao, aged about 46 years, R/o Shri Mahavir Goushala Parisar, K.K. Ro. - 7, First Floor, Moudhapara, Police Station Mudhapara, Raipur, Tahsil and District Raipur (C.G.)
2. State of Chhattisgarh, Through District Magistrate Raipur, District Raipur (C.G.)

---- Respondents

For Petitioner	:	Smt. Smita Jha, Advocate.
For Respondent No.1	:	Shri D.K. Gwalre, Advocate.
For Respondent No.2.	:	Shri Wasim Miyan, P.L.

Hon'ble Smt. Justice Rajani Dubey

C A V Order

19/11/2019

01. Present revision is directed against the impugned order dated 08.10.2009 passed in Criminal Appeal No.86/2009 by Sessions Judge, Raipur, whereby the appeal preferred by the applicant against the order dated 11.08.2009 passed in Criminal Case No.520/2006 by the learned Judicial Magistrate

First Class, Raipur, convicting and sentencing the applicant, has been rejected.

02. Brief facts of the case are that on 04.11.2005, complainant (respondent No.1) gave sum of Rs.2,00,000/- to the applicant on credit and assurance was given by the applicant that he would return the same with interest within three months, but the applicant failed to return the said amount and when complainant (respondent No.1) demanded the money, on 09.04.2006, the applicant gave a cheque amounting to Rs.2,00,000/- to the complainant (Respondent No.1), which was dishonoured by the concerned bank on account of insufficient fund. Thereafter, a legal notice was sent by the complainant (respondent No.1) and then a complaint case was filed before the Magistrate under Section 138 of the Negotiable Instrument Act (for short 'the Act').

03. The learned trial Court, by the judgment and order dated 11.08.2009, convicted the applicant under Section 138 of the Act and sentenced him to undergo R.I. for six months with fine of Rs.3,000/- plus default stipulation. The applicant filed an appeal against his conviction and sentence but the learned Appellate Court rejected his appeal and affirmed the conviction and sentence passed by the learned trial Court. Hence, this revision.

04. Learned counsel for the applicant submits that both the Courts below have failed to appreciate the fact that the presumption available under Section 139 of the Act has been

actively rebutted by the accused in trial. The Courts below have also not appreciated the rebuttal of the presumption by the present applicant that there is no transaction between the complainant and the accused so as to have any legally enforceable debt or the liability, he is a tax advisor of the complainant and for saving the tax he had given a cheque to adjust it in the various account. She further submits that the complainant has failed to discharge his burden of proof that they were having any business transaction, hence, in view of the above mentioned fact, conviction of the applicant could be maintained for dishonor of cheque. She also submits that both the Courts below have not taken into consideration the fact that the complainant has not discharged his initial onus regarding any legally enforceable debt or liability on the applicant. It is next submitted that no notice has been received by the applicant under Section 138 (b) of the Act. The presumption under Section 139 is rebuttable. The accused can prove the non existence of a consideration by raising a probable defence. The prosecution must prove the guilt of the accused beyond all reasonable doubt and the standard of proof so as to prove a defence on the part of the accused is preponderance of probability. Thus, the impugned judgment affirming the conviction and sentence of the applicant is liable to be set aside. In support of her contention, he placed reliance on the decisions of Hon'ble Supreme Court in the matter of ***M/s Kumar Exports Vs. M/s Sharma***

Carpets[1] and ***M.S. Narayana Menon Vs. State of Kerala and Ors.***[2].

05. Learned counsel for respondents support the impugned order passed by both the Courts below.

06. I have heard learned counsel for the parties and perused the material on record.

07. In order to determine the question whether offence punishable under Section 138 of the Act is made out against the applicant, it will be necessary to examine the scope and ambit of presumptions to be raised as envisaged by the provision of Section 139 of the Act, which read as under:-

> **139. Presumption in favour of holder.** - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

08. In the case in hand, the applicant admitted his signature on cheque bearing No.473057 of Rs.2,00,000/- (Ex.P/1). The defence of the applicant is that he gave a blank cheque to the complainant for income tax purpose. It has been specifically contended on behalf of the applicant that no account has been furnished by the complainant in respect of the transaction of credit, and the check of the applicant came to show the entry in the account of any party of the complainant.

09. The material on record reflects the fact that the

1 AIR 2009 SC 1518
2 (2006) 6 SCC 39

complainant/respondent No.1 proved this fact that the applicant gave a cheque in question, which was dishonoured by bank on account of insufficient fund. That apart, the applicant has also admitted his signature thereon and stated that the cheque in question and signature belong to him, but it is his defence that he had given it for income tax purpose. The applicant, to substantiate this particular defence, has not adduced any evidence, and Section 139 of the Act clearly speaks that, it shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

10. In the matter of ***Kishan Rao Vs. Shankargouda[3],*** the Hon'ble Apex Court held in para 23 and 24, which read thus:

> **23.** No Evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence on PW-1, himself has not been explained by the High Court.
>
> **24.** In view of the aforesaid discussion, we are of the view that the High Court committed error in setting aside the order of conviction in exercise of revisional jurisdiction. No sufficient ground has

3 (2018) 8 SCC 165

been mentioned by the High Court in its judgment to enable it to exercise its jurisdiction for setting aside the conviction.

11. Learned counsel for the applicant submits that the incident is of the year 2009 and 13 years have rolled by since then, the applicant remained in jail for two days and, therefore, he may be sentenced to the period already undergone by him, to which learned counsel for respondent opposed and submitted that the applicant has remained only for two days and the fine imposed upon him i.e. Rs.3,000/- is very less, therefore, adequate compensation may be given to him.

12. The Hon'ble Supreme Court in the matter of ***Suganthi Suresh Kumar V. Jagdeeshan***[4]**,** held that the imprisonment till rising of court and fine of Rs.5000/- would not be justifiable when the amount (over 4 lakh) had not been paid by accused to complainant during pendency of the case before trial Court or High Court. Further in ***H Pukhraj V. D Parasmal***[5], it has been held by Hon'ble Supreme Court that High Court cannot award flea-bite sentence to direct the accused either to pay compensation of Rs.2 Lakh or to undergo imprisonment for two months, in case of cheque amount of Rs.6.19 lakhs returned back without being encased.

13. In the case in hand, the amount covered by cheque is of Rs.2,00,000/-. The applicant/complainant had filed a complaint

4 (2002) 2 SCC 420
5 2014 LawSuit(SC) 938

case before the learned trial Court on 19.05.2006 and the order was passed on 11.08.2009 and during pendency of the case, the applicant did not pay this amount before the trial Magistrate or before Appellate Court. The trial Magistrate, only sentenced six month imprisonment and imposed fine of Rs.3000/-, though, the cheque amount in this case is of Rs.2,00,000/-, which shows that the trial Court awarded flea-bite sentence.

14. Thus, in view of the aforesaid discussion and applying the principles of law laid down in **Suganth (Supra)** and **H Pukhraj (Supra)** to the facts of the present case, the impugned order needs to be modified.

15. As regards conviction, this Court does not find any illegality in the findings recorded by the both the Courts below regarding conviction of the applicant and the conviction of the applicant is being so, hereby maintained.

16. As regards sentence, considering the fact that the incident had taken place about 13 years back, applicnt has already remained in jail for two days, therefore, this Court is of the opinion that, in the peculiar facts and circumstances of the case, ends of justice would be served if his sentence is reduced to the period already undergone by him. This Court, accordingly, do so. So far as compensation is concerned, considering the fact that the cheque amount is Rs.2,00,000 (Rs. Two Lakh only), it is directed that the applicant to pay compensation of Rs.1,00,000/- (Rs. One Lakh only) to the

complainant/respondent No.1 within six months from the date of order of this Court, failing which he shall undergo R.I. for six months.

17. The revision is thus allowed in part.

Sd/-
(Rajani Dubey)

JUDGE

Vijay