NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 12.4.2019

Judgment delivered on 25.06.2019

Acquittal Appeal No.82 of 2014

- P.S. Verma S/o Sukhdeo Verma Aged About 62 Years R/o House No.-863, Behind Hanuman Mandir, Kurud Road, Kohka, PS Supela, Bhilai, Tah. And Distt. Durg (Chhattisgarh) Civil And Rev. Distt. Durg, Chhattisgarh

---- Appellant

Versus

- Suresh Kumar S/o Shri Mangluram Aged About 40 Years R/o Quarter No. 7 Road No. 21A, Sector-7, PS Sector-6, Kotwali, Bhilai, Tah. And Distt. Durg, Chhattisgarh

---- Respondent

For the appellant : Shri Akhtar Hussain, Advocate
For the respondent : Shri PK Patel, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This appeal is preferred against judgment dated 19.9.2013 passed by Sixth Additional Sessions Judge, Durg, in Criminal Appeal No.68/2011 wherein the said Court reversed the judgment of conviction and order of sentence passed by Judicial Magistrate First Class, Durg in Criminal Case No.330/2011 and acquitted the respondent for the charge under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act 1881').

2. Complaint was filed by the appellant before the trial Court against the respondent alleging that respondent obtained loan from the appellant on different dates amounting to Rs.80,000/-

and for discharging of the debt the respondent issued cheque in favour of the appellant bearing cheque No.156750 dated 12.8.2002 of Nagarik Sahakari Bank, Durg. The appellant deposited the said cheque in UCO Bank Branch Kohka but the same was dishonoured. The cheque was again deposited on 04.11.2002 but again it was dishonoured by the bank on 06.11.2002 on account of insufficient fund. On 08.11.2002 the appellant has sent registered notice through his counsel which was received by the respondent on 11.11.2002 but the amount was not returned by the respondent, that is why complaint was filed before the Court of Judicial Magistrate First Class, Durg which was registered as Criminal Case No.330/2011. After hearing both sides, the trial Court convicted the respondent for the offence under Section 138 of the Act, 1881 and sentenced him to undergo simple imprisonment for six months and to pay fine of Rs.1 lakh with default stipulation. The respondent preferred appeal against the said order which was registered as Criminal Appeal No.68/2011 and the appellate Court allowed the appeal and acquitted the respondent.

3. Learned counsel for the appellant submits as under:

(i) The cheque was dishonoured on 20.8.2002 for the first time and it was again presented on 04.11.2002 which was also dishonoured on 06.11.2002. Notice was issued to respondent on 08.11.2002 and the respondent received the notice on 11.11.2002. But he did not pay the amount even after the notice that is why the complaint was filed on 05.12.2002. The appellant has issued notice only on 08.11.2002 for the first time therefore, it is not a case where the notice was earlier issued. Therefore, authority related to **Tameeshwar Vaishnav Vs. Ramvishal Gupta** reported in **2010 (1) CCSC 186 (SC)** is clearly distinguishable to the present case. Since the appellant has issued notice only for one time and the complaint case was filed after receiving the notice by the respondent, filing of complaint is within limitation.

4. Learned counsel for the respondent submits that the period of limitation to be counted as per the first notice and first dishonour of the cheque, therefore, complaint filed in the present case is beyond the period of limitation. He placed reliance in the matter of **Tameeshwar Vaishnav Vs. Ramvishal Gupta reported in 2010 (1) CCSC 186 (SC).**

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 has examined himself as PW-1 before the trial Court. The respondent did not enter into witness box to rebutt the statement made by the complainant. As per the version of the complainant, the respondent borrowed Rs.80,000/- from him but did not return the same and issued cheque in his favour to the tune of Rs.80,000/-. Then the cheque was presented in the month of August for clearance but the same was dishonoured. Again it was presented on 04.11.2002 and again it was dishonoured on 06.11.2002. Notice (Ex-P/6) was issued to the respondent on 08.11.2002 but the amount was not returned that is why complaint was filed against him on 05.12.2002. From the entire record, it is clear that the notice was issued for the first time on 08.11.2002.

7. Now the point for consideration is whether cognizance taken by the Magistrate is within limitation or not. Section 142 of the Act, 1881 may be read as under:

> "142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973
>
> (a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing , made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138; [provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.
>
> (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138."

8. In the present case notice was issued on 08.11.2002 and it was received on 11.11.2002 but he did not repay the amount therefore, cause of action arise on 26.11.2002 and the complaint was filed within one month of receiving of the notice i.e. on 05.12.2002. It is not a case where notice was served to the respondent on any prior date. Therefore, it is not a case where cause of action arose on any other date. It is not a case where two notices were served to the respondent as per law laid down in the matter of Tameeshwar Vaishnav (supra), therefore, arguments advanced on behalf of the respondent is not sustainable and the authority cited by him is also clearly distinguishable to the facts and circumstances of the case.

9. 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 indoresements** – that the indorsemnts 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 is a holder in due course lies upon him."

10. 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 presumption. Therefore, it is clearly established that the respondent has not discharged his liability towards the cheque amount. It is proved that the cheque amounting to Rs.80,000/- was issued to the appellant by the respondent and the same was dishonoured as per provisions of Section 138 of the Act. Mischief of the respondent falls under Section 138 of the Act, therefore, finding arrived at by the appellate court is not sustainable and the same is hereby set aside.

11. Accordingly, the appeal is allowed reversing the judgment of acquittal passed by the appellate Court. The respondent is convicted for the offence under Section 138 of the Act 1881 and 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

Bini