NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 11-03-2019

Delivered on 28-03-2019

ACQA no. 223 of 2012

- Mirchumal s/o. Safarmal aged about 65 years, r/lo. Malviya Road, Police Station Gole Bazar,Tahsil and Dist. Raipur (CG).

---- Appellant

Versus

1. Mohamed Wazid Akhatar s/o. Mohamed Bashir Akhatar, aged about 35 years, r/village Birgaon, Police Station Urla, Raipur (CG).
2. M/s. Sofia Industries Proprietorship firm through Proprietor Mohamed Wazid Akhatars/o. Mohamed Baashis Akhatar situated at Siltara Road,Tashil and Dist. Raipur (CG).

---- Respondents

For Appellant	:	Mr. Dilman Rati Minj Advocate
For respondents	:	Mr. Vivek Tripathi and Mr. Rajbahadur Singh, Advocates.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This appeal is preferred against the judgment of conviction and order of sentence dated 23-7-2012 passed by the Judicial Magistrate First Class, Raipur, District Raipur in Criminal complaint Case No. 24 of 2011 wherein the said Court has acquitted the respondent No.1 for charge under

Section 138 of the Negotiable Instruments Act, 1881 (for short, “the Act, 1881”).

2. The appellant/complainant filed a complaint under Section 138 of the Act, 1881 against the respondent No.1 that he had taken loan of Rs.25,000/- from the appellant for repayment of the same. He delivered a cheque baring No. 100011 payable at Central Bank of India, Vivekanand Ashram Branch Raipur. The cheque was presented before the bank but the same was returned with a note “account has been closed”. Therefore, the appellant issued a legal notice dated 15-6-2010 through speed post which is served on respondent No.1, but in spite of the notice, the amount was not paid that is why complaint was filed in which the trial Court acquitted the respondent.

3. Learned counsel for the appellant would submit as under:

i) Procedural part of Section 138 of the Act, 1881 has been duly satisfied, therefore, the trial Court went wrong in acquitting the respondent.

ii The trial court wrongly held that the appellant wants to enforce a time barred debt because respondent has failed to rebut the presumption provided under Sections 118 and 139 of the Act, 1881.

iii) The trial Court erred in relying on the testimony and report of the hand-writing expert, therefore, finding of the trial Court is liable to be reversed and the respondent be convicted for the said offence.

4.. On the other hand, learned counsel for the respondents supporting the impugned judgment would submit that the finding of the trial Court is based on proper marshalling of the evidence and the same is not liable to be interfered while invoking the jurisdiction of the appeal.

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

6. From the evidence of the complainant/appellant, it is established that loan amount was taken on 30-11-2005 and cheque was issued on 7-6-2010. The question for consideration of this court is whether the cheque was issued in favour of the appellant on 7-6-2010.

7. Bhavana Mishra (DW/2) is hand-writing expert who examined the cheque in question and made a report on body formation and relative age of body formation. As per report this medical expert after examination the signature in the cheque of the respondent No.1 which is marked as A-1 (A-A) is executed four years ago from the date of examination. The

examination report is prepared on 7-1-2012 and as per opinion of this expert, the signature in the cheque was executed sometime in the month of January, 2008. He further deposed that the amount of Rs.25,000/- and word pay to Mirchumal is executed 3 1/2 years ago. The expert opined that even if the evidence is taken approximately, it is established that signature of respondent No.1 was obtained in the said cheque sometime in the month of January 2008.

8. For establishing charge under Section 138 of the Act, 1881, proviso of said Section may be read as under:

> "138. **Dishonour of cheque for insufficiency etc. of funds in the account** (a) the cheque has been presented to the bank within a period of six months (within three months vide R.B.I. Notification No. RBI/2011-12/251, DBOD.AMI.BC No.47/14.01.001/2011-12 dated 4th November, 2011 (w.e.f. 1-4-2012) from the date on which it is drawn or within the period of its validity, whichever is earlier".

9. Admittedly, in the present case, the cheque has been presented to the Bank on 7-6-2010 while as per report of

expert, the signature of the respondent No.1 is of Month January 2008. It means, cheque was drawn in the month of January2008 while the same has been presented to the Bank on 7-6-2010 which is not a period of within six months. Therefore, looking to the entire evidence, the case of the appellant does not fall within the purview of Section 138 of the Act, 1881. Admittedly, loan was advanced by the appellant on 30-11-2005 and it could have been recovered within three years i.e., upto 30-11-2008, but that is not done. The amount which was advanced by the appellant was not recoverable after three years that is why the trial Court opined that the entire exercise was done to recover time barred debt.

10. True it is that there is presumption under Section 118 & 139 of the Act, 1881 that cheque was drawn to discharge liability and it was drawn on the date which is bearing in the cheque, but in the present case from the opinion of expert cheque was drawn with a signature of respondent No.1 in the month of January 2008, therefore, presumption under Section 118 & 139 of the Act, 1881 is rebutted by the evidence of handwriting expert. Looking to the entire facts and circumstances of the case, The trial Court recorded finding of acquittal and this court has no reason to substitute the contrary finding.

14. Accordingly, the appeal being devoid of merits is liable to be and is hereby dismissed.

Sd/-
(Ram Prasanna Sharma)
Judge

Raju