HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 593 of 2018

Pawan Kumar Jain

Applicant

Versus

Kunal Verma

Respondent

Post for pronouncement of the order on 30.08.2019

JUDGE
30.08.2019

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on : 16.07.2019

Order Delivered on : 30/08/2019

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 593 of 2018

- Pawan Kumar Jain S/o Late Madan Lal Jain Aged About 63 Years R/o Behind Sai Baba Mandir, Rohinipuram C Gol Chowk Raipur, Tahsil, District Raipur, Chhattisgarh,

----Applicant

Versus

- Kunal Varma S/o Sri Arun Kumar Verma Aged About 32 Years R/o Flat No. 505 Wrongly Mentioned 565 C Block Om Complex Fafadeeh Raipur, Tahsil And District Raipur, Chhattisgarh,

---- Respondent

For Applicant	:	Shri Uttam Pandey, Advocate
For Respondent	:	Shri Kishore Bhaduri, Advocate

Hon'ble Smt. Justice Rajani Dubey

C A V Order

30/08/2019

Present revision has been filed against the order impugned dated 23.05.2018 passed by the learned Second Additional Sessions Judge to the Court of First Additional Sessions Judge, Raipur in Criminal Appeal No. 314/2017 whereby the court below has affirmed the conviction and sentence passed by the Judicial Magistrate First Class, Raipur vide order dated 7.11.17 in Cr. Case No. 271/13 convicting the applicant under Section 138 of the Negotiable

Instruments Act (hereinafter referred to as “the Act”) and sentenced to undergo RI for two years and to pay compensation of Rs. 31,79,000/- plus default stipulation.

2. Brief facts of the case are that the complainant/respondent filed complaint under Section 200 Cr.P.C. against the applicant on the ground that the complainant and accused are in the business of iron scrap and due to which they were known to each other. On September 2011, applicant was in need of Rs. 32,00,000/- for his business and therefore he demanded the said amount from the complainant. Complainant somehow managed to give Rs. 31,79,000/- to the applicant against which he gave post dated cheque bearing No. 169467 dated 20.09.11 for refund of loan amount. Thereafter, complainant presented the cheque in the bank and due to insufficient funds, the cheque got dis honoured. The complainant sent a legal notice vide memo dated 21.12.2011 to the applicant demanding for cheque within a period of 15 days from the receipt of notice through registered post but the applicant neither gave response nor made payment even after receiving the notice and therefore, complaint case was filed against the accused before the trial court.

3. Learned trial court, after hearing the parties and the material placed on record, found the applicant guilty under Section 138 of the Act and convicted and sentenced him to undergo RI for two years and directed to pay compensation of amount of Rs. 31,79,000/- to the complainant. This order was appealed by the complainant before the lower appellate court which was affirmed. Hence, the present revision.

4. Learned counsel for the applicant submits that the order passed

by both the courts below is illegal for establishing a case under Section 138 of the Act. The court has to see whether the law enunciated in this regard is fully complied with, on facts and law. To initiate the proceedings against the accused under Section 138 of the Act, service of demand notice is the condition precedent but in this case, both the courts below have held that the notice has been properly served upon the applicant, though the notice was not served upon him and this fact is on record but the learned court below overlooked this vital aspect and reached to a wrong conclusion that the legal notice was duly served on him on his correct address. The legal notice marked as Ex.P-6 clearly shows that address of accused was written as House No. 127, Sector 1, Deen Dayal Upadhyay Nagar, Raipur whereas the applicant was residing at Deen Dayal Nagar upto June 2007 in HIG 127. In addition to this, it has also not been taken into consideration that the registered receipt Ex.P-7 only demonstrates the address of the applicant as residing in Raipur and thus it cannot be said that the legal notice was sent on the correct address of the applicant and duly served without proof of service of acknowledgement which is mandatory requirement in terms of sub-section (b) of Section 138 of the Act. He further submits that the complainant has not disclosed as to how he arranged such a huge amount within a short period of 3-4 days. In the initial stage of trial, objection was raised in connection with the credibility of the documents as it was objected that the complainant was asked to keep present his witnesses as the application of the complainant was admitted but no direction was issued to keep the witnesses along with the documents and the learned trial court kept the issue pending for deciding it during the course of final adjudication.

The witnesses of the complainant is also not reliable. In para 18 of the judgment, learned trial court has wrongly admitted the documents Ex. P-12 to 17 in connection with the income tax return, computation etc. as in terms of Section 65(b) of the Evidence Act. It is mandatory to produce certificate under the said section and when the original electronic record was produced in the court the compliance of Section 65(b) is not mandatory and it is clear from the record that computer generated record was produced which is not admissible. The findings of the trial court is contrary to law and deserve to be quashed and the appellate court has not given its opinion in connection with Section 74 of the Evidence Act and thus has grossly erred in adjudicating the above aspect which was the real issue of controversy. Learned trial court has committed a grave error by holding that it was not important to adjudicate as to whether the complainant was income tax payee or not and confined its findings on Exhibited document P-1 by this Court. The findings of the learned trail court in para 9 that applicant cannot rebut the presumption totally against law since burden was shifted on the complainant and he was duty bound to prove the legal debt and transaction. The complainant was not allowed to adduce defence and to establish its case that there were several blank cheques signed by him which were is possession of his son Amit Kumar who has died and out of those cheques, the complainant has misappropriated one cheque amounting to Rs. 31,79,000/-. Learned trial court closed the opportunity of hearing and adduced his evidence vide order dated 06.09.16. The accused paid PF to summon official witnesses like officials/employees of police station Deen Dayal Upadhyay Nagar, Police Station Cioty Kotwali, Ambikapur, S.P.Surguja to establish the defence before the trial court. Reliance has been placed in the matter of ***Shakti Travel and Tours Vs. State of Bihar and Another,*** *(2002) 9 SCC 415;* **H.Satyanarayan Reddy Vs. V.Chinappa in Cr.A. No. 2137 of 2005** ***decided on 03.01.12; V.Raja Kumari Vs. P.Subbarama Naidu and Another, AIR 2005 SC 109***; ***Laxman Das Vs. Amar Rochwani decided by the M.P. High Court vide its order dated 05.09.06***; ***Harbanslal Vs. Shyamsundar reported in (2014) 4 MPLJ 37***; ***K.Prakasshan Vs. P.K.Surendran reported in (3008) 1 SCC 258; John K.John Vs. Tom Verghese & Another (2007) 12 SCC 714; Krishna Janardhan Bhat Vs. Dattatraya G.Hegde (2008) 4 SCC 54; K.Subramani Vs. K.Damodar Naidu (2015) 1 SCC 99; Sarav Investment and Financial Consultants Pvt. Ltd. And Another Vs. Lloyds Register of Shipping Indian Office Staff Provident Fund and Another (2007)14 SCC 753; Rama Devi & Another Vs. Ram Prakash and Others (1985) 11 AIR (Allahabad) 17 and Mohammed Farooque Shahdat Vs. Kantaben G.Savalia and Others (2007) ALLMR (Cri.) 1952.***

5. Learned counsel for the complainant/respondent supports the impugned order and submits that presumption of law that cheque was given in discharge of legal debt and burden to show that cheque has not been issued for debt or liabilities lies only on the accused. This revision is being without substance and therefore deserves to be dismissed. Reliance has been placed in the matters of ***State of Kerala Vs. Puttumanaillath Jathavedan Namboodari with Managing director, Western India Ply Woods Vs. Puthumanaillath Jathavedan Namboodiri (1999) 2 SCC 452; Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke & Others (2015)3 SCC 123***

and Rangappa Vs. Sri Mohan (2010) 11 SCC 441.

6. Heard counsel for the parties and perused the material on record.

7. The accused has examined defence witnesses Pannalal Sahu (DW-1), Ranjit Singh (DW-2) and Vinod Kumar Tiwari (DW-2) who have stated that Pawan Jain is residing in Rohini Puram, Gol Chowk, Behind Sai Baba Temple, Raipur since the year 2008. The applicant has given no documentary evidence before the trial court. In this regard, the lower appellate court had rightly observed that if he was really residing on the said address then he would have some documentary proof of his residence like ration card, voter list, electricity connection bill but the accused has withheld the said evidence in para 13 and 14. The appellate court has rightly drawn adverse inference against the applicant.

8. The applicant denied his transaction with respondent on the ground that his son has gone to Ambikapur along with some blank signed cheques and documents, where he died in suspicious condition and the aforesaid blank cheques and documents were found missing from his possession. Therefore, he has given written complaint about the missing of blank signed cheques to the S.P. Ambikapur and police station D.D.Nagar, Raipur. The trial court gave 24 opportunities to the applicant but he did not produce his evidence in this respect. Learned counsel for the applicant submits that he prayed for paying PF for issuing summons but the witnesses did not remain present before the trial court therefore, it is the duty of the trial court that they ought to have kept the witnesses present. The applicant has requested to

summon the witnesses but without any report of the service of summons, his evidence was closed. It is stated that all the witnesses are public servants and without issuing summons they could not remain present.

9. Before the trial court, signatures of the applicant on the cheque in question, is not disputed as the applicant has taken plea of missing of blank signed cheques. Hon'ble Apex Court in the matter of Rangappa Vs. Mohan (2010 (11) SCC (Cri.) 441) has held as under :

> 24. This decision in Mallavarapu Kasivisweswara Rao case (2008) 7 SCC 655, then proceeded to cite an extract from the earlier decision in Bharat Barrel & Drum manufacturing Co. V. Amin Chand Pyarelal (SCC pp. 50-51, para 12) (1999) 3 SCC 35
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> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative

> evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

In the Negotiable Instruments Act, ordinarily what the courts have to consider is whether the ingredients of the offence as enumerated in Section 138 of the Act have been met and whether the accused was able to rebut the statutory presumption contemplated under Section 139 of the Act. Section 138 of the Negotiable Act reads as under:

> 138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [19] [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
> (b) the payee or the holder in due course of the

> cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [20] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
> Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

Under Section 139 of the Act, the Court has to presume unless the contrary was proved in favour of the holder. Section 139 in the Negotiable Instruments Act, 1881

> [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.]

10. Under Section 139 of the Act, the court has to presume that a cheque is issued in discharge of any debt or other liability. In compliance under Section 138 of the Act, the court has to presume that the cheque has been issued for a debt or liability. This presumption is rebuttable but it was upon the accused to rebut the said presumption by leading reliable and cogent evidence proved that there was no debt or liability before the trial court. The applicant did not given any evidence in this regard. The applicant has examined three defence witnesses but all of them have stated about his address and nothing has been stated about misuse of cheque. In cross-examination of complainant nothing came out to falsify his complaint or his evidence. The appellate court below has discussed all the objections

at length in its judgment.

Hon'ble Apex Court in the matter of **State of Kerala Vs. Puthumanaillath Jathavedan Namboodiri (1999) 2 SCC 452**, has held that :

> " In Its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of Supervisory Jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an Appellate Court nor can it be treated even as a second Appellate Jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

In the matter of **Kishan Rao Vs. Shankargouda (2018) 8 SCC 165,** Hon'ble Apex Court held 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 been mentioned by the High Court in its judgment to enable it to exercise its jurisdiction for setting aside the conviction.

11. In this case also the trial court as well as the appellate court after appreciating the oral and documentary evidence has come to the conclusion that the complainant has successfully proved the guilt of the accused beyond reasonable doubt. Hence, the present revision has no merits and same is liable to be dismissed and is accordingly dismissed.

Sd/-

(Rajani Dubey)
Judge

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