NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 1254 of 2018

Reserved on : 05.02.2019

Delivered on : 28.03.2019

Mohammad Mustafa Khan, aged about 40 years, S/o Shri Gulam Muhammad Khan, R/o D/1, Super State Colony, Mahaveer Nagar, Raipur, District- Raipur (C.G.)

---- Petitioner

Versus

Mohammad Mustafa Ansari, S/o Shri Abdul Tais, R/o Behind Prem Park Colony, 12 Block, Mahaveer Nagar, Raipur, Tahsil & District- Raipur (C.G.)

---- Respondent

For Petitioner	:	Mr. Uttam Pandey, Advocate.
For respondent	:	Mr. Umesh Pandey, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. This petition is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against judgment dated 07.05.2018 passed by Judicial Magistrate First Class, Raipur, District- Raipur (C.G.) in Complaint Case No. 575/2015, wherein the said court dismissed the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act, 1881").

2. As per case of the prosecution, the respondent was tenant of the petitioner/complainant and thus both were familiar to each other and due to this relation, the respondent demanded Rs. 1,00,000/- for his business and amount of Rs. 1,00,000/- was given to the respondent on 20.06.2014. The respondent

issued a cheque in favour of the petitioner on 26.10.2014 for repayment of the said amount. The cheque was presented on 31.10.2014 at State Bank of India, New Rajendra Nagar Branch, Raipur and on 01.11.2014, the same stood dishonoured due to insufficient fund. Legal notice was sent by the petitioner on 07.11.2014 demanding the cheque amount, but amount was not repaid that is why a complaint was filed on 16.12.2014. As per version of the respondent, blank cheque was issued by him, but mischiefing, the same was utilized by the petitioner.

3. Learned counsel for the petitioner submits as under:-

(i) The respondent has no where denied issuance of cheque and his defence that cheque was issued in terms of process of bank loan is not established before the trial court. Even then, the trial court passed the order of acquittal which is not sustainable.

(ii) There is proper evidence regarding presentation of the cheque to the bank, date on which it stood dishonoured and issuance of notice to the respondent.

(iii) The respondent did not enter into witness box, therefore, version of the petitioner is unrebutted. The petitioner is entitled for principal amount and compensation.

4. On the other hand, learned counsel for the respondent submits as under:-

(i) The respondent has drawn a blank cheque for processing bank loan and no amount was paid to him.

(ii) After four months from the date of borrowing of the money, the cheque was issued.

(iii) Cheque was dishonoured because no date is assigned on the said cheque. Detail of the cheque is not submitted.

5. From statement of Mohammad Mustafa Khan (PW-1), it is established the respondent borrowed a sum of Rs. 1,00,000/- from him on 20.06.2014 and he issued a cheque on 26.10.2014 in favour of the petitioner for discharging the loan amount. The said cheque was presented before the bank on 31.10.2014 which was dishonoured on 01.11.2014 with endorsement that fund is insufficient. As per version of this witness, he issued a notice on 07.11.2014 to the respondent which was received by him on 08.11.2014, but no amount was returned by him, therefore, complaint was filed before the trial court. Version of this witness is supported by documents i.e. cheque (Ex.P/1), endorsement of dishonoured (Ex.P/2), Notice (Ex.P/3) & Acknowledgment (Ex.P/5).

6. In rebuttal, two witnesses namely Saddam Hussain (DW-1) & Mohammad Firoz (DW-2) were examined who deposed regarding any sale of land, but that is not substantiated by any document. The respondent did not enter into witness box to rebut the version of the petitioner, therefore, version of the petitioner and the document produced by him before the trial court is not rebutted.

7. As per Section 139 of the Act, 1881, there is statutory presumption that the cheque issued for discharging, in whole or in part, of any debt or other liability, the presumption is rebutted but in the present case, the respondent himself has not entered into witness box to rebut the version of the petitioner, therefore, version of the petitioner is not rebutted.

8. Section 118 of the Act, 1881 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;

9. In the present case, date of cheque is mentioned as 26.10.2014. There is no evidence from the respondent side that the cheque was drawn on other date, therefore, it is established that the cheque was drawn on 26.10.2014. It is also presumed that the cheque was drawn because liability of Rs. 1,00,000/- was due against the respondent that is why he issued the cheque. When the entire evidence is unrebutted, it is clearly established that the respondent issued cheque for liability of Rs. 1,00,000/-.

10. In view of the above, finding of the trial court that the cheque was not issued for any liability was not based on any record and the same is not sustainable. The endorsement of the bank is sufficient evidence that the cheque was dishonoured

for insufficiency of fund, therefore, it is proved that the cheque was dishonoured and after notice, the amount of cheque was not repaid by the respondent. Act of the respondent clearly falls within mischief under Section 138 of the Act, 1881.

11. The date of cheque is 26.10.2014, four years is passed, therefore, the petitioner is also entitled for interest @ 9% which comes out to Rs. 36,000/-. In addition to that he is also entitled for recovery of cost of litigation of both courts which assumed to be Rs. 14,000/-. In all, the respondent is liable to pay Rs. 1,50,000/- to the petitioner.

12. Accordingly, the petition is allowed reversing the order of acquittal passed by the trial court. The respondent is convicted for offence under Section 138 of the Act, 1881 and awarded sentence of fine to the tune of Rs. 1,50,000/- (Rs. One Lac Fifty Thousand).

13. The trial court is directed to take steps for recovery upon the respondent for depositing the entire amount. After recovery, the whole amount shall be paid to the petitioner against liability of the respondent.

Sd/-
(Ram Prasanna Sharma)
Judge

Arun