

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 401 of 2018****Reserved on : 08.01.2019****Delivered on : 30.01.2019**

Smt. Shamim Bano, W/o Karim Khan, Aged About 42 Years, R/o Rajendra Nagar, Near Sharma Tent House, Police Station- Civil Line, Tahsil- Bilaspur, Civil & Revenue District- Bilaspur (C.G.)

---- Appellant**Versus**

Smt. Shabana Khan @ Soni, Aged About 32 Years, W/o Hakikat Nawaj Khan @ Waris Khan, R/o Rajendra Nagar, Behind P.N.S. College, Police Station- Civil Line, Bilaspur, District-Bilaspur (C.G.) at present C/o Sheikh Usman Badi Bazar Samlai Mandir, Beside Doctor Panigiri under Street, Police Station- Badi Bazar, Sambalpur, District- Sambalpur (Orissa)

---- Respondent

For Appellant	:	Mr. Goutam Khetrapal & Mr. Avinash Chand Sahu, Advocates.
For respondent	:	Mr. A.R.K. Rao, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This acquittal appeal is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against judgment dated 14.07.2014 passed by Judicial Magistrate First Class, Bilaspur (C.G.) in Criminal Case No. 324/2012, wherein the said court acquitted the respondent for commission of offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act, 1881").
2. As per case of the prosecution, the appellant/complainant and the respondent were residing in the locality of Rajendra Nagar and were having family relation prior to February, 2012. In the

month of January, 2012, the respondent was dire in family financial assistance and a cheque for sum of Rs. 2,00,000/- was given to the respondent by the appellant as loan and for discharging of loan, the respondent drawn a cheque of Rs. 2,00,000/- in favour of the appellant. The respondent thereafter shifted to Sambalpur District of Orissa State and in spite of several efforts, the amount which had been taken by the respondent as loan, has not been refunded. The appellant produced cheque for clearance, but the same has been dishonoured on 6th September, 2012. The appellant sent legal notice for demand of legal liability on 17th September, 2012 and the same was received by her on 20th September, 2012, but the amount was not repaid that is why a complaint under Section 138 of the Act, 1881 was filed before the trial court. The trial court dismissed the complaint on the ground that the cheque which was issued for security of loan does not come under legally enforceable debt, therefore, provision under Section 138 of the Act, 1881 is not attracted and notice to the respondent is not served on the address of District-Sambalpur (Orissa).

3. Learned counsel for the appellant/complainant submits as under:-

(i) There is presumption against the respondent and the said respondent has not come in the witness box to discharge her burden.

(ii) The cheque was given for security of loan and it is admitted position that the loan has been advanced by the appellant, therefore, finding arrived at by the trial court is not sustainable.

(iii) The respondent has not adduced any evidence in rebuttal of the presumption, therefore, finding arrived at the trial court is liable to be reversed.

4. Learned counsel for the appellant placed reliance in the matter of **Rangappa Vs. Mohan**, reported in **2010 (11) SCC 441**.
5. On the other hand, learned counsel for the respondent submits that the cheque was not drawn for existing debt, therefore, no criminal liability can be fastened on the respondent. He placed reliance in the matter of **M/s. Indus Airways Pvt. Ltd. & others Vs. M/s. Magnum Aviation Pvt. Ltd. & another** reported in **2014 (2) Crimes 105 (SC)**, **Sanjay Mishra Vs. Ms. Kanishka Kapoor @ Nikki & another** reported in **AIR 2009 (NOC) 2327 (BOM.)**, **Jitendra Singh Flora Vs. Ravikant Talwar** reported in **2001 (1) M.P.L.J. 229**, **Ramkrishna Urban Co-operative Credit Society Ltd., Ahmednagar Vs. Rajendra Bhagchand Warma** reported in **2010 Cri.L.J. (NOC) 670 (BOM.)**.
6. The contention related to the appropriate interpretation of Section 138 and 139 of the Act, 1881 can be addressed later, but before addressing them, it would be useful to quote the

relevant 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;

7. The appellant appeared before the trial court as PW-1 and as per version of the appellant, the respondent borrowed a sum of Rs. 2,00,000/- from him and for repayment of the loan amount, she drawn a cheque bearing No. 689211 dated 31st August, 2012 of Rs. 2,00,000/-. The cheque was produced before the trial court in which date of drawn is mentioned as 31st August, 2012 and amount is also mentioned as Rs. 2,00,000/-.
8. It will be appropriate to reproduce the statutory provision in question which 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 provision of this Act, be punished with imprisonment for [a term which may extend 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, [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.”

“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.”

9. The respondent did not appear before the trial court and no one appeared as witness on behalf of the respondent before the trial court, therefore, evidence adduced by the appellant is unrebutted. It is contended on behalf of the respondent that the failure by complainant to disclose the amount in her income tax return or book of account is sufficient to rebut the presumption under Section 139 of the Act, 1881. Looking to the facts of the case, the argument advanced on behalf of the respondent is without substance.
10. There is nothing on record that the appellant is regularly filing the income tax return and keeping books of account. The

argument is valuable only when the appellant is filing the return regularly or keeping books of account regularly. It is not the evidence that the appellant is working like money lender and therefore, she is bound to keep books of account. It is also not the evidence that the income tax of the appellant is within the limit of income tax payer and she is bound to file income tax return. In absence of any basic evidence, she is not bound to maintain the books of transaction and file return.

11. It is contended on behalf of the appellant that the cheque was drawn for non-existing debt, therefore, the respondent is not under any criminal liability. Argument advanced is not sustainable.
12. From evidence of the appellant, it is established that the respondent borrowed a sum of Rs. 2,00,000/- from her in the month of January, 2012, therefore, debt was existing in the month of August, 2012 when cheque was drawn. Looking to the instrument dated 31st August, 2012, the only presumption can be drawn is that the sum is drawn for existing debt which is not paid.
13. Again, from notice dated 17th September, 2012 (Ex.P/4) and receipt of registration of the said notice by postal department (Ex.P/5) and acknowledgment (Ex. P/6), it is established that the notice was issued to the respondent on 17th September, 2012 which was received by her on 20th September, 2012. The amount was not repaid after acceptance of the notice

within 15 days, therefore, complaint was filed within stipulated period of one month.

14. From evidence of the appellant and as per document (Ex. P/3), the cheque was dishonoured and looking to the entire evidence, it is clearly established that the cheque amounting Rs. 2,00,000/- was issued in favour of the appellant by the respondent and the same was dishonoured as per provision of Section 138 of the Act, 1881 which is punishable under the same section. The arguments advance on behalf of the respondent is not sustainable and finding arrived at by the trial court is also not sustainable and the same is hereby set aside.
15. Accordingly, the appeal is allowed reversing the order of acquittal passed by the trial court. The respondent is convicted for payment under Section 138 of the Act, 1881.
16. Looking to the period over six years of issuing the cheque and further looking to the expenses borne by the appellant for litigation, the respondent is awarded sentence of fine to the tune of Rs. 3,00,000/- (Rs. Three Lacs).
17. 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 appellant against liability of the respondent.

Sd/-
(Ram Prasanna Sharma)
Judge