

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 409 of 2018****Reserved on : 02.04.2019****Delivered on : 26.04.2019**

Harjit Singh, S/o Late Budh Singh, aged about 60 years, R/o Old Ganj Chowk, Lakhali Road, Rajnandgaon, District- Rajnandgaon (C.G.)

---- Appellant**Versus**

Smt. Shobha Mishra, W/o Sanjay Mishra, aged about 54 years, R/o Diwan Para, Near house of Thakur Darbar Singh, Rajnandgaon, District- Rajnandgaon (C.G.)

---- Respondent

 For Appellant : Mr. M.P.S. Bhatia, Advocate.
 For respondent : Mr. Viprasen Agrawal, 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 28.08.2018 passed by Judicial Magistrate First Class, Rajnandgaon (C.G.) in Complaint Case No. 2383/2014, 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 the appellant, the respondent/ accused had taken a loan of Rs. 2,70,000/- on 04.03.2014 in the name of construction of her house. For repayment, she had given three cheques of Rs. 1,00,000/-, 70,000/- & 1,00,000/- of her account at State Bank of India, Rajnandgaon bearing cheque

No. 083897, 083902 & 723206 respectively. When the appellant/ complainant presented the cheque bearing No. 083897 & 083902 dated 12.05.2014 of Rs. 1,00,000/- & 70,000/- respectively for payment and encashment in his account before his bank i.e. State Bank of India, Rajnandgaon on 18.05.2014, both the aforesaid cheques were bounced and dishonoured as per memo of the bank dated 20.05.2014 on account of insufficiency of funds in the account of the respondent/ accused. Thereafter, the appellant/ complainant sent a legal notice dated 27.05.2014 to the respondent which was received by her on 30.05.2014, but the respondent did not make repayment of the loan against which she had given cheques to the appellant. Thereafter, a complaint was filed which resulted into acquittal.

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

(i) The appellant/ complainant was examined as PW-1 and he proved the documents, but the trial court has not drawn presumption as per Section 139 & 118 of the Act, 1881.

(ii) In absence of rebuttal of presumption, it is proved that the cheques were issued for discharging the debt, therefore, finding of the trial court deserves to be set aside.

4. On the other hand, learned counsel for the respondent submits that the finding arrived at by the trial court is based on relevant material placed on record and the same does not warrant any interference of this Court with invoking jurisdiction

of the appeal.

5. From evidence of the appellant (PW-1) and the document Ex.P/1 & P/2 which are two cheques of Rs. 1,00,000/- & 70,000/- signed by the respondent. Ex.P/3 & P/4 are letter of dishonour from the State Bank of India, Rajnandgaon and subsequent notice (Ex.P/5) issued to the respondent, it is established that two cheques amounting to Rs. 1,00,000/- & 70,000/- were issued in favour of the appellant by the respondent which were submitted before the bank for clearance, but the same were dishonoured due to insufficiency of fund. Notice was served to the respondent, but she did not make repayment.
6. As the respondent admitted that she issued the cheques in favour of the appellant, but she stated that it was issued for surety of loan of Rs. 50,000/-. The respondent is posted in Government Higher Secondary School, Rajnandgaon and she is literate.
7. 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;

8. It will be appropriate to produce 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. When the respondent/ accused is literate, it should be presumed that she signed on the cheques for discharging the

debt because she herself has stated in her statement recorded under Section 313 of the Cr.P.C. that she took amount of Rs. 50,000/- from the appellant, but that version is not substantiated by any document and it is also not clear that as to when this amount was advanced and whether it is repaid or not. As, the theory put-forth by the respondent is not substantiated by any documentary evidence, therefore, the same is not liable to be accepted.

10. The trial court recorded finding that the amount was not issued in form of cheque or bank draft. As per Section 269 of the Income Tax Act, 1961, there is no other document of borrowing the money, therefore, liability of debt is not established.
11. In view of this Court, if the transaction in question was not reflected in the accounts and income-tax returns, that would at best hold the assessee or lender liable for action under the income-tax laws but, if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 & 139 of the Act, 1881. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in form of receipts or accounts or

want of evidence as regards source of funds were not of relevant consideration, therefore, the finding arrived at by the trial court is not sustainable. The amount was taken five years back.

12. Accordingly, the appeal is allowed reversing the order of acquittal passed by the trial court. The respondent/ accused is convicted under Section 138 of the Act, 1881 and is awarded sentence of fine to the tune of Rs. 2,25,000/- (Rs. Two Lacs Twenty Five Thousand).
13. The trial court is directed to take steps for recovery against 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