

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 17.01.2020

Delivered on 27.02.2020

Acquittal Appeal No.41 of 2011

Prashant Parakh, S/o. Shri SC Parakh, aged about 35 years, R/o. Near State Bank of India, Balod, Distt. Durg (CG)

---- Appellant

Versus

Subhash Choudhary, S/o. Ajit Choudhary, R/o. Near Old Post Office, Budhwari Bazar, Balod, Police Station Balod, Distt. Durg (CG)

---Respondent

For the appellant : Shri Punit Ruparel and Shri Kalpesh
Ruparel, Advocates
For the respondent : Shri Malay Shrivastava, Advocate

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

1. The appeal is directed against judgment dated 23.11.2009 passed by Judicial Magistrate First Class, Balod Distt. Durg (Chhattisgarh) in Criminal Case No. 383/2008 whereby the said Court acquitted the respondent for the offence under Section 138 of the Negotiable Instruments Act, 1881(for short 'the Act 1881').

2. As per the version of the appellant/complainant, he gave cash loan of Rs.80,000/- to the respondent/accused and for that payment two cheque bearing No. 737011 dated 30.12.2007 for

Rs.60,000/- and No.737014 dated 15.01.2008 for Rs.20,000/- of District Co-operative Bank Limited Durg, Branch Balod were issued by him in favour of the appellant. Both cheque were presented before the Bank for encashment in his account at State Bank of India in A/c. No.8086364 and both the cheque were dishonoured on account of insufficiency of fund in the account of the respondent. Thereafter legal notice was sent and even after receiving the notice the payment is not made, hence, complaint under Section 138 of the Act 1881 was filed before the said Court which resulted into acquittal.

3. Learned counsel for the appellant submits as under:

(i) Cheque were issued on account of debt and after dishonour of the cheque, notice was issued to the respondent but no reply was given to said notice which shows that the respondent is accepting his liability.

(ii) The respondent is saying that cheque were issued for surety purpose but this fact was not replied in the notice issued to him, therefore, this version of the respondent is after thought and the same is not liable to be sustained.

(iii) The trial Court has not evaluated the evidence, properly, therefore, the finding of the trial Court is liable to be set aside and the respondent may be convicted.

(iv) To substantiate his arguments, learned counsel for the appellant placed his reliance in the matter of **Rangappa Vs. Sri Mohan** reported in **(2010) 11 SCC 411**.

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

(i) As per documents Ex-D/1 to D/11, there was some transaction between the parties, but no loan was advanced to the respondent for a sum of Rs.80,000/-.

(ii) Cheque were issued for surety purpose which were not genuine cheque, therefore, no liability can be fastened upon the respondent and finding of the trial Court is not liable to be interfered with.

5. I have heard learned counsel for the parties and perused the judgment impugned with record.

6. The first question for consideration before this Court is whether cheque for Rs.80,000/- was drawn by the respondent in favour of the appellant for discharge of debt, whether the cheque deposited in the bank for clearance were returned unpaid on account of insufficiency of fund in the account of the respondent and whether after legal notice the respondent has not returned the amount of cheque to the appellant.

7. The appellant side adduced evidence of Prashant Parakh (PW-1), Branch Manager, Distt., Co-operative Central Bank, Balod Rohit Kumar (PW-2) and Assistant Manager Sanjay Sharma (PW-3) and exhibited documents P/1 to P/15. In rebuttal the respondent side submitted documents Ex-D/1 to D/11. From the statement of Prashant Parakh (PW-1), it is established that the loan was advanced to the respondent for a sum of Rs.80,000/- between 02.8.2007 to 05.8.2007 due to necessity of construction work. As per the version of this witness, two cheque were issued in his favour amounting to Rs.60,000/- & Rs.20,000/- which were deposited in the State Bank Of India Balod Branch and the same were dishonoured on 13.3.2008 for insufficiency of fund. Thereafter, he issued notice to the respondent on 02.4.2008 but no payment was made even after receiving the notice on 15.4.2008 and thereafter complaint was filed. This version is supported by Branch Manager Co-operative Central Bank, Balod Rohit Kumar (PW-2) and Asst. Manager, State Bank of India, Balod Sanjay Kumar (PW-3). From the evidence, it is established that no amount was paid even after the notice. Version of these witnesses is unrebutted by the respondent side. The respondent side adduced evidence of Shankar Shrivastava (DW-1) and Satyendra Mukhare (DW-2), but their version is not sufficient for rebutting the evidence adduced on behalf of the appellant. Both

have deposed regarding purchase of some tiles and goods but they have not deposed regarding loan advanced to the respondent. Therefore, their version is not sufficient to rebut the version of the complainant.

8. As per Section 139 of the Negotiable Instruments Act, 1881, 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. 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. It is not a case of the respondent that he has not signed the cheque. A meaningful reading of the provisions of the Act, 1881 makes it ample clear that the person signed the cheque over to a payee remains liable and he may adduce any evidence to rebut presumption. Presumption will live, exist and survive and shall end only when contrary is proved by the accused/respondent.

10. The trial Court recorded finding that there is no specific evidence that on which date loan was advanced, therefore, advancement of loan is not established. In view of this Court, finding arrived at by the trial Court is against the legal aspects of the matter. When the respondent himself has not deposed before the trial Court that he has not borrowed money from the appellant, presumption under Section 139 of the Act, 1881 will survive and remain exist and corroboration to the statement of the appellant is not required. Corroboration is not a rule of law, but it is a rule of prudence and presumption under Section 139 of the Act, 1881 is rule of law and presumption has to be drawn by the Court as per Section 139 of the Act, 1881. When legal presumption is available in favour of the appellant which is not rebutted, no corroboration is required to the version of the appellant by other corroborative piece of evidence. There is nothing on record to say that the liability did not exist on the date of issuance of cheque. The post dated cheque is well recognised mode of payment and purpose of acknowledgment is to ensure promise to pay his debt by the person so promising.

11. On an overall assessment, it can be said that the finding of the trial Court is against the weight of the evidence and the same is not legal and contrary to the provisions of the Act, 1881. therefore, argument advanced on behalf of the respondent is not

sustainable. The act of the respondent falls within mischief of Section 138 of the Act, 1881.

12. Accordingly, the appeal is allowed. Finding of the trial Court is hereby set aside. The respondent is convicted under Section 138 of the Act, 1881. The date of issuance of cheque is 02.8.2007. The appellant is entitled to interest 8% to the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.1,60,000/- (Rupees One lakh sixty thousand only) for offence under Section 138 of the Act, 1881. The trial court shall make effort to liquidate the amount as per provisions of CrPC. It is made clear that if the respondent is sent to jail for non-recovery of amount, the payment of amount shall not be discharged because his detention in jail is a mode of recovery and same is not satisfaction of liability, therefore, his liability shall be discharged only when he pays the amount of Rs.1,60,000/-. It is directed that if the amount is not deposited within fifteen days the amount shall further carry interest @ 8% per annum in principle amount of Rs.80,000/- till the realization of the entire amount. The whole amount shall be paid to the appellant for discharge of liability.

Sd/-

(Ram Prasanna Sharma)

JUDGE