

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 18.02.2020

Delivered on 28.02.2020

Acquittal Appeal No.70 of 2019

M/s. Satguru Oxygen Company, Sirgitti Industrial Area,
Sector – B, Plot No.8, Bilaspur (CG) Through Partner Ashok
Jha, S/o. Kashinath Jha, Aged about 51 years, R/o. Rajasav
Colony, PS Sarkanda, Distt. Bilaspur.

---- Appellant

Versus

Ashok Dutta, S/o. Late Anil Datta, Aged about 56 years,
Managing Director, Freedom Gases Ltd., 59 Josour Road,
Birti, PS Birti Kolkatta (WB)

---Respondent

For the appellant : Shri GS Ahluwalia, Advocate
For the respondent : None present though served.

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

1. The appeal is directed against judgment dated 24.3.2018 passed by Additional Sessions Judge, Bilaspur (Chhattisgarh) in Criminal Appeal No. 226/2017 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, the appellant is a partnership firm represented by one partner and involved in activity of supply of oxygen cylinders on demand to

various institution along with other companies. The appellant firm supplied oxygen cylinders to the respondent company and in consideration, the respondent company issued a State Bank of India cheque No.774998 dated 23.7.2012 for Rs.1,00,000/- signed by Managing Director of the company. The said cheque was deposited by the appellant which was returned with endorsement of dishonoured on account of insufficiency of fund. Notice was sent to the Managing Director of the respondent company for payment of cheque which was not paid, therefore, complaint was filed. The trial Court convicted the respondent but in appeal, the Court of Additional Sessions Judge acquitted the respondent.

3. Learned counsel for the appellant submits as under:

(i) The appellate Court has failed to appreciate the presumption under Section 139 of the Act, 1881.

(ii) The appellant has filed extract of balance sheet duly audited by an auditor to show the name of the respondent as one of Sundry debtor, but the same is overlooked by the said Court.

(iii) The respondent has not denied the facts in his statement under Section 313 of the CrPC.

(iv) Notice was sent for payment of debt to the respondent as the Managing Director of the company, therefore, finding of the appellant Court may be set aside.

4. I have heard learned counsel for the appellant and perused the judgment impugned.

5. The first question for consideration before this Court is whether cheque for Rs.1,00,000/- was drawn by the respondent in favour of the appellant for discharge of debt, whether the cheque deposited in the bank for clearance was 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.

6. The appellant side adduced evidence of Ashok Jha (PW-1) and produced documents Ex-P/1 to P/8. From the evidence of the appellant, it is established that the respondent drawn a cheque in favour of the appellant for Rs. 1,00,000/- which was submitted for clearance in State Bank of India, Commercial Branch Bilaspur on 22.9.2012, but the same was returned due to insufficiency of fund. Notice was issued to the respondent on 03.10.2012 but even after receiving the notice on 06.10.2012, the amount was not paid. Version of this witness is supported by documents Ex-P/1 to P/8 and the same is unrebutted during cross-examination.

7. 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;”

8. Presumption is rebuttable, but from the evidence of the respondent side it is not rebutted and no evidence is adduced by the respondent to rebut the same. It is not a case where the respondent 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.

9. The session court opined that the respondent company – Freedom Gases Limited was not incorporated as accused and the respondent was responsible vicariously, but since the company is not made party, the respondent cannot be convicted.

10. In the present case, the respondent has not been made party as an individual but he has been made party on behalf of the company i.e. Freedom Gases Limited. It is not a case that the respondent is not holding the post of Managing Director of Freedom Gases Limited, therefore, the cheque amount shall be paid by the respondent on behalf of the Freedom Gases Limited and the same is not his individual liability. Therefore, finding of the said court is not sustainable because the company is made party through its living Managing Director.

11. On an overall assessment, it can be said that the finding of the lower appellate Court is against the weight of the evidence and the same is not legal and contrary to the provisions of the Act, 1881, therefore, the act of the respondent falls within mischief of Section 138 of the Act, 1881.

12. Accordingly, the appeal is allowed. Finding of the appellate Court is hereby set aside. The respondent is convicted under Section 138 of the Act, 1881. The date of issuance of cheque is 23.7.2012. The appellant is entitled to interest 6% to the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.1,50,000/- (Rupees one lakh fifty 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 the respondent is liable on behalf of the company for recovery of amount, the liability shall be discharged through assets of the company. The respondent shall be sent to jail only when he avoids recovery from assets of the company. 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.1,50,000/- from the assets of the company. It is directed that the amount shall further carry interest @ 6% per annum in principle amount of Rs.1,00,000/- till the realization of the entire amount. The entire amount recovered shall be paid to the appellant for discharge of liability.

Sd/-

(Ram Prasanna Sharma)

JUDGE