

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 10.02.2020

Delivered on 08.05.2020

Criminal Misc. Petition No.1202 of 2018

Sukhiram S/o. Late Maharathi Sahu, aged about 40 years,
R/o. Kera Road, Bhatapara, Janjgir, Distt. Janjgir-Champa
(CG)

---- Petitioner

Versus

Khurshid Alam @ Bablukhan, S/o. Nijam Alam, R/o. Gandhi
Chowk, Janjgir, Municipal Complex, PS Janjgir, distt.
Janjgir-Champa (CG)

---Respondent

For the petitioner : Shri Ravindra Sharma, Advocate
For the respondent : Shri Anup Majumdar and Shri Basant
Dewangan, Advocates

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Order

1. Heard on leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973.
2. On due consideration, leave is granted. Registry is directed to register it as regular acquittal appeal.
3. The petition is directed against judgment dated 13.02.2018 passed by Judicial Magistrate First Class, Janjgir Distt. Janjgir Champa (Chhattisgarh) in Criminal Case No. 82/2016 whereby the said Court acquitted the respondent for the offence under

Section 138 of the Negotiable Instruments Act, 1881(for short 'the Act 1881').

4. As per the version of the petitioner/complainant, both parties are well known to each other and when the respondent was willing to purchase some land, he borrowed a sum of Rs.7 lakh from the petitioner on 21.5.2013 and promised to return the said amount on or before 20.6.2013. The respondent for discharging his liability issued a cheque of Bank of Baroda, Janjgir bearing No.029254 dated 21.6.2013 amounting to Rs.7 lakh. The cheque was deposited by the petitioner in the bank for clearance but the same was dishonoured due to insufficiency of fund in the account of the respondent. After dishonour of the cheque the petitioner issued notice to the respondent through his counsel on 25.7.2013 and requested him to repay the amount within 15 days. The notice was received by the respondent on 26.7.2013, but he did not repay the amount within the stipulated period and thereafter complaint was filed against him which was resulted into acquittal.

5. Learned counsel for the petitioner submits as under:

(i) Though the complaint is delayed by 17 days, but the delay was condoned on the application under Section 142(B) of the Act, 1881 by the trial court vide order dated 04.7.2014. Once

the delay is condoned and no legal action has been taken against the said order by the respondent, the order attained finality and the complaint cannot be dismissed on the ground of delay.

(ii) Book of accounts and other records are relevant in civil Court but it may not be relevant in present criminal case filed under Section 138 of the Act, 1881 because as per the Act, presumption is raised in favour of the petitioner as per the law laid down by the Hon'ble Apex Court in **Criminal Appeal No (S).132 of 2020** in the matter of **DK Chandel vs. M/s. Wockhardt Ltd. & Anr.** decided on 20.01.2020. Therefore, finding of the trial Court is liable to be set aside and the respondent be convicted for the offence in question.

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

(i) The trial Court has not discussed the reason of delay in said complaint case in the order sheet dated 04.7.2013, therefore, delay is not condoned in the present case.

(ii) Source of income is not proved by the petitioner by books of accounts, therefore, the trial Court is right in holding that advance of loan is not established by the petitioner.

(iii) Finding of the trial Court is based on proper marshaling of evidence, the same is not liable to be interfered with.

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

8. The first question for consideration before this Court is whether cheque for Rs.7,00,000/- was drawn by the respondent in favour of the petitioner 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 petitioner.

9. The petitioner side adduced evidence of Sukhiram Sahu (PW-1) and Ashish Rathore (PW-2). As against this, the respondent did not adduce the evidence of any one. As per the version of Sukhiram Sahu (PW-1), the respondent borrowed a sum of Rs.7 lakh on 21.5.2013 and promised to repay the same on or before 20.6.2013. In discharge of his liability, the respondent drawn a cheque in favour of the petitioner bearing No.029254 dated 21.6.2013 for Rs. 7 lakh. The said cheque was deposited in the bank for clearance but the same was dishonoured on the ground of insufficiency of fund in the account

of the respondent. Notice was issued to the respondent on 25.7.2013 which was received by him on 26.7.2013, but even after receiving the notice, he did not repay the amount within 15 days, thereafter complaint was filed. Version of this witness is supported by version of Ashish Rahtore (PW-2), in whose presence, the respondent borrowed the money from the petitioner. No one entered into the witness box from the respondent side to rebut the evidence adduced by the petitioner side. Version of the petitioner side is supported by document Ex-P/1, which is a cheque and Ex-P/3 is letter of dishonour of the cheque, Ex-P/4 is the notice sent to the respondent and Ex-P/5 is the acknowledgment. From these evidence, which are unrebutted, it is established that the cheque was issued in favour of the petitioner and the same was dishonoured and after receiving the notice issued by the petitioner, the respondent did not return the money.

10. 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;”

11. 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.

12. It is contended on behalf of the respondent that the complaint was filed by delay of 17 days, therefore, the same is not maintainable. From the record of the trial Court it is clear that application under Section 142(B) of the Act 1881 was filed for condonation of delay and cognizance was taken by the trial Court vide order dated 04.7.2014. Taking cognizance by the trial Court

was not challenged by the respondent and the same attained finality because the respondent has participated in the entire proceedings of the trial Court and no such objection was raised before the said court against cognizance. Therefore, cognizance which was taken by the trial Court attains finality and no adverse order can be passed against the petitioner on that count.

13. The second contention of the respondent is that source of income was not shown by the petitioner before the trial Court, therefore, it is not proved that money was borrowed by him. In view of this Court, this argument is without substance. From the evidence of Sukhiram Sahu (PW-1) and Ashish Rahtore (PW-2), it is clear that transaction took place between both sides and the respondent borrowed sum of Rs.7 lakh. There is nothing on record to reject the evidence of both witnesses who are party to the transaction. Books of account may be relevant in civil cases but may not be in the criminal case filed under Section 138 of the Act 1881 as held by the Hon'ble Apex court in the matter of DK Chandel (supra).

14. Presumption in favour of the petitioner is not ended because contrary is not proved by the respondent. Legal presumption is available in favour of the petitioner which is unrebutted, therefore, no corroboration is required because

corroboration is the rule of prudence and while presumption under Section 139 of the Act, 1881 is a rule of law. The amount was advanced on the basis of personal relation and preparation of document was not required under the law and the cheque issued by the respondent is a basic document showing liability of the respondent.

15. On an overall assessment, it can be said that the finding of the lower 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.

16. 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 21.6.2013 . The petitioner is entitled to interest 6% to the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.9,75,000/- (Rupees Nine lakh Seventy Five 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 directed that if the amount is not deposited within fifteen days, the amount shall further carry interest @ 6% per annum in principle amount of Rs.7,00,000/- till

the realization of the entire amount. 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.7,00,000/- with further interest as directed above. The entire amount recovered shall be paid to the petitioner for discharge of liability.

Sd/-

(Ram Prasanna Sharma)

JUDGE