NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 31-01-2020

Delivered on 27-02-2020

ACQA No. 369 of 2019

- Alok Kumar S/o Ramnath Aged About 32 Years Proprietor- Hariom Finance, Nehru Nagar, Bhilai, Tahsil And District- Durg, Chhattisgarh. And R/o Bapunagar, Near Durga Mandir, Khursipar, Tahsil and District- Durg, Chhattisgarh.,

---- Appellant

Versus

- Noori Sheikh W/o Sheikh Firoj Aged About 35 Years R/o Behind Of Shri Shivam Mall Raubandha, Ward No. 8, Tahsil And District- Durg, Chhattisgarh.,

---- Respondent

For Appellant	:	Mr. Jitendra Gupta & Mr. C.P.Soni, Advocates.
For respondent	:	Mr. N.K. Chatterjee, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This acquittal appeal is preferred against the judgment dated 23-2-2019 passed by the Judicial Magistrate First Class, Durg in case No. R.C.C/27420/2011 wherein the said court acquitted the respondent for charge under Section 138 of the Negotiable Instruments Act, 1881 (for short, “the Act, 1881”).

2. As per version of the appellant, respondent borrowed a sum of Rs.25,000/- from him and issued a cheque of Allahabad Bank, Branch Kasaridih, Durg bearing No.000371 amounting to Rs.25,000/- in discharge of the said liability on 7-8-2011. The said cheque was presented for clearance but it was dishonoured due to insufficient funds. Appellant issued a notice to the respondent for payment of his money but the amount was not paid that is why complaint was filed which resulted into acquittal.

3. Learned counsel for the appellant submits as under:

i) From the evidence of complainant Alok Kumar (PW/1), and Gayatri (PW/2), it is established that respondent borrowed a sum of Rs.25,000/- from the appellant/complainant and for discharge of liability respondent issued a cheque in favour of appellant amounting to Rs.25,000/- which was placed before the Bank and same was dishonoured due to insufficient fund.

ii) The trial court decided the issue as per provisions of Money Lenders Act, 1934 and Income Tax Act, 1961, but the issue ought to have been decided under the provisions of Negotiable Instruments Act, 1881.

Iii) The trial court has not evaluated the evidence in its true perspective, therefore, finding of the trial court is liable to be set aside.

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

Debt on the part of the respondent is not established that is why the trial court recorded finding about non-liability of the respondent and same is not liable to be interfered with.

5. I have heard counsel for the parties and perused the record of the trial court where order has been passed.

6. The question for consideration of this court is whether the respondent borrowed a sum of Rs.25,000/- and cheque of Rs.25,000/-

was drawn by the respondent in favour of the appellant for discharge of debt, whether the cheque deposited in Bank for clearance is returned dishonoured on account of insufficiency of fund in the account of the respondent and whether after legal notice respondent has not returned the amount of cheque to the appellant.

7. Appellant Alok Kumar (PW/1) deposed before the trial court that respondent borrowed a sum of Rs.25,000/- and the respondent issued a cheque of Allahabad Bank, Branch Kasaridih, Durg bearing No.000371 in discharge of the said liability on 7-8-2011. The said cheque was presented for clearance but it was dishonoured due to insufficient funds. He issued a notice to the respondent for payment of his money but no amount was paid. Version of this witness is supported by version of Ex.P/1, dishonour memo (ExP/2), Notice (Ex.P/3) and acknowledgement (Ex.P/5).

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. Presumption is rebuttal but respondent did not enter into witness box to rebut the same nor it is rebutted by evidence of appellant side. The trial court recorded finding that advance a sum of more than Rs.20,000/- in cash is contrary to the provisions of Income Tax Act, 1961 and the appellant has not shown account under the Money Lenders Act, 1934. The finding arrived at by the trial court is against the legal aspect of the matter. When respondent has not denied by adducing evidence of himself that he has not borrowed

money from the appellant, presumption under Section 139 of the Act, 1881 will survive and remain exists. Version of appellant is not required to be corroborated by account of money lending. From the statement of the appellant, respondent borrowed a sum of Rs.25,000/- from him due to personal relation, therefore, it is not a case under Money Lenders Act, 1934. Again, the amount in question is not within purview of the Income Tax Act, 1961. Any infringement of provision of Income Tax Act, 1961 is matter between revenue and assessee, but same is not relevant because it is proved that money was borrowed by the respondent. Corroborative piece of evidence 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 presumption is not rebutted, charge under Section 138 of the Act, 1881 is established.

10. On an overall assessment, it can be said that the finding of the trial Court is against weight of the evidence and same is not legal because it is contrary to the provisions of the Act, 1881. In view of the evidence of both sides, argument advanced on behalf of the respondent is not acceptable and the act of the respondent falls within mischief of Section 138 of the Act, 1881.

11. Accordingly, the instant appeal is allowed. Acquittal of the respondent set aside. Respondent is convicted under Section 138 of

the Negotiable Instruments Act, 1881. The date of issuance of cheque is 7-8-2011. Appellant is entitled to interest @ 6% per annum on the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.38,000/- (Rupees thirty-eight thousand) for offence under Section 138 of the Act, 1881. The trial court shall make effort to liquidate the amount as per provisions of Cr.P.C. It is made clear that if 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.38,000/-. It is directed that if the amount is not paid within fifteen days, the amount shall further carry interest @ 6% per annum in principle amount of Rs.25,000/- (Rupees twenty-five thousand) till realisation of the entire amount. The whole amount shall be paid to the appellant for discharge of liability.

Sd/-
(Ram Prasanna Sharma)
Judge

Raju