NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on : 20.02.2020

Order Passed on : 13/03/2020

Cr.R. No.773 of 2019

- Ashok Bharti S/o Itwari Bharti Aged About 28 Years, Headmaster, Ekta Public School, Dhara, Post - Bawa Mohtra, Police Station Tahsil And District Bemetara Chhattisgarh

---- Applicant

Versus

1. Dharam Kumar Tiwari S/o Late Chandrabhan Tiwari, R/o Soni Para, Saja, Police Station And Tahsil Saja, Police Station And Tahsil Saja, District Bemetara Chhattisgarh
2. State Of Chhattisgarh Through District Magistrate Bemetara Chhattisgarh

---- Non-applicants

For Applicant	:	Mr. Prafull N. Bharat, Advocate.
For Non-applicants No.1	:	Mr. Abhishek Chandrawanshi along with Mr. Rajat Agrawal, Advocates.
For Non-applicants No.2	:	Mr. Jitendra Shukla, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

13/03/2020

1. This petition has been filed against the judgment dated 14.06.2019, passed in Criminal Appeal No. 69/2018, by Additional Sessions Judge, Bemetara, C.G., dismissing the appeal and upholding the judgment of conviction and sentence passed by the Court of Chief Judicial Magistrate, Bemetara.
2. A complaint was brought against the applicant under Section 138 of

Negotiable Instruments act mentioning that because of some liability, the applicant issued a cheque bearing No.036472 from his account in Central Bank of India Bemetara on 16.02.2017 for a value of Rs.1,50,000/-. The respondent presented the cheque in bank for payment which was dishonored. A legal notice was served upon petitioner, however, no complaint was filed at that time, due to assurances given by the applicant to the respondent. The cheque was presented again on 13.04.2017 which was again dishonored. Then, after service of legal notice and completion of other formalities, the complaint was filed. The learned trial Court in complaint case No.48/2017 passed a judgment dated 09.08.2018 convicting the applicant under Section 138 of Negotiable Instruments Act and sentencing him with 1 year R.I. along with fine of Rs.3,00,000/- with default stipulation. The challenge in Criminal Appeal No.69/2018 by the applicant has failed and the appeal has been dismissed as mentioned hereinabove.

3. It is submitted by the learned counsel for the applicant that the complaint under Section 138 of Negotiable Instruments act was not at all maintainable against the applicant.

4. It is also submitted that the facts of the case itself reveals that the cause of action in the dishonor of cheque had already expired after the issuance and service of the first notice to the applicant, as no complaint was filed within 30 days, therefore, the complaint has been filed beyond limitation as it is provided under Section 142 (1)(b) of the Negotiable Instruments Act. The Negotiable Instruments Act does not envisage any repeat presentation of the cheque for the payment and repeat notice under Section 138 (b) of the Act.

5. Relying on the judgment of Supreme Court in ***<u>Tameeshwar Vaishnav</u>***

Vs. Ramvishal Gupta reported in ***(2010) 2 SCC 329***, it is submitted that the Supreme Court has held in this case that Magistrate erred in taking cognizance on the complaint filed on the basis of the second notice. This view has been reiterated by the Supreme Court in the case of ***MSR Leathers Vs. S. Palaniappan & Anr.*** reported in ***(2013) 1 SCC 177*** that the cause of action under Section 142(b) of the Act can arise only once, therefore, this complaint is barred by law. It is also argued that the respondent has failed to prove in the complaint case that the applicant had any liability to pay any debt to the respondent and thirdly, it is also argued that the complaint filed itself was unreasonable, impractical because the respondent himself had no resources to make the payment of Rs.1,50,000/- to the applicant.

6. Relying on the judgment of Supreme Court in ***John K. Abraham Vs. Simon C. Abraham & Anr.*** reported in ***(2014) 2 SCC 236***, it is submitted that it was the burden of the complainant, to show that he had the required funds to advance to the accused, in which the respondent has failed for the simple reason that the respondent Dharam Kumar Tiwari (P.W.-1) has admitted in his cross-examination that he is working as a 'book lifter' in Government Middle School, Saja and apart from that he has nowhere mentioned in his whole statement, as to in what manner he was in possession of the funds, which he claims to have been advanced to the applicant. Therefore, the complaint case against the applicant is baseless and also illegal. Hence, it is prayed that the revision petition be allowed and the applicant be granted relief. In the alternative, it is also prayed that if this Court is not inclined to set aside the conviction, then the sentence of imprisonment against the applicant be set aside.

7. The learned counsel for the respondent submits that the complaint on

the basis of subsequent notice under Section 142 (b) of the Act is not barred. It is submitted that the Supreme Court has held in the case of ***Sicagen India Limited Vs. Mahindra Vadineni & Ors***. reported in ***(2019) 4 SCC 271,*** in which it was held that prosecution based on second and successive notice on dishonor of cheque amount is not impermissible, where there is no prosecution based on the first default which was followed by statutory notice and failure to pay. This judgment has been passed after following the ratio laid down in ***MSR Leathers*** (Supra), it is submitted that there is a distinction with regard to the ratio in ***Tameeshwar Vaishnav*** (Supra), hence, it is prayed that this revision be dismissed.

8. It is not disputed that in this case the cheque was drawn by the applicant which was presented for payment in bank by the respondent twice. Firstly on 17.02.2017 and secondly on 13.04.2017 and on both the occasions, the cheque was dishonored. The notice as required under Section 138 (b) of Negotiable Instruments Act was issued by the respondent and served upon the applicant on both the occasions. The first notice was served to the applicant on 02.03.2017 and the second notice was served upon him on 22.04.2017 vide Ex.P/4. It is also undisputed that no complaint was filed after the service of first notice. There is a specific averment in the complaint paragraph No.10 that the complaint has been filed under Section 138 of the Act, subsequent to the cause of action that arose on 13.04.2017, therefore, it cannot be said that it was a complaint filed on the basis of first dishonor of cheque and the first notice given.

9. In paragraph 6 and 7 of the judgment in ***Sicagen India Limited*** (Supra), the Supreme Court has held as under:-

> ***6.***Three-Judge Bench of this Court in 2013 ((1) SCC 177

MSR Leathers vs. S. Palaniappan and Another held that there is nothing in the provisions of Section 138 of the Act that forbids the holder of the Cheque to make successive presentation of the cheque and institute the criminal complaint based on the second or successive dishonour of the cheque on its presentation. In paragraphs 29 and 33 this Court held as under:

29. It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations giving creditability to negotiable instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See Mosaraf Hossain Khan

V. Bhagheeratha Engg. Ltd. Reported in (2006) 3 SCC 658; C. C. Alavi Haji v. Palapetty Muhammed reported in (2007) 6 SCC 555 and Damodar S. Prabhu v. Sayed Babalal H. reported in (2010) 5 SCC 663. Having said that, we must add that one of the salutary principles of interpretation of statues is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognized purposive interpretation as a sound principle for the courts to adopt while interpreting statutory provisions. We may only refer to the decision of this Court in New India Sugar Mills Ltd. v. CST reported in 1963(2) Suppl. SCR 459 = 1963 AIR 1207 wherein this Court observed:

“8. … It is a recognized rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statue, and which effectuate the object of the legislature. If an expression is susceptible of narrow or technical meaning, as well as a popular meaning the court would be justified in assuming that the legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid" …………………………………………………………..

33. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time. (underlining added)

8. In the present case as pointed out earlier that cheques were presented twice and notices were issued on 31.08.2009 and 25.01.2010. Applying the ratio of MSR Leathers (supra) the complaint filed based on the second statutory notice is not barred and the High Court, in our

view, ought not to have quashed the criminal complaint and the impugned judgment is liable to be set aside.

10. In ***MSR Leathers*** (Supra) as observed in paragraph 33, 34 and 35:-

> ***33.*** Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.
>
> ***34.*** The controversy, in our opinion, can be seen from another angle also. If the decision in *Sadanandan case* (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer

period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The Magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in *Sadanandan case* (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened Magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in *Sadanandan case* (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

35.In the result, we overrule the decision in *Sadanandan case* (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

11. Reliance of applicant side on ***Tameeshwar's case*** (Supra) was a judgment delivered in the year 2010, following the ration laid down by the Supreme Court in Sadanandan Bhadran's Vs. Madhavan Sunil Kumar (1998) 6 SCC 514. The ration in Sadanandan's case (Supra) has been overruled by the judgment of larger Bench in

M.S.R. Leathers Case. Therefore, Sadanandan's judgment is no longer a good law.

12. Therefore, the correct view at present as has been settled by the Supreme Court is this that the prosecution under Section 138 of Negotiable Instruments Act based on second dishonor of cheque, second issuance of notice and second default of the accused is maintainable.

13. Now considering on the other submissions made by the learned counsel for the applicant that there is no proof to show that the applicant had any liability, therefore, there had been no reason for issuance of any cheque in favour of the respondent.

14. On perusal of the evidence that is present in the record of the trial Court, it is found that the evidence has been brought regarding advancement of a loan by the respondent to the applicant in January 2016 of Rs.1,50,000/- and this statement has remained in un-contradicted in his cross-examination. On the other hand, the applicant has in his evidence before the Court as Ashok Bharti (N.A.W.1), has made a statement on admission that regarding the purchase of a bus for the school, the respondent had made a payment of about Rs.1,25,000/- and rest of the amount was financed by Cholamandalam Finance Company. This admission statement in examination-in-chief of the applicant comes heavily against him. However, his other statement that he has repaid the amount, was required to be proved by presenting cogent evidence as well as documentary evidence which has not been done. Therefore, the liability on the part of the applicant is demonstrated from this evidence. Hence, I do not find any error committed by the Courts below in giving the finding against the applicant on this point.

15. The other argument advanced by the applicant side that the respondent had no funds to advance is based only on the basis of the admission made by the respondent Dharmendra Kumar Tiwari (P.W.-1) in cross-examination, that he had been working as a 'Book lifter' in Government Middle School, Saja. The purpose of drawing attention to this admission by the applicant side is this that the respondent was simply working as a class fourth employee in his school, therefore, it cannot be assumed that he had the capability of advancing the amount as it is claimed by the respondent side because he was a low paid employee. Apart from putting the question regarding the employment of the respondent, no other question has been put to him in cross-examination as to how, he came into possession of amount Rs.1,25,000/- or Rs.1,50,000/- for advancing the same to the applicant, therefore, without this question and there being no answer to it, it cannot be assumed that the respondent had no capacity to make a payment of amount as claimed by him to the applicant. Therefore, the ground raised in this revision petition on this point is also baseless.

16. As a result of the discussions made hereinabove and dismissal of the grounds raised in the arguments by the applicant side, it is found that this revision petition is totally without any merit, therefore, the conviction against the applicant under Section 138 of Negotiable Instruments Act is well founded.

17. Considered on the prayer made for setting aside the sentence of imprisonment against the applicant. Following the ration laid down in ***Damodar S. Prabhu Vs. Sayed Babalal H.*** reported in ***(2010) 5 SCC 663*** and ***R. Vijayan Vs. Baby & Anr.*** reported in ***(2012) 1 SCC 260*** by the Supreme Court, I am of this view that this prayer can be allowed.

18. The revision petition is allowed with modification. The sentence of R.I.

for one year against the applicant is set aside. The fine imposed of Rs.3,00,000/- is converted to compensation for the respondent under the provision of Section 357 (3) of Cr.P.C. which the applicant is directed to pay to the respondent and in failure of these, he shall be setenced for a simple imprisonment of four months.

19. Accordingly, the petition stands disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Monika