

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 22-11-2019

Delivered on 06-02-2020

ACQA No. 587 of 2019

- Amar Kumar Agrawal S/o Shri Ghanshyam Das Agrawal Aged About 38 Years Proprietor Prabha, Sales Dayalband Bilaspur, Police Station City Kotwali Tahsil, Civil And Revenue District Bilaspur Chhattisgarh. Mo. No. 9425530660.

---- Appellant

Versus

- Ramesh Singh S/o Late Rajnandan Singh Aged About 61 Years Proprietor - M/s Tirupati Construction, R/o Near Petrol Pump, Rajbhawan, Mopka, Police Station Sarkanda, Tahsil And Revenue District Bilaspur Chhattisgarh.

---- Respondent

For Appellant : Mr. Ratnesh Kumar Agrawal, Advocate.

For respondent : Mr. Saleem Kazi, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This acquittal appeal is preferred against the judgment dated 10-7-2019 passed by the Judicial Magistrate First Class, Bilaspur in complaint case No. 402 of 2016 filed under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act, 1881") wherein the said court acquitted the respondent for the said charge.

2. As per the complaint, appellant is the proprietor of Prabha Sales wherein sale and purchase of railway equipment/machinery is done. Respondent/accused is the proprietor of M/s. Tirupati Construction and he obtained tender/contract from Railway division, Bilaspur. Earlier both parties entered into agreement regarding work of the contract of the railway obtained by the respondent. Appellant provided money to the respondent, therefore, cordial relationship was built up between the parties. When respondent obtained new contract from South Eastern Central Railway, Bilaspur, then he demanded loan from appellant and appellant gave him loan to the tune of Rs.13,69,410/-. The respondent returned the amount of Rs.3,69,410/- to the appellant by cash and bank account and for remaining loan amount he gave a cheque bearing No. 887961 dated 2-5-2016 to the tune of Rs.10,00,000/- of Axis Bank of Bilaspur to the appellant as per Annexure A/3. Appellant produced cheque for encashment but the cheque has been returned with endorsement that fund is insufficient in the account of the respondent on 12-5-2016. Dishonoured memo is Annexure A/4, therefore, appellant sent legal notice to the respondent through counsel and same has been received by the respondent despite he had failed to make payment of cheque amount. Appellant recorded the conversation of respondent with him through his mobile and the SIM and transcript of the conversation produced before the trial court. By the impugned order dated 10-7-2019 the trial court dismissed the

complaint and acquitted the respondent against factual matrix and legal aspect of the matter.

3. Learned counsel for the appellant submits as under:

- i) It is undisputed fact that appellant is the proprietor of Prabha Sales and he files the income tax return, but the trial court concluded that the appellant has failed to prove his source of income which is contrary to the principle laid down by Hon'ble Apex Court in the matter of **Bir Singh vs. Mukesh Kumar, reported in 2019(4) SCC 197.**
- ii) The trial court wrongly concluded that appellant failed to discharge the burden that he obtained the question cheque from respondent as repayment of loan which is the contrary to the principle laid down in Smt. **Rohit Bhai Jivanlal Patel vs. State of Gujrat and other, reported in 2019 SCC Online SC 389.**
- lii) When respondent has returned some

portion of amount, it is established that the amount in question is borrowed by the respondent for another contract work, 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:

- I) Appellant has deposed before trial court that the amount in question is shown in income tax return and in record of Prabha Sales, but income tax return or the account of Prabha Sales is not produced and further audit account is not produced, therefore, the trial court is right in holding that the appellant failed to discharge that cheque was issued in discharge of liability.
- lii) The story put-forth by the appellant is after-thought, therefore, the trial court is right in deciding the issue against him. The trial court has rightly evaluated the

evidence, therefore, same is not liable to be interfered with while invoking jurisdiction of the appeal.

Reliance has been placed in **Basalingappa vs Mudibasappa, reported in (2019) 5 SCC 418 and Kamlesh Kumar vs. State of Bihar and another, reported in 2014 SAR (Cri) 180.**

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

6. The first question for consideration of this court is whether cheque of Rs.10,00,000/- was drawn by the respondent in favour of the appellant for discharge of debt, whether the cheque deposited in bank for clearance is returned unpaid 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 side adduced evidence of Amar Kumar Agrawal (PW/1) and produced documents Ex.P/1 to P/7 while respondent side did not adduce any oral or documentary evidence, respondent borrowed a sum of Rs.3,14,000/- from his bank account and borrowed

a sum of Rs.10,69,410/- in cash from him on the said date and assured him that the amount shall be returned within 15 days, therefore, he issued a cheque of Rs.10,00,000/- bearing No.887961 dated 2-5-2016. Appellant deposited the said cheque in the bank, Branch Bilaspur which was dishonoured due to insufficient fund in the account of the appellant. The bank gave information to the appellant regarding dishonouring of the cheque on 12-5-2016 thereafter, he issued a notice dated 30-5-2016 to the respondent for payment of Rs.10,000,00/- which was received by him on 31-5-2016. In spite of receiving notice, he did not return the amount that is why complaint was filed against him on 16-6-2016. Version of this witness is supported by cheque Ex.P/1, Memo of dishonouring of cheque Ex.P/2, notice issued to respondent Ex.P/3 and acknowledgement of receiving notice Ex.P/4. From the evidence of the appellant supported by document, it is established that cheque was issued in favour of appellant and same was dishonoured and after receiving notice issued by the appellant, respondent did not respond to the notice and did not return the money.

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 and respondent may have adduced direct evidence to prove that cheque in question was not supported by consideration and that there was no debt or liability to be discharged by him but he did not lead any evidence to rebut the aforesaid presumption. Appellant even did not enter into the witness box to support his case. No reply was given to the notice which was served

on him., therefore, it cannot be said that the respondent has not made any effort to rebut the presumption. It is not a case of 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 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. In the present case, the trial court recorded finding that though the appellant deposed that the amount is shown in income tax return and account of Prabha Sales but the said income tax and account of Prabhas Sales was not produced, therefore, version of the appellant is not corroborated. In view of this court, the finding arrived at by the trial court is clearly 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 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 version of appellant by submitting income tax return or account of Prabha

Sales. The matter related to income tax is issue between the Revenue and Assessee, therefore, non-filing of income tax return cannot be a solitary basis for rejecting the evidence of the appellant. Filing of account of Prabha Sales is also not necessary because it is not the first transaction between the appellant and the respondent. From the evidence of the appellant, it is clearly established that respondent had earlier taken amount of Rs.3,14,000/- from him which was returned by him. Appellant is running business of of railway machinery and advancing sum to respondent in earlier occasions which shows that he is capable to advance money to the respondent, therefore, it is not a case where source of income of the appellant is not established. The amount was advanced on the basis of personal relation, therefore, preparation of other documents was not required under the law and cheque issued by the respondent is the best document for showing liability of the respondent.

11. On an overall assessment, it can be said that the finding of the trial court is against weight of the evidence and same is perverse. Further, finding arrived at by the trial court is not legal and contrary to the provisions of the Act, 1881. In view of this court, argument advanced on behalf of the respondent is not acceptable and the case laws cited by the respondent are clearly distinguishable from the facts of the present case. The act of the respondent falls within mischief of Section 138 of the Act, 1881.

12. Accordingly, the instant appeal is allowed. Finding of the trial court is set aside. Respondent is convicted under Section 138 of the Negotiable Instruments Act, 1881. The date of issuance of cheque is 10-7-2015. Appellant is entitled to interest @ 6% per annum on the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.12,75,000/- (Rupees twelve lakhs and seventy-five 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.12,75,000/-. It is directed that the amount shall further carry interest @ 6% per annum in principle amount of Rs.10,00,000/- (Rupees ten lakhs) till realisation of the entire amount.

Sd/-
(Ram Prasanna Sharma)
Judge

Raju