

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 10.01.2020

Delivered on 27.02.2020

Acquittal Appeal No.417 of 2018

Kailash Agrawal S/o. Late Bajrang Lal Agrawal, Age-65 years, R/o. Near Jain Mandir Naila, Police Station/Tahsil Janjgir, Distt. Janjgir-Champa (CG)

---- Appellant

Versus

Ganesh Ram Porte S/o. Mayaram Porte Age – 57 years, R/o. Parsahi Nalal Police Station Akaltara Distt. Janjgir-Champa (CG)

---Respondent

For the appellant : Shri Chitranjay Singh Patel, Advocate
For the respondent : Shri Pushpendra Kumar Patel, Advocate

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

1. The appeal is directed against judgment dated 13.7.2018 passed by Judicial Magistrate First Class, Janjgir, Distt. Janjgir-Champa (Chhattisgarh) in Criminal Case No. 59/2017 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, he had personal relation with the respondent and the respondent borrowed a sum of Rs.2 lakh for construction of his house on

03.5.2016 and it was promised that the amount shall be returned within eight months, but the amount was not returned within the said period and thereafter the respondent has drawn a cheque in favour of the appellant on 02.4.2017 of Central Bank of India, Branch Akaltara and the same was deposited by the appellant in Punjab National Bank, Branch Naila for clearance but the same was returned on account of insufficiency of fund. The said information was given by the bank on 03.6.2017 thereafter notice was issued to the respondent on 10.6.2017 for payment and the respondent refused to take the notice on 16.6.2017. Thereafter complaint was filed which resulted into acquittal.

3. Learned counsel for the appellant submits as under:

(i) From the evidence of the complainant, it is established that the respondent borrowed sum of Rs.2 lakh from him and the borrower did not return the amount that is why the respondent issued the cheque in his favour which was dishonoured.

(ii) After service of notice to the respondent, he did not return the money, therefore, charge under Section 138 of the Act, 1881 is proved against him.

(iii) The trial Court recorded finding against the factual matrix and legal aspects of the matter, therefore, finding of the trial Court is not sustainable.

(iv) The trial Court has not evaluated the evidence properly, therefore finding of the trial Court is to be set aside the respondent may be convicted.

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

(i) As per the version of the complainant (para 28), the respondent alone had come to take the money but he produced an agreement i.e. Ex-P/9 in which two persons have been signed which rebutted the version of the appellant.

(ii) Witnesses of the agreement were not produced before the trial Court and no account was produced and proved regarding transaction against the respondent and therefore, charge against the respondent is not proved.

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

5. I have heard learned counsel for the parties and perused the judgment impugned.

6. The first question for consideration before this Court is whether cheque for Rs.2 lakh 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.

7. The appellant side adduced evidence of Kailash Agrawal (PW-1) and produced documents Ex-P/1 to P/8. The respondent side did not adduce oral or documentary evidence. As per the version of Kailash Agrawal (PW-1), the respondent borrowed sum of Rs.2 lakh on 03.5.2016 for repairing of his house and an agreement was prepared between the parties as per Ex-P/9. When the amount was not returned, the respondent issued a cheque in favour of the appellant on 02.4.2017 for Rs.2 lakh which was deposited in the Bank on 02.6.2017 but the same was returned with a note 'insufficient fund' on 03.6.2017. Notice was issued to the respondent on 10.6.2017 but the respondent refused to accept the same thereafter the complaint was filed before the trial Court. Version of this witness is supported by documents Ex-P/1 to Ex-P/8. No one deposed on behalf of the respondent before the trial court and no document was adduced.

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 rebuttable, but from the evidence of the appellant side it is not rebutted and no evidence is adduced by the respondent to rebut the same. The respondent refused to take the notice issued to him and did not reply the notice, therefore, it can be said that the respondent has not made any offer to rebut the presumption. 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.

10. In the present case the trial Court recorded finding that advancing loan for a sum of Rs.2 lakh in cash is contrary to the provisions of Section 269 SS & 271D of the Income Tax Act, 1981 and the appellant had lent a sum of Rs.2 lakh without having licence under Money Lenders Act, 1934, therefore, presumption under Section 139 of the Act, 1881 is rebutted.

11. In view of this Court, finding arrived at by the trial Court is clearly against the legal aspects of the matter. When the respondent has not denied that he has not borrowed money from the appellant on oath, the statement made by the appellant on oath supported by documents is not rebutted. Presumption under Section 139 of the Act, 1881 will survive and no corroboration is required for the same, because corroboration is not a rule of law, but it is a rule of prudence and presumption under Section 139 of the Act 1881 is legal. Presumption has to be drawn by the court as per Section 139 of the Act, 1881. The matter related to income tax is an issue between the revenue and the assessee and same is not relevant in a matter of dishonour of cheque. Therefore, provisions of Income Tax Act is not relevant for deciding the issues between the parties. Even if the appellant is not having licence under Money Lenders Act, the same is not sufficient to rebut the presumption available under Section 139 of the Act,

1881. From the evidence, it is clear that the amount was advanced on the basis of personal relation, therefore, other documents are not required and cheque issued by the respondent is the best document showing liability of the respondent.

12. On an overall assessment, it can be said that the finding of the trial Court is against the weight of the evidence and the same is not legal and contrary to the provisions of the Act, 1881, therefore, argument advanced on behalf of the respondent is not sustainable. The act of the respondent falls within mischief of Section 138 of the Act, 1881.

13. 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 02.4.2017. The appellant is entitled to interest 6% to the amount advanced by him. Accordingly, the respondent is sentenced to pay fine of Rs.2,40,000/- (Rupees Two lakh forty 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 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.2,40,000/-. It is directed that if fine amount is not paid within fifteen days the amount shall further carry interest @ 6% per annum in principle amount of Rs.2 lakh till the realization of the entire amount. The entire fine amount shall be paid to the appellant for discharge of liability.

Sd/-

(Ram Prasanna Sharma)

JUDGE