
(2009) 03 OHC CK 0005
In the Orissa High Court

Gyanaranjan Pattnayak

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 30-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2010) 1 ALD(Cri) 32 : (2010) 1 BC 620 : (2009) CLT 641 (Suppl
Crl) : (2009) CriLJ 2885 : (2009) 1 OLR 290 Supp

Hon'ble Judges : B.K. Patel, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Patel, J.—The petitioner-accused has assailed in this revision the legality of the judgment and order passed by the learned Sessions Judge, Cuttack in Criminal Appeal No. 9 of 2008 confirming the judgment and order passed by the learned S.D.J.M. (Sadar), Cuttack in I.C.C. No. 890 of 2005, instituted by the opposite party No. 2-complainant, by which the petitioner has been convicted u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act") and sentenced to undergo simple imprisonment for one year and to pay a sum of Rs. 4 lakhs to the complainant as compensation.

2. Complainant's case, in brief, is as follows:

Complainant and accused were good friends. During the month of May, 2004 accused, who is a Film Producer, requested the complainant to advance hand loan of Rs. 3 lakhs to meet his urgent needs. The complainant, who is a practising lawyer at Cuttack, accordingly, advanced hand loan of Rs. 3 lakhs on 2-7-2004 to the petitioner by withdrawing Rs. 2.50 lakhs from his bank account and paying balance amount of Rs. 50,000/- which he had with him on the condition that the accused would repay the amount within six months. Towards the end of December, 2004, the complainant requested the accused to repay the loan. The accused, however, did not repay the loan despite several requests.

Finally the accused issued three cheques for Rs. 1 lakh each with a request to encash the same after some time. The complainant encashed one of the cheques in the bank and received Rs. 1 lakh. However, cheques bearing No. 543980 dated 3-4-2005 and No. 543981 dated 9-4-2005 (marked Exts. 2 and 3 respectively) on being deposited on 26-7-2005 (counterfoil of deposit slip marked Ext. 1) were dishonoured and returned unpaid by the bank stating "Funds insufficient" in the cheque return slips Exts. 4 and 5. On being intimated by the complainant, the accused requested the complainant to resubmit both the cheques in the bank after 5 to 6 days. Accordingly, the complainant again deposited the cheques on 2-8-2005 (counterfoil of deposit slip marked Ext. 6). However, both the cheques were again dishonoured and returned under return slips Exts 7 and 8 with the endorsements "Funds insufficient". Thereafter the complainant issued demand notice dated 8-8-2005 (copy of which has been marked Ext. 9). Accused received the notice sent by registered post with A.S. under acknowledgement slip Ext. 13. Copy of notice sent by speed post was also received by the accused under acknowledgment slip Ext. 12. As the accused failed to repay the cheque amount despite receipt of notices, complaint was filed.

Defence plea was one of complete denial.

In order to substantiate the allegations the complainant examined himself as P.W. 1 and two other witnesses P.Ws. 2 and 3 apart from relying upon documentary evidence. Accused examined no witness except examining himself as D.W. 1.

3. On consideration of the evidence on record, learned trial Court held that the two cheques for Rs. 1 lakh each issued by the accused in favour of the complainant towards repayment of loan were dishonoured by the bank due to insufficient funds and that the complainant instituted the complaint case after issuance of statutory notice demanding repayment within the statutory period. Accordingly accused was convicted and sentenced u/s 138 of the Act as stated supra. Learned appellate Court dismissed the appeal upon consideration of rival submissions.

4. In course of hearing learned Counsel for the parties were heard at length. It may be observed at the outset that considering the ambit of revisional jurisdiction, there is little scope to interfere with the concurrent findings recorded by the trial Court and appellate Court. On the basis of evidence on record the appellate Court has affirmed the findings of the learned trial Court to the effect that the petitioner issued two cheques Exts. 2 and 3 for Rs. 2.00 lakhs in favour of opposite party No. 2, that the cheques were presented for encashment in the bank, under deposit slip Ext. 1 and again under deposit slip Ext. 6; that on both the occasions the cheques were dishonoured by the bank stating "insufficient funds" under return slips Exts. 3, 5, 7 and 8; that notice in terms of Clause (b) of the proviso to Section 138 of the Act, copy of which has been marked Ext. 9, was served on the petitioner who acknowledged receipt thereof under postal acknowledgment slip Ext. 13 and Speed Post acknowledgment slip Ext. 12; and

that despite service of notice the petitioner failed to make the payment of the amount of money payable to the opposite party No. 2 under the cheques within the period stipulated under Clause (c) of the proviso to Section 138 of the Act.

5. Learned Counsel for the petitioner strenuously urged that the notice stated to have been sent by opposite party No. 2 does not conform to the statutory requirements under Clause (b) of the proviso to Section 138 of the Act. Referring to copy of the notice Ext. 9, it was argued that as there was no mention of the dishonoured cheque numbers in the notice, opposite party No. 2 cannot be held to have complied with the condition to give the required notice. In this connection, learned Counsel for the petitioner relied upon the decision of Karnataka High Court in V.N. Shivaram Vs. B.M. Nagappa and Another, . However, in the aforesaid decision itself it has been pointed out that whether or not non-mentioning of cheque number, when all other necessary particulars had been given in the notice, would be fatal to the case of the complainant, should depend upon the facts and circumstances of each case. If it is to be found that the absence of cheque number in the demand notice made it impossible for the drawer of the cheque to ascertain which particular cheque that the payee was speaking of, and therefore was not possible for the drawer of the cheque to arrange for the payment of the amount within fifteen days, then, it has to be held that, there was no proper demand within the meaning of Clause (b) of the proviso to Section 138 of the Act. In Nityanand (supra) it was also, observed that if there is only one incidence of issuing a cheque between the parties, then, if all other necessary particulars are furnished in the notice, the mere fact that cheque number is not mentioned would not be material. On the other hand, there could be a case wherein the drawer of a particular cheque that has been dishonoured would also have issued several other cheques in favour of the complainant and, in that event, if the cheque number is not mentioned in the notice of demand, then, the accused-drawer would not be in a position to know as to in respect of which particular cheque among several cheques that he has issued that he should make payment within fifteen days to avoid prosecution. So far as the present case is concerned, the accused does not deny and rather admits to have issued the three cheques as claimed by the complainant. This is not a case involving transactions in course of which several cheques were issued by the accused in favour of the complainant on several occasions. Specific case of the accused is that he had issued the disputed cheques as security. In such circumstances, non-mentioning of the cheque numbers in the notice is not at all material in the present case.

6. Relying upon decisions of Hon'ble Supreme Court in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, and of Andhra Pradesh High Court in G. Veeresham v. S. Shiva Shankar 2008 (1) Crimes 548 (AP) : 2007 Cri LJ 3846, it was further argued that both the learned Courts below simply on the basis of presumption, which is not available under Clause (b) of the proviso to Section 138 of the Act, held that there was a legally enforceable debt against the accused. In this connection, it may be pointed out that Section 138 of the Act has three

ingredients, viz.: (i) that there was a legally enforceable debt; (ii) that the cheque was drawn from the account-of banker for discharge, in whole or in part, of any debt or other liability, which presupposes a legally enforceable debt, and (iii) and that the cheque so issued had been returned due to insufficiency of funds. There is no quarrel over the proposition that Section 139 of the Act raises a presumption in regard to the second ingredient only. Existence of legally recoverable debt is not a matter of presumption. It merely raises presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liability. Also, once execution of the promissory note is admitted or proved the presumption u/s 118(a) of the Act would arise that it is supported by consideration.

7. In the present case, complainant has examined himself as well as two other witnesses to substantiate the complainat. Accused has adduced evidence by examining himself only as D.W. 1. The judgment of the learned trial Court does not indicate that any of the findings recorded therein was based on presumption. In his statement recorded u/s 313 of the Cr.P.C. the accused simply denies the accusation stating that the complainant filed the complaint falsely in order to harass him. He is altogether silent regarding the defence to the effect that the two cheques were issued as security on demand by the complainant for repayment of loan of Rs. 1.00 lakh only which he had availed. Both P.Ws. 2 and 3 testify that in their presence accused issued three cheques of Rs. 1.00 lakh each towards discharge of his loan liability. No suggestion also was given to the complainant in course of his cross-examination that the two disputed cheques were given as security for repayment of loan of Rs. 1.00 lakh. The bare assertion of the accused in his affidavit evidence to the effect that the complainant kept the two cheques for Rs. 1.00 lakh each as security from him on apprehension that loan amount of Rs. 1.00 lakh would not be repaid is not supported, and rather, is contradicted by, other circumstances appearing on record. The accused admits in his cross-examination that he had issued the three cheques of Rs. 1.00 lakh each to the complainant on different dates and that he had changed the date in Ext. 3 cheque No. 543981. He admits that the three cheques are of consecutive numbers. He was also constrained to admit in his cross-examination that he never intimated his banker to stop payment. Also, the circumstances indicate that, the parties being good friends, complainant agreed to lend him money without stipulation of payment of interest. The accused is in the business of production of films conversant with commercial transations. Therefore, the plea of delivering cheques worth Rs. 2.00 lakhs by the accused to the complainant as security for repayment of loan amount of Rs. 1.00 lakh does not appeal to reason. On the contrary, the plea is found to be unreasonable and improbable. Under the facts and circumstances of the case, such plea of accused does not find any material support. Evidence on record clearly establishes that the accused had issued the three cheques towards repayment of loan amount.

8. In view of the above discussion, none of the contentions raised on behalf of the petitioner has any force. Therefore, the revision, being devoid of merit, is

dismissed.