
(2015) 12 TP CK 0008
In the Tripura High Court
Case No : Criminal Rev. P. No. 95 of 2013

Jayanta Banik

APPELLANT

Vs

Ritish Sarkar and Others

RESPONDENT

Date of Decision : 14-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Evidence Act, 1872 — Section 21
General Clauses Act, 1897 — Section 27
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 138(b), 139, 146
Penal Code, 1860 (IPC) — Section 420

Citation : (2015) 12 TP CK 0008

Hon'ble Judges : S. Talapatra, J.

Bench : Single Bench

Advocate : D.C. Roy and A.K. Pal, Advocates, for the Appellant; R. Datta and A. Acharjee, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S. Talapatra, J.—By means of this petition fled under section 397 read with section 401 of the Cr.P.C., the judgment and order dated 29.05.2013, delivered in Criminal Appeal No. 39(3) of 2012 by the Additional Sessions Judge West Tripura, Agartala, Court No. 3 has been questioned.

2. The judgment of conviction dated 18.08.2012 delivered in Case No. N.I. 79 of 2008 by the Additional Chief Judicial Magistrate, West Tripura, Agartala, has been affirmed by the judgment dated 29.05.2013, hereinafter, referred to as the impugned judgment.

3. Mr. D.C. Roy, learned counsel appearing for the petitioner has submitted that there is substantive failure to appreciate the grounds of objection as raised by the petitioner as to the service of notice and admission of the documents namely notice after dishonour of cheque from the bank and the cheques itself purportedly issued by the respondent No. 1 while passing the impugned

judgment. It has been contended for the petitioner that the statement has been treated as the admission by the petitioner cannot also be accepted as admission as the petitioner has categorically denied of executing such document. The bare minimal fact that would be required to lay the perspective of the challenge, may be noted as under:

The revisional petitioner approached for a loan of Rs. 1,15,000/- to the respondent No. 1 and the respondent No. 1 on good faith extended the loan of Rs. 1,50,000/- on condition that whenever he would demand the petitioner shall repay the loan amount at once.

4. When the respondent No. 1 came to know that the petitioner had taken that loan for investing it in some other businesses, then he demanded the repayment on 04.03.2008. The respondent No. 1 approached the petitioner and requested him to repay the loan amount. The petitioner issued the cheque No. 968116 dated 04.03.2008 for an amount of Rs. 20,000/-. On 19.03.2008 and 25.03.2008 the petitioner had also issued two other cheques under No. 968117 for an amount of Rs. 40,000/- and No. 834769 for an amount of Rs. 12,000/- with a request to deposit those cheques after 25.03.2008. The petitioner deposited those cheques in his S.B. A/C. No. 10320385991 in the State Bank of India, TLA Branch at Agartala after 25.03.2008. All those three cheques were dishonoured for insufficiency of fund. The Manager of State Bank of India, TLA Branch on which the cheques were drawn issued a certificate of "Insufficient fund" on 29.03.2008. On 20.04.2008 the respondent No. 1 issued a notice through a lawyer on the petitioner with a request to make payment of Rs. 80,000/- (the aggregate amount) within 15 days. But the petitioner did not make any payment. As such the respondent No. 1 was compelled to file the complaint under section 138(b) and (c) of the N.I. Act, read with section 420 of the IPC.

5. On 20.10.2008 when the petitioner surrendered before the court he admitted that he had taken Rs. 1,15,000/- from the respondent No. 1 and prayed for two months time for making the payment and accordingly, the date was fixed on 20.02.2009 for payment but on that day the petitioner did not appear.

6. Thereafter, by the judgment dated 18.08.2012 delivered in Case No. N.I. 79 of 2008, the petitioner was convicted. It is admitted position that no bank officials appeared as the witness to admit the certificate of insufficient fund nor for admitting the cheques those were dishonoured. Even none appeared from the courier through which the notice was served. Despite that three cheques were admitted in the evidence as Exhibit 1, 2 and 3 whereas the letter of the Branch Manager, State Bank of India, TLA Branch, has been admitted as Exhibit 4, the cheque returning memo from the UCO Bank, Bagan Bazar Branch as Exhibit 6, the receipt of the courier service as Exhibit 7 Series and the purported undertaking of the petitioner as Exhibit 8 without any protest.

7. Mr. Roy, learned counsel appearing for the petitioner has submitted that if it is held that documents were not properly admitted then the case of the respondent

No. 1 must face its consequence and in that event, the judgment dated 18.08.2012 or the impugned judgment cannot be held sustainable.

8. From the other side Mr. R. Dutta, learned counsel has appeared for the respondent No. 1 and has submitted that there is no infirmity in the judgment of conviction as returned by the courts below. He has submitted that when no objection is raised at the time of admission of any document further objection as to their admissibility can be raised in the superior courts. In this regard, he has referred to a decision of the Gauhati High Court in *Shri Biharilal Agarwal and Another versus Shri Tamizul Haque* reported in (1988) 1 GLR 76, where it has been held that:

"Insofar as admissibility is concerned, it has been pointed out by the learned Additional District Judge that as no objection had been raised when this document was exhibited, the admissibility could not be challenged afterwards. Reference was made in this connection to *Uppara Hanumanthu v. Peddapalle Samacharlu*, 33 IC 188 . Shri Sharma, learned counsel for the opposite party, has also referred to *P.C. Purushothama Reddiar Vs. S. Perumal*, , which has held that it is not open to a party to object to the admissibility of documents which are marked as Exhibits without any objection from such party. Let it be pointed out here that when PW 2 was examined the certified copy had not been exhibited. It was subsequently brought on record by filing petition dated 5.5.75 as already stated. This was allowed to be done as no objection had been raised by the counsel for the other side who had received a copy of the petition. It has, therefore, to be held that the certified copy was also brought on record without any objection."

[Emphasis supplied]

Mr. Dutta, learned counsel has further submitted that the initial burden is on the petitioner to show that the cheques were not issued by him or he did not receive the notice from the respondent No. 1 or the communication of the Bank was not really issued showing insufficiency of fund in his account and further that he is not required to pay any amount as demanded by the petitioner. That apart, Mr. Datta, learned counsel appearing for the petitioner has submitted that the court records cannot be disbelieved as the petitioner had already submitted in the trial court that he would pay the amount so demanded within the next two months.

9. Exhibit 8 also is a document which reflects the admission of the petitioner. The requirement of Section 21 of the Evidence Act has been complied with. The scope of interference under the revisional jurisdiction is circumspect. It is unlike appeal that the finding of facts can be revisited on the basis on the evidence unless it is shown that there was no relevant consideration.

10. However, if it is found that the findings so returned are perverse or there had been a go by of the settled position of law by the trial court or by the appellate court this court can definitely interfere with such finding. Here is a case where the petitioner has not disowned that he took loan from the respondent No. 1. He

has not challenged that those three cheques Exhibits 1, 2 and 3 were not issued by him. So far the question of liability is concerned, there should always be a presumption that the cheques were issued for the discharge in whole or in part of any debt or any other liability.

11. Section 139 clearly provides that 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 any other liability. It is not the case of the petitioner that he has discharged that burden to show that he had no liability to issue that cheque and as such the dishonour of cheque cannot saddle him with any culpability.

12. Section 146 of the Negotiable Instruments Act, 1881 provides as under:

"Bank's slip prima facie evidence of certain facts.

The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official bank denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved."

Therefore, again the burden to rebut the presumption lies on the petitioner.

13. That apart, Section 118 provides that until the contrary is proved, the following presumptions shall be made:

- a) of consideration
- b) as to date
- c) as to time of acceptance
- d) as to time of transfer
- e) as to order of endorsements
- f) as to stamps
- g) that holder is a holder in due course

14. In *Mallavarapu Kasivisweswara Rao Vs. Thadikonda Ramulu Firm and Others*, , it has been succinctly held by the apex court that initially burden lies on the accused to prove as to the non-existence of the consideration.

15. That apart, this High Court in *Keshab Banik Vs. Sekhar Banik*, reported in (2013) 1 TLR 528, has held that Section 138(D) of the N.I. Act is only the mode for making the demand. A payee can send the notice for doing his part for his giving the notice. Once it is despatched, his part is over and, the next depends on what the sendee does. For this purpose, the decision of the apex court in *V. Raja Kumari Vs. P. Subbarama Naidu and Another*, may be referred and the relevant part thereof may profitably be reproduced:

8. On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.

9. XXXXX XXXXX XXXXX

10. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader, and clips an honest payee as that would defeat the very legislative measure.

11. In Maxwell's Interpretation of Statutes, the learned author has emphasised that "provisions relating, to giving of notice often receive liberal interpretation" (vide p. 99 of 12th Edn.). The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does.

12. It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him (vide *Harcharan Singh Vs. Smt. Shivrani and Others*, and *Jagdish Singh Vs. Natthu Singh*,).

13. Here the notice is returned as addressee being not found and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act, 1897 will be useful. The section reads thus:

"27. Meaning of service by post.-Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing,

prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has dispatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sender unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

15. XXXXX XXXXX XXXXX

16. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In the present appeal there is no dispute that notice was in writing and this was sent within fifteen days of receipt of information by the appellant Bank regarding return of cheques as unpaid. Therefore, the only question to be examined is whether in the notice there was a demand for payment. (See Central Bank of India and Another Vs. M/s Saxons Farms and Others, .

[Emphasis supplied]

16. In view of the settled position of law as stated above the objection raised as to the admissibility of a few documentary evidence and in respect of the service of notice cannot be held sustainable and hence this petition stands dismissed.

Send down the LCR's forthwith.