
(2011) 08 RAJ CK 0053

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 2342 of 2010

O.P. Sharma

APPELLANT

Vs

Ashok Bohara

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Constitution of India, 1950 — Article 21
Negotiable Instruments Act, 1881 (NI) — Section 138, 139
Penal Code, 1860 (IPC) — Section 463

Citation : (2012) 1 CivCC 372 : (2012) 2 RCR(Civil) 52 : (2012) 1 RCR(Criminal) 659 : (2012) 1 RCR(Rent) 659 : (2012) 1 RLW 408

Hon'ble Judges : Raghvendra S. Chauhan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.S. Chauhan, J.—The petitioner is aggrieved by the order dated 09.11.2009 passed by the Additional Chief Judicial Magistrate No. 7, Jaipur City. Jaipur, whereby the learned Magistrate has declined the petitioner's application for sending the cheque in question to the FSL for its opinion. The brief facts of the case are that Ashok Bohara, the respondent, had filed a criminal complaint against the petitioner for offence u/s 138 of the Negotiable Instruments Act ("the Act", for short). According to the complainant - respondent, on 15.04.2006, the petitioner had borrowed Rs. 20,000/- and subsequently, on the same day, he borrowed Rs. 15,000/-. While borrowing Rs. 20,000/-, he had given him a cheque for the same amount. However, subsequently when he borrowed Rs. 15,000/- the petitioner changed the amount in the said cheque from Rs. 20,000/- to Rs. 35,000/-. Moreover, the petitioner assured the complainant that upon depositing the cheque would be encashed by the bank. On 29.08.2006, the complainant submitted the cheque for encashment. However, the same was dishonoured. Therefore, again on 05.10.2006. the complainant submitted the cheque. But, the cheque was returned with the remark that "there is insufficient fund". Since the petitioner did not repay the amount mentioned in the cheque,

the complainant filed the complaint u/s 138 of the Act. During, the examination of the complainant, as a witness, the petitioner moved an application for sending the cheque in question to the FSL for its opinion. According to the petitioner, he claimed that the signatures on the cheque are not his. Moreover and most importantly, the signature made under the over - writing, carried out in cheque, is certainly not his. However, vide order dated 09.11.2004, the application has been dismissed. Hence, this petition before this Court.

2. Mr. Ghanshyam S. Sisodia, the learned counsel for the petitioner, has vehemently contended that the petitioner's case is that the signature made under the over - writing in the amount mentioned in the cheque is not his. Therefore, the opinion of the FSL is essential. Secondly, since the petitioner had borrowed only Rs. 20,000/-, he is willing to compromise and pay the said amount to the complainant. However, the complainant is not ready to accept the said amount. Thirdly, relying upon the cases of Kalyani Baskar v. M.S. Sampornam, 2007 (1) WLC Cri. 239 and T. Nagappa v. Y.R. Muralidhar, 2008 (2) WLC Cri. 334, the learned counsel has contended that since the burden is placed on the accused to rebut the presumption under the Act, an opportunity needs to be given to the petitioner to adduce the evidence to prove the fact that the signature under the over - writing is not his. The learned counsel has also contended that the accused has a right of fair trial under Article 21 of the Constitution of India. Therefore, the learned Magistrate has erred in dismissing the application of the petitioner on the ground that the complainant is yet to be cross - examined and the application has been filed in order to delay the proceedings.

3. On the other hand, Mr. Mahendra Goyal, the learned counsel for the respondent, has raised the following pleas : firstly, the petitioner has taken a contradictory stand in his application filed before the Court. On the one hand, he claims that the signature in the cheque is not his, yet on the other hand he claims that his signature under the correction in the amount is not his. Thus, the petitioner is confusing as to what is his stand before the learned trial Court. Secondly, the cheque has not been returned on the ground that the signature does not match. In fact, the cheque has been returned on the ground of "insufficient fund". Therefore, no fruitful purpose would be served by sending the cheque to the FSL for its opinion: In order to buttress this contention the learned counsel has relied upon the cases of L.C. Goyal Vs. Mrs. Suresh Joshi and Others, and Raj Kumar Gupta v. State of Raj. & Anr., 2011 (2) RCC (Raj.) 483. Thirdly, the petitioner had already sought number of opportunities to cross - examine the complainant. Even if the cross - examination has been completed, the petitioner had availed three opportunities to compromise the matter with the complainant. Therefore, the learned Magistrate was certainly justified in concluding that the application has been filed with the intention to delay the proceedings. Hence, the learned counsel for the respondent has supported the impugned order.

4. Heard the learned counsel for the parties, perused the impugned order as well

as the case law cited at the Bar.

5. Undoubtedly Section 138 of the Act is a penal provision which creates an offence that in case the cheque is dishonored, then the holder in due course is entitled to file complaint u/s 138 of the Act and to seek that the offender be punished.

6. Section 139 of the Act creates a presumption in favour of the holder. Section 139 is as under : -

139. Presumption in favour of holder: - 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, or any debt or other liability.

7. Thus, while Section 139 of the Act creates presumption in favour of the holder, it also permits the offender the right to prove "to the contrary". Hence, it is not in absolute presumption, but is a rebuttal one.

8. The right of fair trial cannot be over - emphasized. Needless to say, the right emanates from Article 21 of the Constitution of India - the heart and soul of the Constitution of India. The first principle of common law is that every person is presumed to be innocent till proven guilty. But, Section 139 of the Act reverses this presumption under the common law. Therefore, the burden of proof shifts to the accused in the case of offence u/s 138 of the Act. Since the presumption is in favour of the holder, it is for the accused to disprove his guilt. In such a scenario, naturally the right to fair trial becomes stronger. Thus, this right deserves to be protected more strongly and emphatically than in ordinary criminal offences under the Indian Penal Code.

9. In the case of Kalyani Bhaskar (supra), the Hon''ble Apex Court has opined as under : -

The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them.

10. In this case, the Hon''ble Supreme Court was of the opinion that once the law places the burden on the accused, he must be given an opportunity to discharge it. Similar view was also expressed in the case of T. Nagappa (supra).

11. The stand of the petitioner before this Court is that he had borrowed only Rs. 20,000/- and had given a cheque signed by him for repayment of the said amount. But the complainant has altered the amount in the cheque from Rs. 20,000/- to Rs. 35,000/- and has forged the petitioner's signature under the

over - written amount. Therefore, his prayer to the learned trial Court to send the said cheque to the FSL for its opinion about the handwriting of the disputed signature. The learned counsel has also made an offer that since the petitioner has borrowed Rs. 20,000/-, he is willing to pay Rs. 20,000/- to the complainant. However, despite the three opportunities taken by the petitioner before the learned trial courts, it seems the parties have not been able to reach a compromise about the amount. Thus, the issues before the learned trial court obviously would be whether the amount shown in the cheque has been corrected by the petitioner or not? Whether the signature under the over - written amount is that of the petitioner or not? Since the complainant claims that the correction was made by the petitioner, since there is a presumption in favour of the complainant, obviously the said presumption can only be rebutted by the petitioner in case the cheque were to be sent to the FSL for its opinion. Naturally, the genuineness of the signature cannot be commented upon either by the complainant or by the Court unless scientific data is gathered with regard to the genuines of the signature.

12. The learned counsel for the respondent has contended that since the cheque was not dishonored on the ground of dissimilarity of the signatures, therefore, no fruitful purpose would be served by sending the cheque to the FSL. However, the said plea is slightly misplaced. In order to appreciate this contention, one has to keep in mind the intention and purpose behind the forgery being made. Section 463 IPC defines the word "forgery" - "Forgery - Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery." The act of forgery is to make a signature or writing, or an object as close to the original as possible; the purpose of forgery is to pass the forged signature, writing or object as the genuine in nature. The ultimate intent is to cause damage or injury to the public or to any person. The damage or injury is caused by playing a fraud. Thus, when a signature is alleged to be forged, it is meant to be passed off as an original and authentic signature of the person. In case, the bank does not object to the authenticity of the signature, obviously the forger has succeeded in passing off the forgery as original and authentic. Therefore, the contention raised by the learned counsel that since the bank has not objected to the genuineness of the signature, begs the question. After all the contention of the petitioner is that his signature has been forged and has been passed off as being original and authentic. The issue whether signature is original or authentic cannot be decided without the opinion of the expert. Thus, it is imperative to send the cheque in dispute to the FSL for its scientific opinion.

13. The case of L.C. Goyal (supra) is distinguishable on the factual matrix itself. Even the observations made by the Hon'ble Supreme Court in para 8 is merely an obiter and is not a ratio of the case. Therefore, the case is inapplicable to the

present case before this court.

14. The case of Raj Kumar Gupta (*supra*) does not come to the rescue of the respondent. In the said case, the accused was trying to delay the proceedings as the application for sending the cheque to the FSL was filed when the case was listed for final arguments. However, this is not the position in the present case. In fact, the application has been filed during the cross - examination of the complainant himself.

15. The cases in which the applications are filed at the time of final arguments may deserve to be dismissed on the ground that the accused is trying to delay the judgment of the day. However, every case in which application is filed cannot be rejected mechanically without looking to the facts and circumstances of the case. In the present case, when the application was filed, the complainant had yet to be cross - examined. Obviously, the opinion of the FSL may buttress the petitioner's case that a fraud is being played by the complainant. It is a defence, the petitioner may introduce while cross - examining the complainant. Therefore, the observation of the learned trial Court that the filing of the application is merely to delay the proceedings is unsustainable. For the reasons stated above, this Court allows this petition and quashes and sets aside the order dated 09.11.2009. This Court directs the learned trial Court to immediately send the cheque in dispute to the FSL for its opinion with regard to the genuineness of the alleged petitioner's signature under the over - written amount. The FSL is directed to submit its report before the learned trial Court within a period of three weeks. The learned trial Court is directed to expeditiously complete the trial once the opinion of the FSL is received by it.