(2016) 03 DEL CK 0049

In the Delhi High Court

Case No : Cri. Revn. P.No. 14 of 2016 & Cri. M.B. No. 48 Of 2016.

Pawan Kumar Tanwar APPELLANT

Vs

State (Govt of Nct of Delhi) and another RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2016) ACD 459

Hon'ble Judges : P.S. Teji, J.

Bench : Single Bench

Advocate : Manish Aggarwal, Chhaya Sharma, and Vikram Saini, Advocates, for the Appellant; Rajat Katyal, Additional Public Prosecutor Raj Bahadur Singh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Teji, J. - By this petition filed under Section 401 read with Section 482 of Cr. P.C., the petitioner seeks to challenge the order of conviction dated 23.09.2015 and order on sentence dated 09.10.2015 passed by learned Metropolitan Magistrate, South-West District, New Delhi, whereby the petitioner has been convicted for the offence punishable under Section 138 of Negotiable Instruments Act, 1881, and has been sentenced to undergo simple imprisonment for a period of six months. The petitioner is also directed to pay a sum of Rs. 2,70,000/- as compensation to the complainant.

2. The petitioner also seeks to challenge the orders dated 04.01.2016. passed by learned Additional Sessions Judge, Dwarka, Delhi, in CA No.60/2015, whereby the appeal of the petitioner has been dismissed.

3. In nutshell, the brief facts of the case are that the petitioner was the Member/ Director of M/s. Drona Learning Systems and the complainant, who is wife of Shyam Sunder (since expired), had given Rs. 51,000/- for four students for getting admission in Drona Institute at Plot No.86, Near Chhawla Bus Stand,

Najafgarh, New Delhi for the JBT course from Madhya Pradesh Board of Education for the academic session 2010-2012. Though the examination of the said four students could not be conducted by the petitioner and in order to return the fees, the petitioner had paid Rs. 4,000/- in cash and for the remaining amount, the petitioner issued a cheque for Rs. 2,00,000/-. Upon presentation of the cheque, the same was dishonoured due to ''insufficient funds''. Demand notice dated 02.06.2012. was served upon the petitioner calling upon him to make payment against the cheque, which the petitioner failed to do within fifteen days, accordingly the complaint under Section 138 of Negotiable Instruments Act, 1881 was filed by the complainant.

4. Thereafter, summons were issued to the petitioner and notice under Section 251 of Cr. P.C. was served upon the petitioner to which he pleaded not guilty and claimed trial. Trial commenced, evidences on behalf of the complainant were lead, statement of petitioner under Section 313 of Cr. P.C. was recorded, wherein he narrated different version of the story for giving the cheque to Shyam Sunder. Though the impugned cheque is admitted to be issued by him but it was submitted that the cheque in question was issued for securing employment for his brother, which was misused by the complainant.

5. While considering the facts and circumstances of the case, the learned Metropolitan Magistrate has passed the impugned order of conviction and order on sentence there against, which the petitioner preferred an appeal before the learned Additional Sessions Judge, which has also been dismissed while upholding the orders passed by learned Metropolitan Magistrate. Hence the petitioner has preferred the present revision petition.

6. Mr. Manish Aggarwal, counsel for the petitioner contended that there is no lawful transaction between the parties, therefore no complaint under Section 138 of Negotiable Instruments Act, 1881 is liable to be entertained and respondent No. 2 (complainant herein) has no locus standi to file the complaint against the petitioner. It is further contended on behalf of the petitioner that the complaint as filed by the petitioner is defective and the same is not maintainable without following the mandatory procedure of sending proper legal notice under the Negotiable Instruments Act, 1881.

7. According to the counsel for the petitioner, the petitioner met one Shyam Sunder (husband of the complainant) and Naresh Kapoor who were working in Drona Institute. Since Shyam Sunder was a Government servant, therefore, he was a sleeping partner in Drona Institute. It is contended that Shri Shyam Sunder told the petitioner that he is having high approach and he can get the Government job particularly in MCD. The petitioner was lured and he gave Rs. 2,00,000/- by cheque for securing job of peon for his brother in MCD. As the job could not be made available to the brother of the petitioner, therefore he asked to return his cheque of Rs. 2 lac. Upon this, Shyam Sunder told that the said cheque is lying with Naresh Kapoor and the same will be returned to the petitioner very soon. However, Shyam Sunder expired in the year 2011. In the

aforesaid circumstances, it is contended that there is no legal transaction and link between the petitioner and respondent No. 2.

8. It is further contended on behalf of the petitioner that the ingredients of Section 138 of Negotiable Instruments Act, 1881 are not fulfilled, as the legal notice was defective as the cheque number mentioned in the legal notice was different from the impugned one. In this regard, it is submitted that if the legal notice is defective, the complaint is liable to be dismissed on this very ground. It is further contended on behalf of the petitioner that there is no legally recoverable debt as claimed by respondent No. 2 against the petitioner. The counsel for the petitioner has drawn attention to the averment made by the complainant that he had received the cheque in question in the second week of May 2012 then how can the cheque be back dated i.e. of 12.12.2011. It is contended that even the legal notice sent by the complainant which is mandatory and fundamental requirement for the initiation of the proceedings under Section 138 of Negotiable Instruments Act, 1881 does not mention the cheque number for which the present case was filed. Counsel for the petitioner further contended about the material contradictions in testimony of the complainant and his witnesses and even none of the girls/students or their fathers were examined by the complainant to prove his case.

9. In the aforesaid facts and circumstances, the counsel for the petitioner urged for setting aside of the impugned order.

10. Mr. Rajat Katyal, Additional Public Prosecutor appears on behalf of the State and submits that the order passed by learned Additional Sessions Judge in the appeal filed by the petitioner is well justified and does not call for any interference from this Court.

11. I have heard learned counsel for the parties and have also gone through the impugned judgments and orders passed by learned Metropolitan Magistrate as well as learned Additional Sessions Judge.

12. After considering the submissions advanced by both the sides and upon perusal of the impugned order, evidence on record and the decisions cited, this Court observes that there is concurrent finding of guilt against the petitioner. This Court also observes that the petitioner has taken all the grounds in his appeal preferred before the learned Additional Session Judge and while dealing with all those contentions, learned Additional Session Judge had concurred with the decision of the learned Metropolitan Magistrate. Paragraph 19 of the order passed by Appellate Court while quoting paragraphs 10 to 13 of the impugned order passed by learned Metropolitan Magistrate is reproduced herein:

"19. I find it apposite to reproduce here the reasoning given by the Ld. M.M. in rejecting the defence of the appellant. The same is hereunder :

"10. On the face of it, this version fails to inspire any confidence. Why would a person, who has asked for cash, since obviously the transaction was for unlawful purpose, would accept cheque instead. Further, instead of receiving advance cash payment, why he agreed to forego the same and became satisfied with a security cheque. No explanation was forthcoming on this aspect.

11. Interestingly, the cheque was issued to Shyam Sunder in the presence of one Harish who is a friend of the accused. However, this Harish, who is the sole witness to the transaction as per the case of the accused, was never sought to be examined as a witness. The testimony of Harish would have been vital in order to establish the defence of the accused. Failure to call the witness raises doubts as to the genuineness of the stand taken by the accused.

12. Further admittedly, the accused did not lodge any complaint or initiate action of any sort against the said Shyam Sunder and also against the complainant for defrauding him, since no job was secured for his brother and his security cheque was also not returned, rather the same was misused by the complainant.

13. Any prudent man would have taken all possible steps to ensure that his blank signed cheque is not misused. The accused also did not bother to instruct his banker to stop payment against the cheque even after his brother did not get the promised job and there was no occasion for Shyam Sunder to keep the cheque in his possession. Failure on the part of Shyam Sunder to return the cheque would have created an apprehension in the mind of the accused that his cheque could be misused. Least that he could have done was to get his banker to stop payment against the cheque. Rather, the accused slept over as his cheque allegedly changed hands and was not woken from his slumber even when his cheque was dishonoured. The unexplained silence on the part of the accused is not initiating any action against Shyam Sunder or the complainant generates doubt as to the veracity of defence put forth by the accused."

20. I entirely agree to the aforesaid reasoning given by the Ld. M.M.

21. I am also in agreement with the observations of the Ld. M.M. that the legal notice Ex.CW1/C shall be presumed to have been duly served upon the appellant in view of the provisions of section 27 of General Clause Act for the reason that the appellant has admitted that the legal notice has been sent at his correct residential address and he has not led any evidence to show that he was not residing at the said address at the relevant time.

22. It is true that the serial number of the cheque has been mentioned incorrectly as 011981 in the legal notice instead of 011989. It appears to be a typographical error, as rightly observed by the Ld. M.M. There is nothing on record to suggest that the appellant was misled by such mistake. It is quite evident that he has defended the complaint knowing fully well that it is founded upon the dishonour of the cheque bearing Serial No.011989.

13. In view of the aforesaid discussion and the fact that the petitioner has taken all his grounds before the appellate Court, which are duly considered by learned Additional Session Judge, this Court of the opinion that there is no illegality or

infirmity in the orders passed by the Trial Court as well as the Appellate Court. Accordingly, finding no merit in the present petition, the same is hereby dismissed.

14. Petitioner is in custody. Let a copy of this order be also sent to Jail Superintendent for apprising the fate of the petition to the petitioner.

15. The aforesaid petition is disposed of.