

(2016) 02 JH CK 0096

In the Jharkhand High Court

Case No : Criminal Appeal (S.J.) No. 839 of 2015

Ravindra Prasad Singh

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 372

Evidence Act, 1872 — Section 114, Section 4

Negotiable Instruments Act, 1881 (NI) — Section 118, Section 138, Section 139

Citation : (2016) ACD 603 : (2016) 3 ECrC 256 : (2016) 2 JBCJ 278 : (2016) 2 JLJR 434 : (2017) 1 PCCR 127

Hon'ble Judges : Ravi Nath Verma, J.

Bench : Single Bench

Advocate : Naveen Kumar Jaiswal, Advocate, for the Appellant; Mukesh Kumar, A.P.P., for the Respondent

Final Decision : Dismissed

Judgement

Ravi Nath Verma, J.—1. The complainant has moved this Court under Section 372 of the Code of Criminal Procedure against the judgment of acquittal dated 15th September, 2015 passed by learned Additional Judicial Commissioner-IV, Ranchi in Cr. Appeal No. 06 of 2015 whereby and whereunder the judgment of conviction and order of sentence dated 12th December, 2014 passed by learned Judicial Magistrate, 1st Class, Ranchi in Complaint Case No. 2163 of 2012 (T.R. No. 1001 of 2014) has been set aside and the accused opposite party No. 2 has been acquitted of the charges.

2. The only question that arises for consideration in this appeal is whether the cheque issued by the respondent No. 2 could be considered in discharge of legally enforceable debt or other liability and, if so, whether dishonour of such cheque amounts to an offence under Section 138 of Negotiable Instrument Act, 1881 (in short "the Act").

3. Bereft of unnecessary fact, the facts which is relevant for the purpose of

proper adjudication of the issue involved in this appeal, in short, is that at the instance of the present appellant, a complaint was filed with the allegation that the respondent No. 2- Ajay Kumar Upadhyay had taken a friendly loan of Rs. 6,40,000/- on 09.07.2012 from the complainant and promised to make repayment of the said amount by 09.08.2012 but as the respondent No. 2 did not make any payment within the said stipulated period, on one pretext or other but subsequently on his request the respondent No. 2 issued a cheque bearing No. 156541 dated 09.10.2012 in favour of the complainant. However, on presentation of the cheque in the bank concerned for its encashment, the same was dishonoured showing "insufficient fund". After getting the return memo showing "insufficient fund" dated 12.10.2012, a legal notice was sent to the respondent on 20.10.2012 but respondent No. 2 failed to make any payment whereafter the complaint case was instituted.

4. The trial court upon consideration of the evidence and pleadings of the parties convicted the accused-respondent No. 2 under Section 138 of the Act and sentenced to undergo simple imprisonment for four months and to pay Rs. 7,00,000/- by way of compensation to the complainant within two months. Aggrieved by the said judgment of conviction and sentence, the accused-respondent No. 2 preferred an appeal and the Lower Appellate Court after considering the evidence on record and submissions of the counsels, acquitted the accused of the charges by the impugned judgment whereafter this appeal has been preferred.

5. Mr. Jaiswal, learned counsel appearing for the appellant assailing the order of the First Appellate Court as bad in law and perverse seriously contended that the Appellate Court without applying its judicial mind and without appreciating the evidence on record in right perspective, passed the order impugned relying upon highly improbable story which is not sustainable in law. It was also submitted that the Lower Appellate Court merely relying upon the fact of non-examination of the son of the complainant in fanciful manner held that non-production of any chit of paper regarding alleged transfer of Rs. 6,00,000/- coupled with non-examination of the son has created doubt over the entire complaint case.

6. Refuting the above submissions, the learned counsel representing the respondent No. 2 seriously contended that the complainant has failed to prove by any cogent evidence that the said cheque was issued by the accused respondent No. 2 in discharge of any enforceable debt or other liability and Section 138 of the Act treats dishonoured cheque as an offence only if the cheque has been issued in discharge of any debt or other liability. Supporting the impugned judgment of acquittal, learned counsel further submitted that there is no infirmity, illegality or perversity in the order passed by the said court so to interfere in the judgment of acquittal.

7. Before I enter into the veils of submissions of the counsels, it is necessary to examine as to whether the ingredients responsible to constitute the offence punishable under Section 138 of the Act is made out against the accused-

respondent No. 2 in the instant case but before that it would be necessary to first delve upon Sections 118 and 139 of the Act which deals with the subject of presumption that are to be raised in deciding the liability of the accused under Section 138 of the Act. Section 118 of the Act deals with the presumption with respect to consideration to be raised until the contrary is proved. Relevant portion of Section 118 is quoted hereinbelow for proper appreciation:--

"Section 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;

Similarly, Section 139 of the said Act deals with the presumption in favour of the holder and it shall be presumed, only unless the contrary is proved.

8. The scope and ambit of the above two provisions i.e. Sections 118 and 139 of N.I. Act have been considered by the Hon"ble Supreme Court in the case Kumar Exports v. Sharma Carpets; , AIR 2009 SC 1518 and observed in Paragraph 11 as under:

"11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on

record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

9. In a recent case, *Vijay v. Laxman and Anr.*, (2013) 3 SCC 86, the Hon'ble Supreme Court while considering the ratio decided in the above case held that what is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution and the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted. It was also held that the standard of proof evidently is preponderance of probabilities and the inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

10. In the case *Indus Airways Private Limited & Ors. Versus Magnum Aviation Private Limited & Anr.*, (2014) 12 SCC 539 the Hon'ble Supreme Court considering the scope of Section 138 of the N.I. Act further explained the term "debt or other liabilities" as follows:--

"The Explanation appended to Section 138 of the N.I. Act explains the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is a sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not

carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."

11. Now in the light of the ratio decided in the above cases by the Hon''ble Supreme Court, I would like to see whether the accused-respondent No. 2 in the instant case has succeeded in rebutting the presumption arising in favour of the complainant in terms of Section 118 read with Section 138 of the Act. The complainant as witness in the trial court in Paragraph 13 has clearly testified that his son Sushil Kumar had transferred Rs. 6,00,000/- in the account of the accused and Rs. 40,000/- was given in cash. The witness also supported the above statement by saying that since he is not submitting income tax return but his son is an income tax assessee so he had given the said amount through his son. The witness has nowhere stated in the complaint petition that the said amount he had given to the accused through his son. The said son Sushil Kumar of the complainant has not been examined in court to prove that he had ever sent any amount to the accused. Secondly, the witness has not been brought on record a chit of paper to show that any such amount was ever transferred in the account of the accused. Even if it be considered that the amount was transferred at the instance of the son of the complainant in that term, the complainant-appellant has no locus to prove this case because he is neither payee nor holder in due course. Similarly, the complainant in his evidence has also testified during cross-examination that the document relating to advancement of loan to the accused was never prepared but in Paragraph 23 the witness has deposed that as the amount was transferred by his son, he can produce some document but neither the son has been examined nor any document has been produced in court. The Hon''ble Supreme Court *Indus Airways Private Limited & Ors.* (supra) has held that the explanation of Section 138 leaves no manner of doubt that to attract an offence under the said provision, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque and in other words, drawal of cheque in discharge of existing or past adjudicated liability is a sine qua non for bringing an offence under the ambit of Section 138 of the Act. In the instant case, in the complaint petition there is no such averment that son of the complainant had given the amount of Rs. 6,00,000/- to the accused but the same has come in the evidence of the complainant during trial. Undoubtedly, it is well settled that in absence of pleading, no evidence can be looked into. Hence, it is necessary to see the defence of the accused-respondent No. 2 as to why the cheque was issued in favour of the complainant. The defence has taken the ground that there was tenancy agreement between the complainant and the accused-respondent No. 2 and he was a tenant and this fact has not been denied by the complainant rather the same has been admitted in his evidence. The further defence is that said amount of Rs. 6,00,000/- was given in terms of tenancy agreement as security and he had never taken any loan from the

complainant but as some differences cropped up between the parties over the tenancy, this false case has been instituted. The defence examined two witnesses D.W.1-Rajiv Upadhyay and D.W. 2- Ravi Ranjan Kumar Upadhyay and these two witnesses in their testimonies have deposed that the tenancy agreement between the parties was executed between them on 01.09.2011 and the said cheque in question was given to the complainant in their presence by way of security. The Appellate Court while deciding the said issue has considered the evidence and came to the finding that onus as envisaged under Section 139 of the Act stands sufficiently discharged and the presumption of existence of legally enforceable debt liability gets rebutted. The court below had not considered this aspect rather based the finding on mere presumption.

12. Hence, in my opinion, the non-examination of the son of the complainant and absence of any document or chit of paper to show the transfer of amount in the account of the accused completely demolishes the case of the complainant that any legally enforceable debt or liability was there against the accused. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of cheque. I am unable to accept that the issuance of cheque by the accused by way of security in terms of tenancy agreement has to be considered as subsisting liability and the dishonour of such cheque amount to an offence under Section 138 of the N.I. Act.

13. This appeal, being devoid of any merit is, hereby, dismissed.