
(2016) 05 GAU CK 0063
In the Gauhati High Court
Case No : Criminal Appeal No. 174 of 2008

Shri Anjelus Topno

APPELLANT

Vs

Shri Shreekanta Sharma

RESPONDENT

Date of Decision : 20-05-2016

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2016) ACD 742 : (2016) 4 BC 431 : (2016) 3 DCR 677 : (2016) 5 GauLR 242 : (2016) 3 GauLT 474 : (2017) 1 NIJ 104

Hon'ble Judges : A.K. Goswami, J.

Bench : Single Bench

Advocate : Mr. P.J. Saikia, Advocates, for the Appellant; Mr. P. Borah, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J. (Oral) - Heard Mr. P.J. Saikia, learned counsel for the appellant. Also heard Mr. P. Bora, learned counsel for the respondent.

2. This is an appeal against the judgment and order dated 23.07.2008 passed by the learned Additional Sessions Judge (FTC), Dibrugarh in Criminal Appeal No.35(4)/2007, setting aside the judgment and order dated 29.09.2007 passed by the learned Chief Judicial Magistrate, Dibrugarh in C.R. Case No.444 C/2005 under Section 138 of the Negotiable Instruments Act, 1881 (in short, "N.I. Act"). The learned trial Court had sentenced the respondent to undergo simple imprisonment for a period of 1(one) month and to pay a fine of Rs.1,50,000/-, as compensation, to the complainant and in default, simple imprisonment for 6(six) months. The learned appellate Court, on appeal, set aside the impugned judgment and acquitted the respondent.

3. In the complaint petition filed by the appellant herein, it was stated that the respondent is a contractor and on 28.11.2002, he came to the house of the complainant and requested to advance him a sum of Rs.2,00,000/-, as he was in

urgent need of money, promising and assuring him to pay Rs.2,35,000/- as soon as he receives the payment for contractual works undertaken by him. Accordingly, an agreement was executed on 28.11.2002 (Exhibit-1) and the appellant advanced Rs.2,00,000/-. However, the said amount was not paid in spite of repeated requests and only much later, on 17.10.2005, the respondent issued a cheque bearing No.323430 for Rs.1,00,000/-. The cheque being deposited was returned back for insufficient fund. A notice dated 02.11.2005 was served upon the complainant requesting him to make the payment of the cheque amount within 15(fifteen) days and the said notice was received on 10.11.2005. However, as the payment was not made, the complaint came to be filed.

4. During trial, complainant had examined 3(three) witnesses and the defence had examined 2(two) witnesses. From the evidence of PW-1, i.e. the complainant, it appears that the complainant came to know the accused from the year 2002. In his examination, he has stated that after much insistence, the accused had given him the cheque for Rs.1,00,000/- towards repayment of part payment of Rs.2,00,000/-, which was given by him to the accused under the Exhibit-1 Agreement. In his cross-examination, he had also deposed that prior to 17.10.2005, he had not done anything for recovery of the amount. It is stated by him that he knew Basistha Ojha and Ajay Sarma, who are employed with the Firm of the accused, namely, Neelam Steel Industry, and that a case was lodged against them by the accused. He had also stated that he had transactions with the accused. He had denied the suggestion given that the accused had paid back the amount payable under Exhibit-1 agreement.

5. PW-2 is the bank official, who deposed with regard to insufficiency of amount in the bank account of the accused. PW-3 is an advocate, who deposed with regard to drafting of the Agreement (Exhibit-1).

6. In his evidence as DW-1, the accused person stated that Basistha Ojha had introduced him to the complainant and that Basistha Ojha used to arrange funds, operated the bank accounts and cheque book was also retained by him. He stated that he used to sign cheques so that money could be withdrawn for urgent works when he was out of station. He admitted taking of Rs.2,00,000/- from the complainant and that the same was repaid back after 3(three) months. He had also signed 2(two) cheques as security, which were handed over to Basistha Ojha. He made payment of Rs.1,00,000/- by cheque No.562437 dated 22.02.2003 and also paid an amount of Rs.1,00,000/- vide cheque No.562488 dated 28.02.2003. The statements from the Bank were exhibited as Exhibit-Ka and Exhibit-Kha, respectively. The balance amount of Rs.35,000/- was paid in cash. He was also informed by the Manager, Basistha Ojha, that cheques, which were given as security, were returned by the complainant. Later on, the Manager and the Accountant fled away by withdrawing a sum of Rs.5,29,000/- from his account together with the cheques issued as security along with some other documents and the said accused persons were absconding. The complainant had demanded some amount by way of loan, which was declined by the accused. He

had filed cases later on for recovery of the valuable documents. In his cross-examination, he had categorically stated that he had not taken any other sum of money from the complainant. He denied a suggestion that on 23.02.2002, he had taken Rs.5,00,000/- from the complainant. He also denied a suggestion that on 18.11.2002, he had taken Rs.1,50,000/- by making an agreement. He also denied the suggestion that he had taken Rs.10,00,000/- and had paid back Rs.2,00,000/- to the complainant.

7. DW-2, is the Officiating Senior Manager of the United Bank of India and he proved Exhibit-A and Exhibit-B demonstrating that the complainant had received payment of Rs.1,00,000/- vide cheque No.562437 dated 22.02.2003 and Rs.1,00,000/- vide Cheque No.562488 dated 28.02.2003.

8. It appears that during pendency of the appeal before the learned Sessions Judge, a petition was filed by the complainant under Section 311 Cr.PC and under Section 165 of the Evidence Act. In the said petition, it was stated that the accused was paid Rs.3,00,000/- by 2(two) cheques on 23.08.2002 and Rs.2,00,000/- by cash on 24.08.2002. The learned Sessions Judge had rejected the said petition while allowing the appeal filed by the accused person.

9. Mr. Saikia has submitted that even on the basis of the materials on record, it is abundantly clear that the complainant had been able to prove the case, notwithstanding rejection of the petition under Section 311 Cr.PC and Section 165 of the Evidence Act and the accused had failed to discharge his burden.

10. Mr. P. Bora, learned counsel appearing for the respondent, on the other hand, has submitted that the positive case of the complainant was that the respondent had taken a loan of Rs.2,00,000/- vide Exhibit-1 agreement dated 28.11.2002 and he had not whispered at all in the complaint petition or in the evidence that the sum of Rs.2,35,000/- was paid by the respondent/accused. It is submitted by him that in the complaint petition also, the complainant had not referred to any other transaction. Mr. Bora has submitted that the respondent had discharged his liability by making payment of the aforesaid amount against the agreement (Exhibit-1). It is submitted by him that because of the mischief played by the Manager of the respondent that the cheque in question had gone to the hand of the complainant and there being no legally enforceable date, merely because the cheque came to be dishonoured, Section 138 of the N.I. Act is not attracted. In this connection, he has referred to a decision in Krishna Janardhan Bhat v. Dattatraya G. Hegde, reported in (2008) 4 SCC 54.

11. I have considered the submissions of the learned counsel appearing for the parties and have perused the materials on record.

12. It will be appropriate to quote Sections 138 and 139 of the N.I. Act, which are as follows:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. ? Where any cheque drawn by a person on an account maintained by him with a

banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless ?

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

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, of any debt or other liability."

13. At the outset, it will be relevant to take note of the judgment of the Apex Court in Krishna Janardhan (supra). In paragraphs 29, 30, 31 and 32 of the said judgment, the Apex Court had laid down as follows:-

"29. Section 138 of the Act has three ingredients viz.:

(i) That there is a legally enforceable debt;

(ii) That the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) That the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in

favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for providing the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different."

14. Reading of Sections 138 and 139 of the N.I. Act goes to show that out of the three ingredients comprising Section 138, a presumption is available in favour of holder of a cheque that the same had been issued for discharge of any debt or other liability under Section 139 of the N.I. Act. Section 139 of the N.I. Act does not give rise to a presumption with regard to existence of legally enforceable debt. A complainant has to discharge this burden of existence of a legally enforceable debt and if he fails to do so, merely because he is a holder of a cheque issued by the accused, conviction of the accused will not be warranted.

15. From the evidence on record, it is clear that the complainant came to know the accused/respondent only from the year 2002. It is not in dispute that a sum of Rs.2,00,000/- in cheque was paid on or about 3(three) months from the date of execution of the Exhibit -1 agreement. Neither in the notice nor in the complaint, the complainant referred to the payment of such amount by the respondent. The appellant had not taken a plea that prior to execution of Exhibit-1 agreement, there had been other previous transactions. The edifice and foundation of the legally enforceable debt, as projected by the complainant, is based on Exhibit-1. Because of payment of Rs.2,00,000/- through cheque as well as payment of cash amount of Rs.35,000/-, it appears to the Court that the existing enforceable debt under Exhibit-1 had been liquidated. The complainant had, in the facts and circumstances of the case, failed to prove existence of a legally enforceable debt. In the background of the factual matrix, it is possible to take a view that the case projected by the defence is a plausible case as recorded by the learned Sessions Judge. The complainant had also admitted that cases are pending against Basistha Ojha and Ajay Sarma, which were filed by the respondent.

16. Law is well settled that in an appeal against acquittal, the appellate Court has the power to reappraise the evidence on record to come to its own conclusion. While doing so, it has an obligation to consider each and every matter on record having a bearing on the questions of fact and the reasons assigned by the court

below in support of the order of acquittal. If two views are reasonably possible on the basis of the evidence on record, the view which is favourable to the accused must be preferred. If the view taken by the trial court while acquitting the accused is a possible and reasonable view, the High Court ought not to interfere with such an order of acquittal only because of the fact that it is possible to take a contrary view. It is only in cases where the findings recorded by the Court are manifestly erroneous, contrary to the evidence on record or perverse, it is open to the appellate court to interfere with the order of acquittal. Present is not a case of such nature and, therefore, I am of the considered opinion that no interference is called for with the judgment under challenge. Accordingly, the appeal is dismissed. No costs.

17. Registry will send down the LCR.