(2017) 04 RAJ CK 0139

In the Rajasthan High Court

Case No : 424 of 2010

Shyam Sunder @ Mangat Ram — APPELLANT

Vs

State of Rajasthan and another — RESPONDENT

Date of Decision : 18-04-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 251 - Substance of accusation to be stated
Negotiable Instruments Act, 1881, Section 138 - Dishonour of cheque for insufficien

Citation : (2017) 04 RAJ CK 0139

Hon'ble Judges : Deepak Maheshwari

Bench : SINGLE BENCH

Advocate : Pankaj Gupta, Arpita Shrmali, Rishiraj Singh, Bharat Sharma

Judgement

1. This Criminal Misc. Petition has been preferred by accused/petitioner Shyam Sunder challenging the order dated 2nd February, 2009 passed by learned trial Court for stating the accusation to him under Section 251 Cr.P.C. for the offence punishable under Section 138 of the Negotiable Instruments Act as also the order passed by learned Revisional Court on 19th February, 2010 whereby, the revision petition preferred by the accused/petitioner was dismissed.

2. Heard learned counsel for the accused/petitioner as also learned counsel appearing for the complainant/non-petitioner No. 2 and learned Public Prosecutor.

3. Learned counsel for the accused/petitioner submits that the petitioner has been wrongly implicated in the matter. A complaint has been wrongly filed by the complainant/non-petitioner No.2 against him. A cheque (Annexure-2) on the basis of which, this complaint has been filed against the accused/petitioner was not issued by the petitioner but the same was issued by his son Vishnu for and on behalf of M/s Vishnu Trading Company. If the cheque has been dishonoured then, the liability for the offence under Section 138 of the Negotiable Instruments Act can be fastened only upon the drawer of the cheque but in any

way cannot be fastened upon the accused/petitioner. So, the accusation drawn against the petitioner vide order dated 2nd February, 2009 is completely without any justification. He has relied upon the following judgments:- (i). Aparna A. Shah v. Sheth Developers Private Limited & Anr. reported in (2013) 8 SCC 71;

(ii). T.N. Devi v. A.C. Haridas & Anr. reported in 2004 CRI.L.J. 4710 (Kerala High Court); and,

(iii). Geeta Srivastava v. Bhanu Sharma reported in 2003 CRI.L.J. 801.

4. Per contra, learned counsel appearing for the complainant/non-petitioner No.2 has though admitted this factual matrix that the cheque (Annexure-2) was issued by Vishnu, who happens to be the son of the petitioner, yet he contends that the order dated 2nd February, 2009 passed by the learned trial Court cannot be faulted with as the said cheque was dishonoured on account of "insufficient fund" in the bank account. Learned counsel has also defended the order dated 19th February, 2010 passed by the learned Revisional Court stating that within the purview of the provisions contained under Section 251 Cr.P.C. this factual aspect could have not been raised that who had issued the cheque. This point could have been raised only during defence evidence and not at the juncture of levelling of accusation under Section 251 Cr.P.C.

5. I have given thoughtful consideration to the arguments advanced by the rival sides.

6. It is an admitted position that the cheque (Annexure-2), which was dishonoured and for which a complaint has been filed by the complainant/non-petitioner No.2, was issued by one Vishnu on behalf of M/s Vishnu Trading Company and not by the accused/petitioner.

7. A bare perusal of the cheque (Annexure-2) reveals above facts which have also been admitted by the learned counsel for non-petitioner No. 2. Now, if the said cheque has been dishonoured on account of "insufficiency of the funds" in the bank account maintained by the drawer of the cheque then, the liability could have been fastened only upon the drawer of the cheque. On perusal of para - 4 of the complainant (Annexure-1), it also reveals that the complainant has not alleged that the accused Shyam Sunder drew the cheque in favour of the complainant. It has simply been mentioned that the accused handed over the cheque of Bank of Baroda, Dausa Branch for Rs.50,000/-.

8. A bare perusal of the provisions contained in Section 138 of the Negotiable Instruments Act clearly reveals that only the drawer of the cheque can be held liable for the said offence. This position has further been settled by the Hon''ble Supreme Court in Aparna A. Shah (supra), relied on by learned counsel for the petitioner. Relevant part of the judgment is quoted as below:- "27. In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A

copy of the cheque was brought to our notice, though it contains the name of the appellant and her husband, the fact remains that her husband alone had put his signatures. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque."

9. Other judgments relied upon by learned counsel for the petitioner, as mentioned above, also lay down that no liability can be fastened upon the person who has not drawn the dishonoured cheque.

10. Learned counsel appearing for the complainant/non-petitioner No.2 has not been able to refer to any judgment contrary to the ones cited above.

11. In view of the admitted position that the said cheque, which was dishonoured, has not been drawn by the accused/petitioner Shyam Sunder @ Mangat Ram; hence, the accusation could have not been read over to him for the offence punishable under Section 138 of the Negotiable Instruments Act. It will be proper to observe here that if the proceedings for the offence under Section 138 of the Negotiable Instruments Act is allowed to continue against the accused/ petitioner, it will be only abuse of process of law as ultimately, no liability can be fastened upon him for the offence punishable under Section 138 of the Negotiable Instruments Act.

12. Hence, this Criminal Misc. Petition is allowed and the orders impugned dated 2nd February, 2009 and 19th February, 2010 are quashed and set aside; and the proceeding against the accused/petitioner for the offence under Section 138 of the Negotiable Instruments Act is resultantly quashed and set aside.

13. The Criminal Misc. Petition stands disposed off accordingly. Petition allowed.