
(2018) 07 MP CK 0165

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Casel No.-15773 Of 2015

Surendra Kumar Dubey

APPELLANT

Vs

Neelendra Mishra

RESPONDENT

Date of Decision : 18-07-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 378(4)
Negotiable Instrument Act, 1881 — Section 138, 139
Indian Evidence Act, 1872 — Section 4, 45

Citation : (2018) 07 MP CK 0165

Hon'ble Judges : Sushil Kumar Palo, J

Bench : Single Bench

Advocate : Arun Kumar Dixit, Ashok Kumar Chakrawarti

Final Decision : Disposed Off

Judgement

The petitioner preferred this application for leave to appeal under Section 378(4) of the Cr.P.C., challenging the judgment dated 21.07.2015, passed in

Cr.A. No. 95/2015, whereby the accused/respondent has been acquitted from the charges under Section 138 of the Negotiable Instrument Act by

setting aside the judgment of conviction by the learned JMFC, Raisen in Criminal Case No. 845/2007 decided on 27.04.2015.

Bereft of the unnecessary details, the facts of the case are that, the complainant/petitioner filed a criminal complaint case No. 845/2007 against the

respondent/accused under Section 138 of the Negotiable Instrument Act alleging that the respondent executed a cheque on 02.11.2006 for Rs.

1,00,000/- of State Bank of Indore Branch, Raisen. The said amount was given to the accused/respondent. In lieu of which, the accused allegedly

executed the Cheque No. 2185043 in relation to A/c No. 5301801303. The complainants brother Akhilendra and Ravindra sold a piece of land,

therefore, this case is lying with the complainant.

Subsequently, when the cheque was placed for encashment on 30.04.2007 at the Central Co-operative Bank, Raisen, it was intimated to the

complainant on 01.05.2007 that there was insufficient of fund, hence, the cheque was dishonoured. The complainant issued a registered notice on

24.05.2007. The same has been served to the respondent/accused. When the respondent did not pay the cheque amount within 15 (fifteen) days, the

complainant filed the complaint under Section 138 of the Negotiable Instrument Act. After recording of evidence, learned JMFC, Raisen vide

judgment dated 27.04.2015 held that though the signature of the respondent/accused in cheque (Ext.P/1) has variation according to the handwriting

expert A.K. Das, but this variation after seven years is natural and also held that offence under Section 138 of the Negotiable Instrument Act has

been proved, convicted the respondent/accused and sentenced him to two years rigorous imprisonment and imposed a compensation of Rs. 1,67,500/-

inclusive of 9% interest from the date of issuance of cheque.

The respondent preferred Cr.A. No. 95/2015 before the learned Fourth Additional Sessions Judge, Raisen.Â Learned Additional Sessions Judge vide

judgment dated 21.07.2015 after analyzingÂ the evidence held that the report of the handwriting expert indicates that the signature is not tallied, but

the petitioner/complainant has failed to prove that the said cheque was given for legal enforceable debt or liability, only for the reason that the cheque

has not been dishonoured due toÂ mismatched of signature, it cannot be said that the opinion of the handwriting expert can be negated.

On behalf of the complainant/petitioner, it is argued that the Bank has not dishonoured the cheque on the ground of mismatch of signature. There is

slight difference in the signature which could be due to the long lapse of time. If signatures are made on the same date slight variation is observed. In

the present case the signature has been tallied after seven years from the date ofÂ issuance ofÂ the cheque, therefore variation was bound to come.

The petitioner also argued that the amount was given to the respondent/accused against the cheque. Therefore, the burden of proof was on the

respondent/accused to show that the cheque was issued not for legal enforceable liability.

O n behalf of the respondent/complainant, it is claimed that the finding of the

lower Appellate Court is clear. The signature of the accused has not been proved, therefore at this stage, the same cannot be questioned. The presumption is rebuttable and the respondent accused has rebutted the same.

On this background the judgment impugned is not liable to be interfered.

It would be appropriate to note that the cheque was sent to the Bank for encashment. The Bank did not find any mismatch of signature of the

respondent/accused. Subsequently, when the notice was issued to the accused/respondent he did not reply that the cheque was not issued by him. The

defence that the signature of the respondent mismatched does not by itself indicate that the accused has not signed the cheque for the simple reason

that after lapse of seven years it could be due to the natural variation or it may be possible that the accused might have signed the signature

differently.

The expert opinion obtained under Section 45 of the Evidence Act is only an opinion evidence. If there are other materials available before the Court,

the Court can ignore the expert opinion and consider the other materials and decide the case independently on that basis. It is not always necessary

that the opinion evidence has to be relied on by the Court, if there are other circumstances available to overrule the same.

So far as, the rebuttal of the transaction under Section 139 of the Negotiable Instrument Act is concerned, the burden lies on the accused to rebut the

same, though it is a rebuttable presumption, but it is mandatory presumption. The presumption is in favour of the holder of the cheque. The

accused denied his debt liability as well as issuance of the cheque in favour of the complainant. Therefore, the accused-respondent has the onus to

rebut the same. Normally the presumption is in favour of the complainant, once the complainant discharged his part of evidence that the cheque has

been issued by the respondent- accused. The phrase "shall presume" is defined under Section 4 of the Evidence Act. It implies that the Court shall

read a fact as proved unless and until it is disproved, therefore, the phrase "shall be presumed" occur in Section 139 of the Negotiable Instrument Act

empowers the Court dealing with a complaint under Section 138 of the Negotiable Instrument Act to presume that the holder of the cheque received

the cheque of the nature referred to in Section 138 of the Act for the discharge for the debt or liability unless the contrary is proved.

For these reasons stated above, the judgment dated 21.07.2015 does not stand correct. Therefore, it would be appropriate to set aside the judgment

dated 27.04.2015 and 21.07.2015 and the case is remitted back to the trial Court for decision afresh, without having influenced by this order and to

consider the criminal case on merits after affording opportunity to both the parties on the following points.

(1) Whether the cheque Exhibit P/1 was executed by the respondent for a legal enforceable liability?

(2) Whether the respondent has succeeded in rebutting the presumption under Section 138 of the Negotiable Instrument Act?

Copy of this order be sent to the trial Court along with the record at the earliest. The parties are directed to be present before the trial Court on 13th of August 2018.

The trial Court is directed to dispose of the case at the earliest.