(2015) 10 CAL CK 0013

In the Calcutta High Court

Case No : C.R.R. 1111 of 2013

Tapan Kumar Srimani APPELLANT

Vs

The State of West Bengal and Others RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 313
Evidence Act, 1872 — Section 118
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2015) 10 CAL CK 0013

Hon'ble Judges : Sudip Ahluwalia, J.

Bench : Single Bench

Advocate : Krishnendu Bhattacharjee and Amit Dey, for the Appellant

Final Decision : Dismissed

Judgement

Sudip Ahluwalia, J.—This revisional application is directed against the Judgment and Order dated 05.03.2013, passed by the Ld. Additional Sessions Judge, Fast Track, 5th Court, City Sessions Court, Calcutta in Criminal Appeal No. 142 of 2011, arising from the Judgment and order dated 03.09.2011 passed by learned Additional Chief Metropolitan Magistrate, Calcutta in case No. C-366/2007 under Section 138 of the Negotiable Instrument Act, 1881. The petitioner was Convicted and Sentenced to pay a fine of Rs. 10,000/- in default, to suffer simple imprisonment for one month. He was also directed to pay an amount of Rs. 5,50,000/- to the complainant as compensation.

2. The background of the matter is that the Respondent No. 1 herein as complainant had filed the complaint U/s 138 of the N.I. Act against the appellant/ accused contending inter alia that the accused in discharge of his existing legal debt/liability arising out of the loan granted to him had issued five Account Payees cheques being cheque Nos. 475469 dated 20.03.07, 475470 dated 31.03.07, 478471 dated 21.03.07, 475472 dated 22.03.07 and 475473 dated 22.03.07 each amounting to Rs. 1,00,000/-, drawn on Indian Bank, Strand Road

Branch, Kolkata-1 in favour of the respondent. Those five cheques on being presented within the validity period were dishonoured with the remarks "funds insufficient" and were returned with the returning memos dated 21.03.07 and 28.03.07. Following this the legal demand notice was issued to the accused on 03.04.07, which was purportedly served upon him on 05.04.07. Despite receipt of the same, no payment of the cheque amounts was made, on account of which the complaint was filed.

3. The Ld. Addl. Chief Metropolitan Magistrate, Calcutta was pleased to take cognizance of the same and after examining the complainant, issued process U/s 138 of the N.I. Act. Thereafter, he examined the accused U/s 251 Cr.P.C. In the trial the complainant had deposed as the sole witness in support of his case. The accused/appellant was then examined U/s 313 Cr.P.C wherein he stated that he was ''falsely implicated'' as actually he had no liability or debt at all. He then examined himself as DW and exhibited certain documents, and represented that his case is one of "complete innocence and false implication". The Ld. Addl. Chief Metropolitan Magistrate, Calcutta finally disposed off the complaint by passing his Judgment and order dated 03.09.2011, in which the accused was found guilty of the offence punishable U/s 138 of the N.I. Act, and sentenced to pay a fine of Rs. 10,000/-, in default, to suffer simple imprisonment for one month. He was also directed to pay an amount of Rs. 5,50,000/- to the respondent No. 1 as compensation.

4. The Ld. Appellate Court however dismissed the appeal preferred by the Petitioner/Accused with the following observations -

"I find from the L.C.R. that all the five cheques of Rs. 1 Lakh each bears the signature of Sri Tapan Kumar Srimani being the accused/appellant of this case and those were issued in favour of Sambhu Nath Kundu being the complainant/ respondent No. 1. The banker''s memo goes to show that those cheques on being presented within the validity period were dishonoured due to insufficient fund. Although, it is the claim of the accused that all those cheques were blank and given as security of the repayment, although no payment was actually made. This Court fails to understand, even if, this is taken to be granted for the sake of argument that no loan was actually given to the accused/appellant then what prevented the accused/appellant from giving instruction to his banker regarding ''stop payment'' or to show on the either that despite having sufficient fund to honour the cheques he was compelled for the aforesaid reason to give instruction of stop-payment to his banker to those cheques.

It is further curious to note that even after issuing the notice (Ext. A) by the Ld. Advocate for the accused/appellant where from it appears that in pursuance of the loan amount the accused had issued few undated, unfilled cheques in favour of the complainant/respondent No. 1 then what prompted him to keep mum having received no reply to the said legal notice within the desired time. He even could have taken resort to the appropriate forum for taking measures against such activity of the complainant/respondent No. 1, if any. So these queries do not have any satisfactory explanation. It further appears that the accused/ appellant has taken different stand at different stage of the proceedings before the Ld. Court below. The lower Court record reveals that the accused in his oral evidence stated that he had got Rs. 2 lakhs from the complainant which has already been re-paid by way of installments. But there remains doubt as to the dates of such re-payment of Rs. 2 lakhs. He also failed to bring before the Court any scrap of paper to substantiate the said re-payment of Rs. 2 Lakhs. I am not unmindful to the settled principle, in view of the decision of the Hon''ble Apex Court that the comparing to the case of the complainant U/S 138 of the N.I Act rebuttal of the prosecution case by the accused is a mere preponderance of probabilities. Still I hold that what he has stated before the Court during the evidence should have been proved by the accused to shift the burden upon the complainant to prove his case. Needless to mention that the accused/appellant has miserably been failed to do the same.

In an answer to a question put to him by the Court U/s 313 Cr.P.C with regard to issuance of five cheques he only kept mum by adopting the plea of innocence whereas he had the ample scope to answer the said question properly to deny the existence of his liability.

It is well settled legal principle that the presumption U/s 118 and 139 of the N.I. Act is a rebuttable presumption and the burden lies on the accused to prove that he had no liability/debt on the date of issue of the cheque. It is also a settled principle of law that to bring home an offence under any of the penal provision, it is essential to prove the case beyond the reasonable doubt and the ingredients of the offence should be satisfied. Therefore, the accused has failed to rebut the prosecution case that he had no liability or debt recoverable on the date of issue of the cheque. Therefore, presumption U/s 118 of the Indian Evidence Act should go in favour of the complainant. Therefore, the complainant/respondent No. 1 has established that the said impugned five cheques were issued by the accused in favour of the complainant in discharge of existing liability or debt."

5. The basic grievance of the petitioner is that both the Trial as well as Appellate Court have been unable to appreciate the evidence led in the case in its true perspective. His contention in this regard as mentioned in the written notes of arguments submitted on his behalf is -

"The Hon''ble Revisional Court can look into the illegality, impropriety and/or jurisdictional error where the learned trial court lightly brushing aside the infirmities, improbabilities, contradictions and omissions in the prosecution case and convicting accused on the basis of uncorroborated testimony....

Here the appellate Court had wrongly held the evidence. Here the material evidence has been overlooked by the Appellate Court. Here, the appellate Court ought to have scanned the evidence in its true perspective.

It is the trite of law that the revisional jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice.

Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

6. To support the aforesaid contention, the petitioner has referred to the decision of the Supreme Court in Ram Dass Vs. Ishwar Chander and Others, , wherein a three judge Bench had held- "the expression "legality and propriety" enables the High Court in revisional jurisdiction to re-appraise the evidence while considering the findings of the first appellate Court. A similar view was taken by another three judge Bench of this Court in the case of Moti Ram Vs. Suraj Bhan and Others, ..."

7. The petitioner has also cited some more decisions in which the Supreme Court had set aside convictions for the offence under section 138 of the N.I. Act in cases where, from the evidence led, it could be inferred that the facts and circumstances indicated the non-existence or high improbability of any legal liability, on account of which the statutory presumption in favour of the complainant stood rebutted.

8. In John K. Abraham Vs. Simon C. Abraham and Another, , Supreme Court set aside the conviction on following grounds -

"a) Though the respondent as PW-1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs. 1,50,000/- was paid to him.

b) As regards the source for advancing the sum of Rs. 1,50,000/-, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs. 50,000/-, which he availed by way of loan from the co-operative society of the college where he was employed. Though the respondent stated before the Court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the Court below.

c) In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs. 1,50,000/-.

d) According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque was not in the handwriting of the appellant and that he (complainant) wrote the same.

e) The respondent also stated that the amount in words was written by him.

f) The trial Court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the accused appellant.

g). It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant."

9. Again in Vijay Vs. Laxman and Another, , after both the Trial Court and Appellate court had ruled against the accused persons, the Supreme Court held -

"[13] Applying the ratio of the aforesaid case as also the case of K.N. Beena v. Muniyappan And Anr. (supra), when we examine the facts of this case, we have noticed that although the respondent might have failed to discharge the burden that the cheque which the respondent had issued was not signed by him, yet there appears to be a glaring loophole in the case of the complainant who failed to establish that the cheque in fact had been issued by the respondent towards repayment of personal loan since the complaint was lodged by the complainant without even specifying the date on which the loan was advanced nor the complaint indicates the date of its lodgement as the date column indicates ''nil'' although as per the complainant''s own story, the respondent had assured the complainant that he will return the money within two months for which he had issued a post- dated cheques. The complainant/appellant has conveniently omitted to mention the date on which the loan was advanced which is fatal to the complainant''s case as from this vital omission it can reasonably be inferred that the cheque was issued on 14.8.2007 and was meant to be encashed at a later date within two months from the date of issuance which was 14.8.2007.

Under the background that just one day prior to 14.8.2007 i.e. 13.8.2007 an altercation had taken place between the respondent-accused and the complainant-dairy owner for which a case also had been lodged by the respondent-accused against the complainant''s father/dairy owner, missing of the date on which loan was advanced and the date on which complaint was lodged, casts a serious doubt on the complainant''s plea. It is, therefore, difficult to appreciate as to why the cheque which even as per the case of the complainant was towards repayment of loan which was meant to be encashed within two months, was deposited on the date of issuance itself.

The complainant thus has miserably failed to prove his case that the cheque was issued towards discharge of a lawful debt and it was meant to be encashed on the same date when it was issued specially when the complainant has failed to disclose the date on which the alleged amount was advanced to the Respondent/ Accused. There are thus glaring inconsistencies indicating gaping hole in the complainant''s version that the cheque although had been issued, the same was also meant to be encashed instantly on the same date when it was issued.

14. Thus, we are of the view that although the cheque might have been duly

obtained from its lawful owner i.e. the respondent-accused, it was used for unlawful reason as it appears to have been submitted for encashment on a date when it was not meant to be presented as in that event the respondent would have had no reason to ask for a loan from the complainant if he had the capacity to discharge the loan amount on the date when the cheque had been issued. In any event, it leaves the complainant''s case in the realm of grave doubt on which the case of conviction and sentence cannot be sustained."

10. In K. Subramani Vs. K. Damodara Naidu, , the case of the complainant was that the accused had borrowed a loan of Rs. 14 lakhs in cash on 1.12.1997 from him to start granite business, promising to repay the same with 3% interest per month on demand and issued post-dated cheque.

The Trial court observed that complainant had failed to show any origin or source of money, and so the accused was acquitted. But the High Court reversed the order of acquittal.

The Supreme Court however overturned the decision of the High Court by observing that that firstly no source was disclosed - no income tax return was filed - Both of them were governed by the Government Servants'' Conduct Rules which prescribes the mode of lending and borrowing- There is nothing on record to show that the prescribed mode was followed. Though the complainant was an income-tax assessee he had admitted in his evidence that he had not shown the sale of site No. 45 in his income-tax return.

11. In Rev. Mother Marykutty Vs. Reni C. Kottaram and Another, , the Supreme Court held -

"The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances...."

12. Relying on the aforesaid decisions, the petitioner has sought to emphasise that this Court must revisit the evidences led in the Ld. Trial Court, which, according to him, have the effect of negating the presumption against him under Section 139 of the Act.

13. From his side, however, the complainant/respondent has placed various decisions in which it has been laid down that there is hardly any scope for the Revisional Court to reappreciate the evidence led in a Trial, particularly if both the Courts below have already considered the same.

14. In Munna Devi Vs. State of Rajasthan and anr, it was held -

"3. We find substance in the submission made on behalf of the appellant. The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged. This Court in Kanti Bhadra Saha & Anr. v. State of West Bengal has held that there is no legal requirement for the trial court to write a reasoned or lengthy order for framing the charges."

15. Similarly in Duli Chand Vs. Delhi Administration, it was held -

"4. Now the jurisdiction of the High Court in a Criminal Revision Application is severely restricted and it cannot embark upon a re-appreciation of the evidence, but even so, the learned Single Judge of the High Court who heard the revision application, examined the evidence afresh at the instance of the appellant. This was, however, of no avail, as the learned single Judge found that the conclusion reached by the lower Courts that the appellant was guilty of gross negligence. Was correct and there was no reason to interfere with the conviction of the appellant. The learned single Judge accordingly confirmed the conviction and sentence recorded against the appellant and dismissed the revision application. Hence the present appeal by special leave obtained from this Court."

16. In State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others, it was observed -

"14. We have heard the learned Counsel for the parties at length and looked into the relevant evidence on record. In our considered opinion the learned Single Judge of the High Court of Bombay exceeded his revisional jurisdiction by embarking upon in depth re-examination of the oral and medical evidence. Most surprisingly, the High Court has come to a conclusion, contrary to be consistent one reached by the two Courts, that the happening of the incident, as alleged, appears to be doubtful."

17. The respondent has also contended that in the present case the petitioner has failed to bring on record the requisite facts and circumstances which could have enabled him to rebut the Statutory presumption, in spite of having brought himself on the dock and giving evidence designed to demolish the complainant''s claim. The respondent in this regard has relied on the decision of the Supreme Court in Rangappa Vs. Sri Mohan, in which the supreme Court had held -

"To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist."

18. In the present case, in order to assess whether the petitioner/accused has been actually able to bring on record such facts and circumstances upon consideration of which the Court may either believe that the consideration did

not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist, some reappraisal of the overall evidence led in the case does appear to be necessary.

19. It has first of all been emphasised on behalf of the Petitioner that the basic legal requirement of any transaction exceeding Rs. 20,000/- has not been adhered to in this case, which in itself casts a doubt upon the genuineness of the loan transaction and the consequent legal liability, as claimed by the complainant. The Ld. Trial Court in this regard had observed that such legal requirement does give rise to penal consequence under the Income Tax Act. But non-compliance of the same does not automatically render the transaction as void, nor any of the rights and obligations between the parties inter-se get affected.

20. Learned Counsel for the Petitioner has however drawn attention of this Court to the fact that the complainant in his cross-examination had stated that he had lent the amount of Rs. 5 lakh to him by Ten separate and unequal instalments. But he could not mention the date of even one of such transactions, nor any such date of payment was mentioned in the original petition of complaint. But it is seen from the own evidence of the petitioner/accused as the DW, that he has stated in his examination-in-chief that he got an amount of Rupees 2,00,000/- from the complainant, which he also claims to have returned by way of instalments. He however did not mention any details of such instalments or the dates on which he paid the same. In such circumstances, the similar inability of the complainant to mention about the amounts or dates of the instalments by way of which he claims to have given the loan to the petitioner need not be considered adversely.

21. Again, it has been emphasised on behalf of the petitioner that the complainant has been unable to show that he was possessed of sufficient means from which he could have given the alleged amount of Rs. 5 lakhs as loan. It is however seen that the complainant had stated in his cross-examination that the amount of Rs. 5 lakh given by him to the accused was made up on account of a withdrawal of an amount of Rs. 1,50,000/- from the Bank, and the balance of Rs. 3,50,000/- which was already in his hands. There is of course no material on record to show any such withdrawal. Nevertheless, it has also been asserted on behalf of the complainant that he was in possession of an amount of Rs. 3,50,000/- in cash, since the same had been received by him after taking Voluntary Retirement from his Service, which according to his statement was in the year 1993, which is many years before the alleged transaction. In such circumstances it would not be improbable that the complainant who had received retirement benefits long ago, and had no apparent liability to discharge, would be having the requisite funds with him. This Court therefore finds no substance in these contentions raised on behalf of the petitioner.

22. On the other hand, it is to be noted that the allegations of the cheques in question being deposited in the complainants bank for encashment, their

subsequent dishonour on account of insufficiency of funds, and service of the demand notice on the appellant convict are beyond any controversy. The veracity of these facts is established not only from the oral and documentary evidence led in this regard from the side of the complainant, but also from the own reply sent by the Petitioner''s Advocate to the Complainant''s Advocate, which was marked Exhibit ''A'' from the defence side. The postal initial receipts and the registered acknowledgement card showing service of such reply were marked Exhibit ''B'' and ''C'' series respectively.

23. In the given circumstances the only remaining controversy for the purpose of determining whether the offence against the appellant has been made out therefore is whether the cheques were issued in discharge of some legal liability or not. In this regard the Apex Court has held that the accused has an option to rebut the presumption under Section 139 by highlighting various circumstances before the Court to indicate the absence of any legal liability. It is also to be noted that in this particular case the Petitioner tendered himself as the sole defence witness and gave evidence in support of his contention after however having remained virtually silent in relation to the questions put to him by the Learned Trial Court earlier under Section 313 Cr.P.C.

Of course, the burden of proof required from the accused for rebutting the presumption under Section 139 is not to be as hard as expected in case of the complainant. So it would be pertinent to first take note of what the Petitioner had to say in regard to this aspect from the material on record.

24. In the reply sent by his Advocate Mr. Dipankar Kundu (Exhibit A) it was stated on behalf of the accused -

"That I have instructions by my client to state that in pursuance to a loan account as per your client''s instruction, my client had issued few undated, unfilled cheques in favour of your client which only bears my client''s signature with the assurance from the side of your client that the said cheques will be utilized for each B.N.I i.e. Rs. 1,00,000/- one by one after intimation and/or information to my client-totaling to a sum of Rs. 5,00,000/- and also with the assurance that the said cheques will never be produced without prior consent of my client.

That I have further instructions by my client to state that without any intimation and/or information to my client your client misutlised the same by depositing the same to your client''s Banker for encashment."

25. It is thus seen that in the aforesaid reply the petitioner had not mentioned anywhere about the actual loan amount, although he stated subsequently in Court that the loan amount was Rs. 2 lakhs only, and that it was repaid later on in cash. In this manner the petitioner has indirectly admitted about a loan transaction concerning a loan taken by him, in which of course the actual amount covered is at a variance from the complainant''s claim. After having thus first admitted about the loan account in his Advocate''s reply, without specifying the

amount of loan in the same, and having remained totally silent in this regard during his examination under section 313 of the Cr. PC, he has subsequently tried to make out a case that a loan was indeed taken, although for a lesser amount, which was also subsequently paid up. In the given circumstances the own admission of the petitioner regarding existence of the loan account dispels any notion that might arise to suggest the total nonexistence of a legal liability towards the complainant. As such, in the absence of any document or other verifiable material to support the petitioner''s claim, the only option available to the Court(s) would be to accept that the loan was actually for the amount of Rs. 5 lakhs as claimed by the complainant, since the cheques in question were issued by the petitioner, which covered the amount claimed by the complainant. To sum up therefore, the opinion of this Court is that the decisions relied upon by the petitioner do not help him, as he has failed to rebut the Statutory presumption against him under section 139 of the NI Act in the given facts and circumstances.

The Revisional application is therefore dismissed.

