HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 56 of 2010

Madan Tiwari

Applicant

Versus

State Of Chhattisgarh

Respondent

Post for pronouncement of the judgment on .05.2019

JUDGE
Sd/-

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on : 05.04.2019

Judgment delivered on : . .2019

CRR No. 56 of 2010

- Madan Tiwari S/o. Shiv Prasad Tiwari, Aged about 55 years, R/o. Dongargaon, Tahsil and district Rajnandgaon (CG)

---- Applicant

Versus

1. Yashwant Kumar Sahu S/o. Brijlal, Aged about 27 years, R/o. Bhadra Post Tarri, Tahsil Gurur, District Durg (CG)
2. State Of C.G.

---- Respondents

For Appellants : Shri Malay Kumar Bhaduri, Advocate
For Respondent No.1 : Shri R.K.Pali, Advocate
For Respondent No.2/State : Shri S.K.Mishra, PL

C A V Order

Hon'ble Smt. Justice Rajani Dubey

/05/2019

Being aggrieved by the judgment dated 22.01.2010, passed by the 12th Additional Sessions Judge (FTC) Durg in Cr.A. No. 80/2007 whereby the judgment dated 29.05.2007 passed in Cr. Case No. 780/2007 has been affirmed by convicting the applicant under Section 138 of the Negotiable Instrument Act and sentencing him to undergo RI for two years and fine of Rs. 5,000/- with default stipulation.

2. Short facts of the case are that the respondent No.1 filed a complaint alleging that applicant, who is running an institution (Pleasant Health Welfare Foundation) at Dongargaon and has appointed the complainant and 21 other persons on agreement basis. It is further case that the complainant and other persons deposited some amount as per the agreement, with the institution. In the agreement it was mentioned that the amount so deposited would be refunded after completion of probation period of one year. It is the case of the complainant and other persons that after completion of probation period, they have not been regularized therefore, the complainant and others demanded for refund of the amount of Rs. 3,16,000/- from the applicant/institution. The applicant issued a cheque bearing No. 402428 dated 20.03.2004 for Rs. 3,16,000/- in favour of the complainant. When the cheque was deposited by the complainant in the bank, the bank dis honoured stating therein that payment of the cheque was not being made because of insufficient amount being in the account of the drawer. Thereafter, the opposite party-applicant was sent a legal notice dated 10/05/2004 and the complaint was presented in the Court against the opposite party-accused. Thereafter, complainant issued a legal notice and when the applicant did not respond to the same, complaint was filed against the applicant for the offence under Section 138 of the Negotiable Instrument Act. After framing the charges and recording of evidence, learned trial court allowed the complaint filed by the respondent No.1 holding that the applicant has committed offence punishable under Section 138 of the Negotiable Instrument Act and sentenced him to undergo RI for

two years and fine of Rs. 5,000/- with default stipulation. Against this order, the applicant filed Cr.A. No. 80/2007 before the appellate authority whereby the judgment of conviction and order of sentence was affirmed. Hence, this present revision filed by the applicant.

3. Counsel for the petitioner argued that the learned court below committed an error in convicting the applicant for the offence under Section 138 of the Act. He submits that no loan was given to the petitioner by the respondent No.1/complainant and it is for the respondent No.1 to prove the burden that loan of Rs. 3,16,000/- was given to the applicant but there is nothing on record to show that any loan was given to the applicant by respondent No.1. The courts below have wrongly held that burden of prove lies upon the accused/applicant. The complaint was premature before the trial court and the complainant had no cause of action to file complainant on behalf of other 21 persons and it is clear from the complaint that the cheque has not been issued against any debt. The applicant had not issued the cheque in question and no handwriting expert has been examined by the complainant/ The complainant failed to establish this legal aspect of the case that the applicant was the Managing director of the Institution and authorized signator of the institution. The courts below have misinterpreted the provisions of Section 138 of the Negotiable Instruments Act as well a failed to appreciate the testimony of the witnesses.

4. In support of his argument, he has relied upon in the matter of ***Mujeeb Husain @ Sonu Vs. Ismail S/o. Noorbaksh Musalman***

and another reported in ***2009(2) MPLJ 285***.

5. I have heard learned counsel for the accused-applicant, learned State counsel as well as learned counsel for the complainant and perused the materials available on record.

6. Yashwant Kumar (PW-1) has stated that he is not aware as to how much amount has been deposited by each one of them (21 persons). He has stated that he has not been given any cheque for the amount of Rs. 25,000/- which he has deposited with the said institution. He however has denied any legal notice to the applicant. He has stated that when the cheque given by the applicant was deposited by the complainant in the bank, the same was dis honoured stating therein that payment of the cheque was not being made because of insufficient amount being in the account of the drawer. Narendra Kumar Verma (PW-2) ha stated that he was posted as Branch Manager at Bank of Baroda, Gurur at the relevant time i.e. July 2004 and the complainant had given cheque of Rs. 3,16,000/- on 22.03.2004 for depositing the same in the said bank. When the same was sent to the main branch for collection, on 7.4.04, it came to his knowledge that due to insufficient funds the cheque got dishonoured. Subroto Paul (PW-3) is the deputy manager at Bank of Baroda, Branch Raipur and when the cheque came for clearance, due to insufficient funds,it was returned to the bank at Gurur with a note.

7. From close scrutiny of the statements of the witnesses, it is clear that the applicant had signed and gave the cheque to the

complainant. The Apex court in the matter of ***Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited*** reported in ***(2016)10 SCC 458*** has considered and held as below :

> 9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in ***Indus Airways (P) Ltd. V. Magnum Aviation (P) Ltd***., (2014) 12 SCC 539:(2014) 5 SCC (Civ) 138:(2014) 6 SCC (Cri) 845 with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the section is attracted and not otherwise.
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> 10. Reference to the Facts of the present case clearly shows that though the word "security" I used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28.02.2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.
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> 11. The judgment in ***Indus Airways*** is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself on a par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later lilability is clearly covered by the statute in question. Admittedly, on the at eof the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against ***Indus***

Airways where the purchase over had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liablity but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of instalments was also described as “security” in the loan agreement. In applying the judgment in ***Indus Airways,*** one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

12. The crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of the different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.

17. In ***Rangapa V. Sri Mohan***, (2010)11SCC 441: (2010)4 SCC(Civ) 477:(2011) 1 SCC (Cri) 184, this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficent to rebut the said presumption. A post-dated cheque is a well-recognized mode of payment ***Goaplast (P) Ltd. Vs. Chico Usula D”Souza*** (2003) 3 SCC 232:2003 SCC(Cri) 603.

That the purport of the special law under the Negotiable Instruments Act is to ensure that the promise to pay is abided by the person so promising. The provision under Section 139 of the NI

Act is that it shall be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138 of NI Act for the discharge, in whole or in part, of any debt or other liability.

8. In light of above, the signing of cheque by the applicant indicate that he admitted his liability, and he has not rebutted the presumption of 139 Negotiable Instruments Act, therefore not only debt but the liability also call for criminal proceedings under this act. With reference to the facts of the present case, the Court noted that the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused/applicant and it was presented in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. Both the courts below have convicted the applicant under Section 138 of NI Act. The Trial Court and the Appellate Court arrived at the specific concurrent factual finding that the cheque had admittedly been signed by the applicant-accused. Thus, I find no merit in this revision and the same is hereby dismissed and it is dismissed as such.

Sd/-
(Rajani Dubey)
Judge

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