IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Revision No. 178 of 2014

Mohammad Sayeed ..... Petitioner

Versus

1. The State of Jharkhand.
2. Md. Jamaluddin ....Opposite Parties

CORAM : HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Petitioner :Mr. A. K. Das, Adv.
For the Opposite Party-State : APP
For the O.P.No.2 :Mr. B.M.Tripathy, Sr. Adv.

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C.A.V. on 22.4.2022 **Pronounced on 10/08/2022**

Heard learned counsel for the parties through V.C.

2. This revision application is directed against the judgment dated 3.2.2014 passed by the learned Principal Sessions Judge, East Singhbhum at Jamshedpur in Criminal Appeal No.292 of 2012; whereby the judgment of conviction and order of sentence, both dated 9.10.2012, passed by the learned S.D.J.M, Jamshedpur, in C/1 Case No.1757 of 2009; whereby the petitioner was convicted for the offence under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for 1 year and to pay a sum of Rs.9 lakhs to the complainant by way of compensation; has been affirmed and the appeal filed by the petitioner was dismissed.

3. The prosecution case in short is that a complaint case was filed by Opposite Party No.2 on 01.07.2009 mainly stating therein that the parties are known to each other and out of acquaintance, in order to help the

petitioner in his business, Opposite Party No.2 had given Rs.7,20,000/- during the period March, 2007 till July, 2007 through several account payee cheques from time to time as well as cash also and the account payee cheques were encashed by the accused/petitioner and accordingly the petitioner received Rs.7,20,000/-. It has been further stated that the petitioner undertook to repay the said amount within two years from the date of receipt and in lieu thereof had issued post-dated account payee cheque bearing No.891585 dated 27.12.2008 drawn upon Canara bank, Mango Branch, Jamshedpur. As the accused did not pay the said amount within two years, the complainant (Opposite Party No.2) firstly presented the cheque on 27.12.2008 in Bank but the same was dishonoured and later on, on the assurance of the petitioner, he claimed to have re-presented the cheque on 18.05.2009, but the same was dishonoured and a Cheque Return Memo dated 19.05.2009 was issued intimating Opposite Party No.2 regarding the dishonor of the said cheque bearing No. 891585 due to insufficient fund. The complainant claims to have thereafter given a notice to the petitioner on 10.06.2009 requesting the petitioner to make payment of the aforesaid amounting of Rs.7,20,000/- to the complainant within 15 days, but despite service of notice the accused did not repay the amount, rather submitted a reply through his lawyer on 19.06.2009 wherein it has been alleged that complainant never paid the sum of

Rs.7,20,000/- to the petitioner but the said cheque was issued by the petitioner in favour of complainant as a security for investment in real estate business with the complainant which did not materialize and the complainant did not return the said cheque saying that the same was misplaced and now the complainant wants to utilize the said cheque in illegal manner and the petitioner disowned to have received any amount as claimed in the legal notice. Accordingly, the complaint was filed.

4. Mr. A. K. Das, learned counsel for the petitioner assisted by Ms. Swati Shalini submit that a serious doubt is casted on the claim of the complainant that the cheque was issued in discharge of outstanding debt and liability as the complainant though in the complaint petition claimed to have advanced loan to the petitioner through account-payee cheques and cash, but in his deposition he admitted that not a single farthing was paid through account-payee cheque rather he claimed to have made the payments through cash and self-drawing cheques which falsifies his entire case.

Mr. Das further submits that this is a case where the complainant has not approached the Court with clean hands and despite even admitting his mistake in mentioning the cheque number in the complaint did not wait for the Court's order and at his own risk tampered with the Court's papers which included the tampering of the cheque number even in the legal notice filed by him

along with the complaint petition. This fact goes to the root of the matter and when a finding has been recorded that the complaint was filed with respect to Cheque No. 891584, the trial could not have proceeded with respect to Cheque No.891585 for which in fact no legal notice was ever issued. It is a settled principle of law that the standard of proof in rebuttal of presumption available under Section 139 of Negotiable Instruments Act, 1881 is evidently 'preponderance of probabilities'. Inference of 'preponderance of probabilities' can be drawn not only from the materials on record but also by the reference to the circumstances upon which he relies. In support of his contention he referred to the judgment passed by the Hon'ble Supreme Court in the case of ***M.S. Narayana Menon Vs. State of Kerala [(2006) 6 SCC 39]*** .

Similar view has been taken by the Hon'ble Supreme Court in the case of ***Anss Rajashekhar Vs. Augustus Jeba Ananth [(2020) 15 SCC 348],*** where the Hon'ble Supreme Court has held as under:-

> ***"13.*** *In the present case, it is necessary now to consider whether the presumption under Section 139 stands rebutted by the appellant-accused. The defence of the appellant is that he has not borrowed the amount of Rs 15 lakhs from the complainant as alleged nor had he issued the cheque (Ext. P-1) in discharge of a legally enforceable debt. Specifically, the defence of the accused is that no payment was made by the complainant to him, in discharge of which the cheques have been issued. His defence was that the cheque was issued to the complainant on an assurance of a loan which would be obtained from a financial institution. This, as we have noted, was also the defence in reply to the notice of demand issued by the complainant.*

> ***15.*** *Besides what has been set out above, an important facet in the matter was that the complainant failed to establish the source of funds which he is alleged to have utilised for the disbursal of the loan of Rs 15 lakhs to the appellant. During the course of his cross-examination, the complainant deposed that earlier, the appellant had furnished two cheques, one of ICICI Bank for Rs 5 lakhs and another of Canara Bank for Rs 10 lakhs which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the appellant. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction.*
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> ***16.*** *On a totality of the facts and circumstances and based on the evidence on the record, the first appellate court held that the presumption under Section 139 of the Act stood rebutted and that the defence stood probabilised. From the judgment of the High Court, the significant aspect of the case which stands out is that there has been no appreciation of the evidence or even a reference to the reasons furnished by the first appellate court. The High Court adverted to the judgment of this Court in Rangappa. Having adverted to that decision, the High Court reversed the order of acquittal by holding that a mere denial of the transactions or an omnibus denial of the entire transaction could not be considered as a tenable defence. The judgment of the High Court is unsatisfactory and does not contain any reference to the evidence whatsoever. There was absolutely no valid basis to displace the findings of fact which were arrived at by the first appellate court, while acquitting the accused.*

Learned counsel further contended that in the instant case, the complainant admitted that he has no document regarding payments claimed to have been made to the petitioner through cash and with respect to his claim of making payment through account-payee cheques. Though the complainant stated in his deposition that he can produce the statement but ultimately did not choose to do so.

Learned counsel further submits that as per the complaint petition, the complainant claims the cheque to have been given as security. This Court in the case of ***Lalan Prasad Vs. State of Jharkhand & Ors reported in 2004(3) ECC 192*** held that admittedly on the date of issuance of the cheque there was no subsisting liability or debt and therefore with respect to a post-dated cheque as collateral security, no case under Section 138 of the Negotiable Instruments Act, 1881 can be said to be made out.

Learned counsel contended that in view of the law laid down by the Hon'ble Supreme Court, the petitioner is entitled to be acquitted and the judgment of conviction and sentence passed by the trial Court and the judgment of dismissal of appeal is liable to be set aside. The appellate Court took into consideration that the petitioner never brought on record the cheque issued by Rakesh Kumar Mishra, however, lost sight of the fact that the bank statement was already produced by the petitioner which was marked as Ext.F which showed the dishonor of the said cheque. The complainant despite opportunity and despite knowing Rakesh Kumar Mishra as a sole witness did not produce him before the trial Court which itself raises doubt on his case and in such circumstances, non-production of the witness named in the complaint petition shall give rise to various presumptions against the petitioner.

He lastly submits that in view of the specific provision under the Income-tax Act, 1961, there is bar in making payment of such huge amount through cash. When the complainant in his deposition admitted that he had made payment through cash to the petitioner, he apparently claims that the act of lending money by cash was in violation of the specific provision of the Income-tax Act, 1961 and, therefore, no legality can be conferred to such transactions nor on the basis of transactions claimed by the complainant which otherwise is barred under law, the petitioner could not have been prosecuted in the instant case. Hence, impugned judgment is liable to be set aside.

5. Mr. B.M. Tripathy, learned senior counsel appearing for the O.P.No.2 submits that a friendly loan of Rs.7,20,000/- was taken by the accused/petitioner with assurance that he will return the money within two years and he also issued a cheque. When the amount was not paid then the cheque was presented twice for encashment before the bank but the same was dishonoured due to insufficient fund. Thereafter, legal notice was sent and in spite of that when the amount was not paid then this case was filed. Mr. Tripathy further submits that the cheque issued by the Complainant/O.P.No.2 has been wrongly typed as 891584 instead of 891585 in the legal notice and in the complaint petition and it is a typographical error. The original cheque bearing number 891585 is marked as

Ext. 1. The legal notice sent by the Complainant/O.P.No.2 was replied by the accused/petitioner.

The petitioner had admitted the issuance of the cheque bearing No.891585 not once but thrice at the stages of the trial. Firstly, in his reply against the legal demand notice which has been marked as Ext.6 and secondly, during his cross examination as a defence witness. In the informatory petition which is marked Ext.C he has himself admitted regarding issuance of cheque no.891585.

He further submits that the defence has merely suggested that the cheque was issued by the accused in favour of the complainant not against liability but as security but defence has not stated that against what security the cheque was issued. Therefore, the defence has not been able to deny the liability.

He lastly submits that there is no error in the findings of the courts below, hence no interference is required and the instant application deserves to be dismissed.

6. Having heard learned counsel for the parties and after going through the LCR; it appears that C.W.-1 in his evidence in chief has fully supported his contention which he has mentioned in the complaint petition. He has said that he has given a friendly loan of Rs.7,20,000/- to the accused with an assurance that it will be returned by him within two years. Accused also issued a cheque bearing no.891585 of Rs.7,20,000/- in his favour. Twice the cheque

was presented in the bank but it was dishonoured. Thereafter, he has sent a legal notice. On behalf of the complainant Ext. 1 has been brought on record which is cheque bearing No.891585 of Rs.7,20,000/- issued in favour of the complainant. Ext.-2 series are the cheque return memo which shows that on presentation of the said cheque in the bank it was dishonored. Thereafter vide Ext.-3 legal notice was sent. The postal receipt and the acknowledgement has been brought on record marked Ext.4 and Ext.5 respectively and the reply of the legal notice has been marked as Ext.6. All these documents brought on record shows that the cheque was issued by the accused in favour of the complainant and on its presentation in the bank it was dishonoured due to "insufficient fund".

On the other hand, during course of argument, Mr. A. K. Das, learned counsel for the petitioner submits that cheque bearing no.891585 does not tally with the legal notice wherein the cheque bearing no.891584 has been written. Further he has said that as per Ext. E the cheque book was issued on 11.11.2008 then how the cheque was issued on July, 2007.

7. Considering the submission made on behalf of the petitioner and after perusing the LCR it appears that in the legal notice which is marked as Ext.3, cheque bearing no.891585 has been mentioned. However, it appears that in the last digit of the cheque number over writing has been

done. D.W.1 is the petitioner himself and in his evidence in cross examination he has said that Ext.1 is in his handwriting and signature. By this way he has admitted his signature and writing in the Ext.1 which shows that the cheque book serial number 891581 to 891590 was issued in favour of the petitioner on 11.11.2008. Ext. 1 which is cheque bearing no.891585 shows that it was issued on 27.12.2008 in favour of the complainant/O.P.No.2 which shows that it was issued after issuance of the cheque book. All these factual aspect has been critically examined by the trial court before arriving at the conclusion.

8. Section 139 of Negotiable Instruments Act clearly states that "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."

Section 118 (g) of Negotiable Instruments Act clearly states that "(g) that holder is a holder in due course:— that the holder of a negotiable instrument is a holder in due course : provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

9. It has been held by Hon'ble Supreme Court in ***Rangappa V. Sri Mohan [(2010) 11 SCC 441]*** that Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under section 139 is a device to prevent undue delay in the course of litigation. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is now a settled position that when an accused has to rebut the presumption under section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution fails.

In ***T. Vasanthakumar V. Vijaykumari [(2015) 8 SCC 378]*** it has been held by the Hon'ble Apex Court that since the cheque as well as the signature has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability."

10. In the case in hand, the petitioner has not disputed cheque in question and signatures found therein.

The petitioner admitted that cheque in question belongs to him and they bear his signature. When the drawer has admitted the issuance of cheque as well as the signature present therein, the presumption envisaged under Section 118 read with Section 139 of NI Act would operate in favour of the complainant. The said provisions lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and there under the court shall presume that the instrument was endorsed for consideration.

Further, in absence of contrary evidence on behalf of the petitioner, the presumption under section 118 and 139 of the NI Act, goes in favour of the complainant/O.P.No.2.

11. There is also no assertion in the complaint petition that the date when accused received Rs.7,20,000/- from the complainant on the same day itself accused issued the cheque; rather it appears that in lieu of the aforesaid loan amount the accused issued a postdated cheque bearing no.891585 in favour of the complainant. The evidence of D.W.1 itself shows regarding his admission with regard to the issuance of the cheque in favour of the complainant.

The trial court after examining all the evidences, both oral and documentary, concluded that on behalf of the complainant/O.P.No.2 sufficient material has been brought on record to prove that the complainant gave loan amount

to the accused and in lieu of the loan amount accused issued cheque Ext.1 in favour of the complainant/O.P.No.2 and on presentation of the said cheque in the bank, it was dishonoured. Thereafter, legal notice was sent.

These factual findings goes to show that all the requirements to establish a case under Section 138 of the N.I. Act has been fulfilled by the complainant.

12. Before parting, it would be relevant to clarify that a wrong cheque number, as alleged in the instant case by the petitioner, mentioned in the complaint petition and/or the legal notice may not be the end-all and be-all of the case. The other factors are also required to be seen to decide as to whether the complainant has been able to prove his case.

At the cost of repetition, the original cheque was placed before the trial court and the same was exhibited. The cheque as well as the signature has been accepted by the petitioner. Thus, the presumption under Section 139 would operate and the wrong number of the cheque in the complaint and/or in the legal notice would not make any difference and has to be taken as typographical error.

13. In view of the aforesaid discussion, no interference is required so far as judgment of conviction is concerned and the same is hereby sustained.

However, so far as compensation amount and sentence is concerned, the learned Appellate Court has sustained the compensation amount of Rs.9 lakhs and

sentenced the petitioner to undergo S.I. for a period of 1 year.

13. Having regard to the facts of the case and looking to the continuity of litigation, since the case is of the year 2009 and 13 years have elapsed; interest of justice would be sufficed if the sentence part is modified in lieu of compensation itself. Thus, the sentence of one year is hereby modified to the extent that the petitioner shall pay an amount of Rs.1 lakh over and above 9 lakhs compensation and after paying Rs.10 lakhs in total shall be discharged from his liability of bail bond.

It is clarified that the petitioner is directed to pay the aforesaid amount within a period of 10 weeks' from today, failing which the trial court shall proceed in accordance with law.

14. With the aforesaid observations, directions and modification, the instant criminal revision application is disposed of.

15. Let a copy of this order be communicated to the court below and also to the petitioner as well as O.P.No.2 through the officer-in-charge of concerned police station.

16. Let the lower court record be sent to the court concerned forthwith.

(Deepak Roshan, J.)

Jharkhand High Court,
Ranchi.
Dated:-10/08/2022
Fahim/-N.A.F.R/