TEJENDRA SINGH v. RAVINDRA KUMAR , (2019-1)193 PLR 14 (IJ)

BOMBAY HIGH COURT

Before: Mr. Justice S.M. Modak.

TEJENDRA SINGH – Petitioner.

Versus

RAVINDRA KUMAR – Respondent.

CRIMINAL APPEAL NO.103 OF 2008

(i) Negotiable Instruments Act, 1881 (26 of 1881) Sections 138, 139 and 146 – Bank memo issued by Drawee bank not bearing the seal of the bank – Witness from the payee's bank though has identified the signature of the Branch Manager on the Memo of payee bank, is not knowing the reason for dishonour – There is clear reference in the letter that the cheque is returned unpaid – Drawee bank representative is not examined – Trial Court rightly refused to accept bank memo issued by Drawee bank as it does not bear the seal of the bank – The presumption under section 146 of the N.I. Act will not come to his rescue – There has to be the seal on the bank slip before the presumption as to dishonour can be drawn – Complainant could have given benefit of this lacunae even if proper person from SBI, that is signatory of the letter, could have been examined – Complaint dismissed.

(ii) Negotiable Instruments Act, 1881 (26 of 1881) Sections 138 and 139 – Allegation that the partnership firm between the complainant and the accused was dissolved and amount covered under the cheque represents the share of the complainant arrived at on the settlement of accounts – Even though the complainant adduced sufficient evidence on the point of formation of firm, running business and on the point of dissolution of firm, he falls short in proving the case of settlement of accounts and arrival of share amount – Unless that is done, liability cannot be fastened on the accused.

Mrs. Ritu Jog, for the Appellant. *Shri S.B. Mohta,* for the Respondent.

JUDGMENT

S.M. Modak, J. – *(17th January, 2019)* –

This is complainant's appeal against the judgment acquitting the accused for commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I. Act" for the sake of brevity). Respondent is the accused. Appellant and respondent will be referred by their original status before the trial Court.

2. Both the sides adduced evidence before the trial Court. Court refused to give benefit of legal presumption under Section 139 of the N.I. Act to the complainant. Trial Court finds accused successful in making out a probable defence. So, issue before this Court is whether the complainant has proved legal liability and whether trial Court has erred in appreciating the evidence.

3. I have heard Mrs. Ritu Jog, learned Counsel for complainant/appellant and Shri B.N. Mohta, learned Counsel for accused/respondent. With their assistance, I have gone through the record. The complainant and the accused are having different versions about liability covered by the cheque in question. The partnership firm between the complainant and the accused was dissolved and amount covered under the cheque represents the share of the complainant arrived at on the settlement of accounts. This is the complainant's version. Whereas on the other hand, the accused had put up two versions. Denial of constitution of firm, it's dissolution and settlement of accounts is one version. Whereas, taking a hand loan from the complainant, issuing a cheque towards security, repayment of hand loan and misuse of cheque by the complainant is another version.

4. Both parties were knowing each other earlier to the financial transaction of the year 2000, whether it was of a partnership firm/hand loan. Accused was running a shop of selling matching

blouse pieces. It was in the name and style as “Didi Matching Blouse” at Nagpur. The shop of the accused was rented one in the name of his father. Whereas, there is a shop of sister of complainant, adjoining the shop of the accused.

5. Overall the foundation of the complainant’s case is contribution of money of Rs.2,50,000/- in the partnership business. It was started as per Registered Deed of Partnership, dated 15/11/2000. They continued the business till the year 2005. On persistent demand, accused has shown the income tax returns for the year 2000-01 to 2004-05. They were in the individual name of the accused and not in the firm’s name. This created a doubt about bona fides of the accused. Accused gave a resignation notice. Then the accounts were settled and a cheque for Rs.3,25,000/- was issued towards the share of the complainant. It got dishonoured and accused failed to pay amount in spite of receipt of notice.

6. COMPLAINANT EXAMINED FOLLOWING WITNESSES :

a] himself

b] Mangala Uddav Sukhdeve, representative from State Bank of India, where cheque was deposited for encashment.

c] Sudhir Sitaram Desai, representative of Rupee Cooperative Bank, wherein there was current account in the name of Didi Matching Blouse.

d] Prem Ashok Mulchandani, Income Tax consultant, who filed returns.

e] Milind Anand Bhangare, representative from Office of Assistant Registrar of Firms.

Whereas, accused also entered into witness box. Trial Court has given categorical findings on disputed issues. I will deal with them and gave my own findings.

7. FINDINGS OF TRIAL COURT & CORRESPONDING FINDINGS OF THIS COURT:

a] Formation of Partnership Firm :

i. The accused in his evidence has taken inconsistent stand. On one hand, he denied execution of partnership deed, whereas on the other hand, he deposes about equal investment by them in the partnership business and stock being the sole contribution of the accused. Complainant has deposed about the manner of constitution of the firm, execution of partnership-deed and it’s registration.

ii. There is also an evidence of Shri Bhangare, representative from the Office of Assistant Registrar of Firms. The deed was produced.

iii. This evidence was sufficient to hold about constitution of firm from 15/11/2000. Admitting partnership business and denying the execution are inconsistent stands. Deed was registered with public office. It is a public record of private documents. Trial Court has rightly believed about the firm and it’s business.

b] Running of Business & Dissolution of Firm :

i. Complainant used to sit in the shop. Both have undertaken the responsibility to file returns. Return in the name of the firm could not be submitted. It was due to non-cooperation of the accused.

ii. There is oral evidence of Income Tax Consultant Shri Prem Mulchandani. The certified copies of Income Tax Returns were tendered in evidence (Exh.51, 52 & 53). It bears the signature of the accused. Accused went to the extent of denying them.

iii. It is difficult for any consultant to prepare Income Tax Returns with forged signature of the assesses. There is no reason to prepare such forged returns. Though accused has not met him, returns were submitted on the basis of information given by Mahesh Kunjwani, Accountant of accused. I believe them.

iv. In order to prove the running business, the complainant heavily relied upon these Income Tax Returns, Current Account Statements produced through Shri Sudhir Desai representative of Rupee Cooperative Bank and statements produced by Mangala Sukhdeve from State Bank of

India. So also in order to prove dissolution of the firm, he relied upon the notice dated 2/5/2005 and it's acknowledgement. The core issue is legal presumption under Section 139 of the N.I. Act coupled with the documents as referred above on one hand and the probable defence made out by the accused on the other hand if considered together, whether the offence is said to be proved and whether the findings of the trial Court are correct. Before giving any opinion on this issue, it will be useful to refer to the ratios laid down in the judgments relied upon by both the sides.

Citations :

v. Both have relied upon catena of decisions. The law on the point of interpretation of the Section 139 of the N.I. Act has evolved by passage of time. There was a need to interpret those provisions very strictly. That is why as long as in the year 2001 Hon'ble Supreme Court in case of *Hiten P. Dalal v. Bratindranath Banerjee* – 2001 AIR SCW 3861 probable defence was not considered to be sufficient to discharge the onus by the accused. The presumption under Section 139 of N.I. Act was construed to be mandatory presumption and independent evidence was held to be necessary on behalf of the accused. However by passage of time and possibly due to increasing trend of voluminous prosecutions, Hon'ble Supreme Court was required to take the view that there can only be presumption about debt or liability. It mean to say that presumption does not extend to legal debt or liability. The presumption of innocence was given more weightage. This was the view expressed in case of *Krishna Janardhan Bhat v. Dattatraya G. Hegde* – (2008) 4 SCC 54. However this view was overruled by Hon'ble Supreme Court in case of *Rangappa v. Sri Mohan* – (2010) 11 SCC 441. The interpretation "presumption relates to legal debt or liability" as existing earlier was restored.

vi. The principles about standard of proof and onus of proof were discussed. The burden on accused is only about preponderance of probabilities. It can be discharged also by taking assistance to documents which are already on record.

vii. There is one more judgment relied upon by the complainant which throw light on the approach of the Appellate Court while dealing with dishonour of cheques appeals. It is in case of *Purushottam s/o Maniklal Gandhi v. Manohar K. Deshmukh & another* – 2007(1) Mh.L.J. 210.Normally, the Appellate Court is slow in interfering the acquittal by the trial Court. The reason is that presumption of innocence is reinforced by the findings of one Court. This approach was held not applicable when dishonour of cheques cases are involved.

viii. These are the basis principles which every Court should follow in assessing the evidence in such type of cases. I will refer to few other judgments relied upon by both the sides touching the subject. But what I feel is that the observations made therein restrict to the facts involved in those cases.

ix. In the case of *Purushottam Gandhi* (supra), the acquittal was converted into conviction. There was blank cheque given and the payee was held entitled to complete it. There were inconsistencies in the defence of the accused. In case of *Moideen v. Johny* in Criminal Appeal No.516 of 2001 of Kerala High Court, the accused was convicted for absence of evidence to rebut the presumption. In case of *Haribhau Baliram Gondchawar v. The State of Maharashtra & another* in Criminal Appeal No.239 of 2009 decided by this Court, the accused was convicted for failure to discharge the burden. Whereas, in case of *Shri Ram Transport Finance Co. Ltd. v. State of Rajasthan & anr.* – III(2018) BC 195(Raj.), lacunae in the foundation of case of complainant were held insufficient to draw presumption in his favour.

x. These are the legal principles culled out only on the basis of the judgments relied upon by both the sides. On this background, when the evidence is considered, I found that there are lacunae in the evidence of complainant as well as there are lacunae in the evidence of accused.

xi. Accused claims repayment of hand loan of Rs.20,000/- and cheque issued towards the security was not claimed back. I am not impressed by this story for the simple reason that there are no documents of taking hand loan. At the same time there are no documents showing it's repayment. Furthermore, there is no reply to the notice. I found it to be after thought. I am also not impressed by the argument that this loan repayment theory is not challenged during cross-examination taken on behalf of complainant. Two judgments are relied upon by the accused. It is

in cases of *Balaji Sarjerao Kamble v. State of Maharashtra* – 2017(5) Mh.L.J. (Cri.)39 and *Kundan s/o Nanaji Pendor v. State of Maharashtra* – 2016(6) Mh.L.J. (Cri.) 565. The inference about implied admission can be drawn on the basis of facts and circumstances. In case before us there are suggestions put to the accused during his cross-examination, which suggests that the theory of repayment of hand loan is challenged by the complainant. The accused was put questions on the theory that the cheque was issued for payment of share arrived at on dissolution of the firm.

xii. I do not find any difficulty in accepting the evidence of the complainant on the point of contribution of Rs.2,50,000/- towards his share in the business. He had given details of cheques as to how he contributed his share periodically. I also do not find any difficulty in accepting the evidence of the complainant on the point of business being started on partnership basis. But, the controversy starts thereafter only. The proved Income Tax Returns were filed in personal name of the accused and not in the name of the firm. This circumstance only assists the complainant in supporting his suspicion about the bona fides of the accused and it does not extend to the extent of proving any income/profit of the firm. Current Account Statement in the name of 'Didi Matching Blouse' is also produced through witness Sudhir Desai. Even if, we keep aside the issue of ownership of this account, can this statement will suggest us anything about income, profit/loss of the firm?. The answer is certainly no. Income, profit/loss can be inferred only through Profit & Loss Account or Balance-sheet.

xiii. There will absolutely no issue in accepting the evidence of complainant about his intention to retire from the partnership business. The notice dated 02/05/2005 is self explanatory. Though it's intimation is not given to the Office of Registrar of Firms, the contents of notice sufficiently show the intention to retire from the business.

xiv. Now the crucial question comes whether on the basis of presumption under Section 139 of N.I. Act we can presume about the debt or liability towards the complainant ? But, I am unable to accept the complainant's evidence. The presumption does not help us to the fullest extent. There is no evidence about loss suffered by the firm as contended by the accused in the evidence. At the same time, there is certain procedure laid down as per the provisions of Indian Partnership Act relating to the settlement of account. It says about appropriation of the income of the firm. The retirement notice was given on 02/05/2005 and the cheque bears the date 30/6/19(20)05. The complainant does not come with the case that after this notice, they have sat together and accounts were settled through the help of some Accountant/Chartered Accountant. The intervention of some third person as such is not necessary. But, some exercise needs to be done prior to finalization. There is neither document showing finalization of accounts nor oral evidence sufficiently give the details as to how the accounts were settled and how the figure of Rs.3,25,000/- was arrived at.

xv. Trial Court has rightly laid emphasis on this aspect. There is reason to believe that the accused has discharged the onus by pointing out shortcomings in the evidence of the complainant. The ratios laid down in the judgments relied upon by the complainant on the point of drawing of presumption do not come to the rescue of the complainant.

xvi. There was also an objection about not joining the firm as the party. The accused relied upon the judgment in case of *Kailash s/o Dashrath Khatal v. Jijabapu s/o Shahaji Kakad & anr.* in Criminal Application No.5169/2017 of this Court. There was dissolution of the firm and cheque was issued by the accused in his personal name and, hence, the liability was not proved. Whereas, the complainant relied upon the judgment in case of *Aneeta Hada v. Godfather Travels & Tours Private Limited* – (2012)5 SCC 661. Hon'ble Supreme Court has considered in which cases not joining of company is fatal and in which cases it is not fatal. I have already negatived the case of the complainant. Hence, I am not going into this issue.

c] Dishonour of Cheque :

i. There are 2 banks. One is drawee bank i.e. UCO Bank on whom cheque was drawn and payee's bank i.e. State Bank of India, in which complainant has deposited the cheque. This bank has limited role of sending the cheque through clearing to payee bank. Shri Mangesh Sukhdeve representative from S.B.I. He has identified the signature of the Branch Manager on the letter dated 06/10/2006. He need not know who has issued the cheque. He is not knowing the reason

for dishonour. There is clear reference in the letter that the cheque is returned unpaid. I think the complainant is unfortunate in this evidence also.

ii. Admittedly, UCO Bank representative is not examined. Trial Court refused to accept bank memo issued by that bank. It does not bear the seal of the bank. I agree with the trial Court. The presumption under section 146 of the N.I. Act will not come to his rescue. There has to be the seal on the bank slip before the presumption as to dishonour can be drawn. I could have given benefit of this lacunae even if proper person from SBI, that is signatory of the letter, could have been examined. It seems that while conducting the prosecution, these minor procedural aspects are overlooked.

d] Receipt of Notice : The trial Court has concluded in favour of the complainant about proof of notice. The notice, dated 12/07/2005, postal receipt and acknowledgment are proved. The complainant relied upon the judgment in case of *Ajeet Seeds Ltd. v. K. Gopala Krishnaiah* – AIR 2014 SC 3057 on the point of limitations, while quashing the complaint on the ground of absence of proof of notice. But, I am convinced about sufficiency of service of notice and correctness of the findings of the trial Court.

8. FINAL CONCLUSION :

Even though the complainant adduced sufficient evidence on the point of formation of firm, running business and on the point of dissolution of firm, he falls short in proving the case of settlement of accounts and arrival of share amount. Unless that is done, liability cannot be fastened on the accused. So also, he failed to prove fact of dishonour of cheque. I find no reason to interfere in the judgment of trial Court and appeal needs to be dismissed. Hence, the appeal is dismissed. Parties to bear their own costs.

S.S. – Appeal dismissed