

(2017) 03 RAJ CK 0001
RAJASTHAN HIGH COURT
Case No: 1049 of 2015

Manjeet Singh

APPELLANT

Vs

Ranjeet Singh

RESPONDENT

Date of Decision: March 31, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 313, Section 311, Section 374, Section 378 - Power to examine the accused - Power to summon material witness

Hon'ble Judges: Prashant Kumar Agarwal

Bench: SINGLE BENCH

Advocate: G.P.Kaushik, K.D.Nagar, R.R.Gurjar, Ajeet Bhandari, Jitendra Mishra

Judgement

1. The complainant-appellant has filed this appeal under Section 378 Cr.P.C. against the judgment and order dated 28.11.2013 passed by the Additional Sessions Judge No.3, Jaipur Metropolitan, Jaipur in Criminal Appeal No.15/2013 whereby the learned appellate Court allowed the appeal filed by the accused-respondent under Section 374 Cr.P.C. and by setting aside the judgment and order dated 5.10.2012 passed by the Metropolitan Magistrate No.30, Jaipur Metropolitan, Jaipur in Criminal Case No.61/2009 acquitted the respondent for offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred as "the Act"). Learned trial Court after convicting the respondent-accused for aforesaid offence sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs.three lacs and in default thereof to further serve simple imprisonment for one month. It was further ordered that out of Rs.three lacs to be paid as fine, an amount of Rs.2,90,000/- would be paid to the complainant-appellant as compensation and the remaining amount of Rs.10,000/- be deposited in the exchequer. It is further to be noted that in appeal an application under Section 311 Cr.P.C. was filed by the respondent- accused with a prayer to produce evidence in defence which was

allowed by the appellate Court vide order dated 31.7.2013 and in defence Shri Jaspal Singh and Smt.Gurjeet Kaur were examined on behalf of the respondent.

2. From the evidence available on record and the admissions made by the parties dispute does not exist between them about following facts:-

(1) A transaction of sale was entered into by the respondent- accused, who is real brother of the complainant, in regard to their joint property situated at Delhi and a share of Rs.four lacs was to be paid by the respondent to the appellant-complainant and in this regard Rs.two lacs were paid in cash by respondent to appellant some in July 2008 and in order to pay the remaining amount of Rs.two lacs respondent gave disputed cheques to the appellant. In regard to the payment of Rs.two lac in cash and issuance of disputed cheques an agreement (Ex.P8) was executed by respondent in favour of appellant.

(2) When disputed cheques were presented by the appellant for encashment in his bank on 5.11.2008 they were dishonoured by the reason that the bank account for which they were issued was found closed.

(3) The demand notice sent by the appellant to the respondent through his counsel on 29.11.2008 returned back with a postal remark that addressee could not be found although several efforts were made.

A complaint for offence under Section 138 of the Act came to be filed by the appellant against the respondent with the aforesaid averments with a prayer that respondent may be convicted for aforesaid offence and an amount double the cheque amount may be awarded to the appellant as compensation. Respondent appeared before the trial Court through his counsel and following two defences were taken by him:-

(1) Demand notice was not served upon him as it was not sent to his present and correct address and in absence of service of demand notice offence under Section 138 of the Act is not made out. (2) The remaining amount of Rs.two lacs was also later on paid by the respondent to appellant in cash but appellant did not return the disputed cheque to him and by misusing the same the complaint has been filed. In trial it was not made clear that when this remaining amount was paid.

3. Learned trial Court after appreciating and evaluating the evidence available on record did not accept both the defences taken by the respondent and in view of the fact that cheques in dispute were admittedly issued by the respondent and the same were dishonoured by the reason that the account was closed, respondent was accordingly convicted and sentenced. It is to be noted that respondent failed to produce evidence in defence in trial despite the fact that several opportunities were given to him.

4. Aggrieved with the judgment and order of the trial Court, respondent filed appeal before the appellate Court and as already stated application under Section 311 Cr.P.C. filed by him was allowed and in defence two witnesses were examined by him who happens to be brother and sister of the parties. Learned appellate Court firstly found that the demand notice was not served upon the respondent by the reason that it was sent to a wrong address and at that time appellant was residing at some other place and not at the place where the notice was sent. Secondly, it was found by the appellate Court that the remaining amount of Rs.two lacs was paid by respondent to appellant in cash in presence of Shri Jaspal Singh and Smt.Gurjeet Kaur. In view of these findings the appeal was allowed and respondent was acquitted.

5. In support of this appeal, learned counsel for the complainant submitted as below:- (1) It is an admitted fact by the respondent that till 1.8.2008 he was residing with his brother-Shri Jashpal Singh at the place where the demand notice was sent by the appellant through his counsel on 5.11.2008 and, therefore, in absence of reliable evidence to the effect that after 1.8.2008 he left that place and started residing at some other place and in the month of November 2008 also he was residing at some other place, it must be held that in the month of November 2008 he was continuously residing at the same place where the notice was sent and when a registered notice was sent to a correct address service of the same upon respondent must be presumed but learned appellate Court only on the basis of oral statements of Shri Jaspal Singh and Smt.Gurjeet Kaur held that respondent was residing at some other place when the notice was sent to him. Respondent himself did not appear as defence witness in trial Court as well as in appellate Court and in absence thereof mere oral evidence of aforesaid two witnesses is not sufficient to show that respondent left his previous place of residence and started residing at some other place. Merely because during the course of hearing of the complaint an application was filed by the appellant on 27.10.2009 with a prayer to serve notice of the complaint on the respondent on a new address and subsequently the bailable warrant was served upon the respondent on the new address as given in that application, it cannot be said that in the month of November 2008 also respondent was residing at the address given in the application and not at the place where the demand notice was sent on 5.11.2008. The application dated 27.10.2009 with a new address of the respondent was filed by the reason that in the meanwhile

respondent changed his place of residence in order to avoid the service of notice upon him. (2) No reliable evidence has been produced by respondent showing that the remaining amount of Rs. two lacs was paid by him to appellant in cash and no amount remained to be paid by him in respect of the sale transaction and the cheques in dispute were misused by the appellant as he did not return them even after obtaining the remaining amount in cash. Learned appellate Court has committed a grave mistake to believe the oral statement of Shri Jaspal Singh and Smt.Gurjeet Kaur to held that the remaining amount was paid by respondent to appellant in cash and no legal liability remained to be discharged by the respondent.

(3) The learned appellate Court wrongly allowed the application under Section 311 Cr.P.C. filed by the respondent and, therefore, statements of Shri Jaspal Singh and Smt.Gurjeet Kaur cannot be read in evidence for any purpose and if statements of these two witnesses are excluded and not taken into consideration nothing remains to support the findings of the appellate Court. Although, order dated 31.7.2013 was not challenged by the appellant separately but the same can be challenged and considered in this appeal.

6. On the other hand, learned counsel for the respondent defending the findings of the appellate Court submitted as below:-

(1) In absence of separate challenge to the order dated 31.7.2013 whereby application under Section 313 Cr.P.C. was allowed and aforesaid two witnesses were examined in defence by the appellate Court, the same cannot be challenged for the first time in this appeal and order dated 31.7.2013 has attained finality and statements of both these witnesses are to be considered alongwith remaining evidence available on record.

(2) From the evidence available on record more particularly from the statements of defence witnesses it is clear that the respondent left his previous place of residence on 1.8.2008 and started to reside at a place where the bailable warrant issued by the appellate Court was served upon him and, therefore, it has rightly been held by the appellate Court that the demand notice was not served upon the respondent as it was sent not to a correct address. It cannot be disputed that in absence of service of demand notice upon accused as required under Section 138 of the Act, cause of action does not arise and offence is not made out. As per the judgment dated 24.1.2013 passed by Metropolitan Magistrate N.I.Act No.2 (West) Delhi in Complaint Case No.1049/2010, it was held that respondent was not residing at the place where demand notice was sent by the appellant of that case. In that case one of the sisters of respondent-Shrimati Jasbir Kaur filed complaint against respondent for the same

offence and demand notice was sent by her to the same address to which notice was sent in the present case by the appellant but the trial Court in that case acquitted the respondent with a finding that demand notice was sent to a wrong address. As in the present case also, demand notice was sent to the same address, similar view has rightly been taken by the appellate Court.

(3) From the evidence available on record including the statements of Shri Jaspal Singh and Smt. Gurjeet Kaur it is clear that remaining amount of Rs.two lacs was paid by respondent to appellant on 17.7.2008 in cash in presence of these witnesses and when the disputed cheques were demanded by the respondent, appellant did not hand over the same to him by saying that they are missplaced. Statements of these witnesses cannot be disbelieved merely by the reason that respondent himself did not appear as witness in defence more particularly in view of the fact that these witnesses are brother and sister of parties and appellant has failed to show their undue interest in respondent. Documentary evidence is not required in every case to show payment in cash On consideration of submissions made on behalf of the respective parties and the evidence produced during the course of trial as well as the evidence produced by the accused-respondent in appeal, I found that the appeal is liable to be allowed for the follwoing reasons:-

(1) It cannot be said that the demand notice by a registered post was not sent by the appellant to the respondent through his counsel on 5.11.2008 to his correct address and he was not residing at the place where the notice was sent to him. Respondent did not appear as defence witness during trial as well as in appeal to substantiate his claim that he left his previous place of residence on or about 1.8.2008 and started to live at a place whereailable warrant issued by the trial Court was ultimately served upon him. Due to non-appearance of respondent as witness appellant did not get opportunity to cross- examine him. Respondent was the best person to clarify on oath about his actual place of residence at the relevant time. It is well settled legal position that adverse inference must be raised against party with holding the best evidence. It is further to be noted that no suggestion was made to the appellant in his cross-examination that demand notice was sent to a wrong address and even in his statement recorded under Section 313 Cr.P.C. it was not said that respondent changed his place of residence on or about 1.8.2008 and started to reside at some other place. In absence of the same merely on the basis of statements of Shri Jaspal Singh and Smt.Gurjeet Kaur it cannot be held that respondent resided at the place to which the demand notice was sent only upto 1.8.2008 and thereafter he shifted to some other place for his residence. It is to be noted that during the course of hearing of the complaint filed by Smt.Jasbir Kaur, another sister of the parties, for the same offence in a Delhi Court as pointed out by the learned counsel for the respondent, respondent in that case appeared as

defence witness and specifically said in his examination-in-chief that his residence was at some other place and not the place to which demand notice was sent by Smt.Jasbir Kaur and he further deposed that he never resided at the address mentioned in the complaint and to which the demand notice was sent and in support of his claim respondent filed copy of driving licence to show his address but in the present case no such evidence has been filed by the respondent. It is further to be noted that Shri Jashpal Singh in his cross-examination has admitted that the respondent was residing at the new place in a rented house but copy of rent-deed or any other document was not filed to support this fact. It is also to be noted that during the course of cross-examination of Smt.Gurjeet Kaur, a copy of notice dated 10.12.2010 allegedly sent on behalf of respondent by his advocate Shri Sunil Kumar Singh to appellant bearing address of respondent was shown to her which was marked as Ex.P9 subject to objection raised by the respondent as not relevant. This notice bears the same address of respondent to which demand notice was sent by the appellant. If respondent would have appeared in defence as witness, appellant would have cross-examined him on the basis of this notice also seeking his explanation about the circumstances in which it was given on his behalf bearing his previous address even on 10.12.2010. Due to non-appearance of respondent, valuable right of cross-examination was denied to appellant. Although, during the course of hearing of the complaint an application was filed by the appellant on 27.10.2009 with a prayer that the respondent has changed his residence and, therefore, notice may be sent for service upon him on the address now given in the application but merely by that reason it cannot be held that in the month of August 2008 when demand notice was sent to him, he was residing at the place given in the application and bailable warrant was served upon him. It is to be noted that when judgment of conviction and order of sentence was passed by the trial Court on 5.10.2012, respondent was ordered to submit bail bonds so that the sentence can be suspended and in compliance thereof bail bonds were submitted by him in which same address was mentioned to which the demand notice was sent to him on 5.11.2008. It has not been explained by respondent in what circumstances the same address was mentioned in the bail bonds filed on 5.10.2012.

(2) Burden was on the respondent to prove his stand that the remaining amount of Rs.two lacs was paid by him to appellant in cash and appellant did not return the disputed cheque to him and misused them. As already said, respondent was not courageous enough to appear before the trial Court as well as in appeal to support his aforesaid claim depriving the appellant to cross-examine him. In the cross-examination of appellant only one question was asked to the effect that Rs.four lacs were paid by respondent to appellant in cash which was denied by the appellant. In his cross-examination although appellant admitted that the cheques were to be returned to the respondent on entire amount being paid to him but he at the same time specifically stated that the remaining amount was not paid to him. It

is to be noted that no suggestion was made in the cross-examination of the appellant in respect of the date and place where the remaining amount of Rs.two lacs was paid to him. In his statement recorded under Section 313 Cr.P.C., although it was stated by respondent that Rs.two lacs were paid by him to appellant in cash and the cheques in dispute were not returned to him but in this statement also it was not clarified by the respondent when, and in whose presence and where the aforesaid amount of Rs.two lacs was paid. The source of this amount was also not clarified by him. It is well settled legal position that statement of an accused recorded under Section 313 Cr.P.C. is not evidence. In absence of statement of respondent himself on oath and in absence of his cross-examination by appellant merely on the basis of oral statements of Shri Jaspal Singh and Smt.Gurjeet Kaur, it cannot be held that the remaining amount of Rs.two lacs was paid by respondent to appellant on 17.7.2008 in their presence. It is an admitted fact that no receipt was executed to show payment of Rs.two lacs to appellant. No documentary evidence has been produced to show that on 17.7.2008, a registered sale-deed was executed by appellant and respondent in regard their property in favour of the buyer and the remaining amount or part thereof was paid by the buyer to respondent in cash and out of such amount, an amount of Rs.two lacs was paid to the appellant. Presence of the defence witnesses at the time of such payment is also doubtful by the reason that they were not party to the sale transaction in any capacity. It is to be noted that to show the initial payment of Rs. Two lacs in cash and issuance of disputed cheques to appellant admittedly Ex.P8 was executed whereas no receipt or any other document was executed to show the payment of remaining amount of Rs.two lacs on 17.7.2008 or on any other date as claimed by the respondent although the cheques in dispute were not returned by appellant.

7. Consequently, the appeal is allowed and the judgment and order dated 28.11.2013 passed by the appellate Court is quashed and set aside and that of the trial Court dated 5.10.2012 is restored. The conviction and sentence awarded by the trial Court is upheld and affirmed.