Shri Jose Pullan @ Joseph P Vs Smti Uma Jasrasaria @ Agarwal Proprietor of Kojani''s Dhankheti

Court: Gauhati High Court (Shillong Bench)

Date of Decision: April 27, 2011

Acts Referred: Negotiable Instruments Act, 1881 (NI) â€" Section 138, 139
Penal Code, 1860 (IPC) â€" Section 420

Citation: (2011) 4 GLR 9

Hon'ble Judges: T. Vaiphei, J

Bench: Single Bench

Advocate: T Yangi, for the Appellant; S.R. Sen, S. Sen and E. Nongbri, for the Respondent

Judgement

T. Vaiphei, J.

1 This revision is directed against the judgment and order dated 8-6-2009 passed by the learned Chief Judicial Magistrate, Shillong in C.R. No.

369(S) of 2004 acquitting the Respondent of the charge u/s 138, Negotiable Instruments Act, 1881(""NI Act"").

2 The case of the Petitioner, who filed the complaint petition, is that the Respondent, who is a carrying on business under the name and style of

M/S Kojani''s"" at Dhanketi, Shillong, along with her two children, who were initially arraigned as the accused No. 2 and 3 but later on dropped

by this Court, approached him for loan from time to time to meet their financial requirements and for meeting the treatment expenses of her ailing

husband. In acknowledgement of the loan and for the repayment thereof, six different cheques bearing dated 23-2-2004 and one cheque

amounting to Rs. 10,000/- dated 16.02.2004 were issued by her in his favour. The total loan amount comes to Rs. 2,10,000/-. The Respondent,

however, requested the Petitioner to encash the cheques later on so that necessary funds could be arranged by her. In the meantime, the husband

of the Respondent died sometime in the month of August-September, 2003 and as a result, Respondent requested the Petitioner to wait for

sometime for encashing the cheques as she was due to receive the amounts payable to her from LIC for which the accused No. 2 and 3 were the

nominees. In the month of December, he made enquiries in the Bank about the availability of fund in the account of the Respondent as he was

badly in need of money for the education of his son but found from the Bank that there was insufficient fund. The Petitioner thereafter repeatedly

requested the Respondent to return the money and issued the letter dated 15-12-2003 to that effect, but the Respondent asked for time till

February, 2004. Finally, he in consultation with the Respondent presented the cheques to the Vijaya Bank, Laitumkhrah Branch, Shillong on 16-2-

2004 and 23-2-2004, which were, however, returned vide memos dated 16-2-2004 and 23-2-2004 without being honoured on the ground that

they exceeded the arrangement. The Petitioner then issued pleader''s notice dated 2-3-2004 to the Respondent for payment of the amount within a

stipulated time, but the Respondent refused to do so. It is contended by the Petitioner that from the conduct of the Respondent, she intentionally

and knowingly issued the cheques without having any balance in her account with a view to defraud him and has thereby committed the offence

punishable u/s 138 NI Act and Section 420 IPC.

3. In response to the summons issued by the trial court, the Respondent entered her appearance and contested the case. She pleaded not guilty to

the charge and claimed to be tried whereupon the trial court commenced the trial. The case of the Respondent is that of total denial. On the

conclusion of the trial, the trial court passed the impugned judgment of acquittal. Mrs. T. Yangi, the learned Counsel for the Petitioner, assails the

findings of the trial court by contending, firstly, that though the Petitioner has clearly established the fact that the cheques were signed and issued by

the Respondent for the discharge of her debt and liability to her, which were subsequently dishonoured by the Bank and the Respondent refused to

pay the amounts despite receipt of her pleader notice, the trial court has erroneously held that the Respondent was not guilty of the offences

charged against him. She further submits that the trial court also committed perversity in holding that the Respondent filed the complaint petition on

3-3-2004 immediately after issuing the pleader''s notice on 2-3-2004 without waiting for the expiry of the statutory notice period of fifteen days

inasmuch it is on record that the complaint petition was filed on 22-3-2004 i.e. seventeen days after the notice period as the notice was received

by her on 5-3-2004. According to the learned Counsel, the trial court has completely overlooked the fact that u/s 139 NI Act, there is

presumption in favour of the holder of the cheque and the onus lies on the drawer of the cheque to rebut the same by adducing evidence, but the

Respondent, in the instant case, does not adduce any evidence and does not, therefore, discharge the onus of proving that the cheques were not

issued for discharging her debt to the Petitioner. It is also the contention of the learned Counsel for the Petitioner that the learned Chief Judicial

Magistrate has failed to appreciate that no prudent person like the Respondent would issue a cheque unless she had a liability to discharge and has

in the process reached a wrong conclusion. She, therefore, strenuously urges this Court to reverse the findings of the trial court and return a verdict

of guilty against the Respondent.

4. On the other hand, Mr. S. Sen, the learned Counsel for the Respondent, supports the impugned judgment of acquittal and submits that no

serious infirmity could be pointed out by the Petitioner warranting the interference of this Court. He next contends that the Petitioner has miserably

failed to prove that he paid any money or loan to the Respondent, and when the Respondent never took any loan from the Petitioner, there is no

question of issuing cheques to him: the cheques are never issued or signed by her and they were forged by the Petitioner himself. It is also

contended by him that when no separate document was executed for huge loans amounting to a total of ?1,20,000/- allegedly extended and no

interest contemplated and different cheques for different loan amounts purportedly issued mostly on the same date i.e. 23-2-2004, serious doubt is

created on the case of the Petitioner about the very existence of her liability or the issuing of the cheques in question by the Respondent. Moreover,

argues the learned Counsel, the Petitioner also contradicted himself by saying in his examination-in-chief that the loan was given to the Respondent

from time to time but at the same time by stating in his cross examination that he gave the loan at one go. For all these unreliable evidence, so

submits the learned Counsel, the conviction of the Respondent is absolutely unwarranted. Relying on the decision of the Apex Court in Krishna

Janardhan Bhat Vs. Dattatraya G. Hegde, he also submits that it is not obligatory on the part of the Respondent to examine herself and can always

discharge her burden on the basis of the material already brought on record as has been done in this case. He finally contends that there is no

presumption of existence of legally recoverable debt u/s 139 of NI Act: it merely raises a presumption in favour of a holder of a cheque that the

same has been issued for discharge of any debt or other liability.

5. The case pleaded by the accused-Respondent is that she did not owe a single farthing to the Petitioner or has not any legally enforceable debt or

liability; that she never issued any cheques in favour of the Petitioner; that the cheques relied upon by the Petitioner are false and the signatures

appearing therein are not hers but are forged. But, before proceeding further, it will not be out of place to refer to Sections 138 and 139 of the

Negotiable Instruments Act, 1881, which are in the following terms:

138. Dishonour of cheque for insufficiency, etc., of funds in the account. ""Where any cheque drawn by a person on an account maintained by him

with banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or

other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour

the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be

deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term

which may extended to two years, or with fine which may extend to twice the amount of that cheque, or with both.

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity,

whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by

giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of

the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due

course of the cheque within fifteen days of the receipt of the said notice.

Explanation. For the purpose of this section, -debt or other liability"" means a legally enforceable debt or other liability.

139. Presumption in favour of holder. It shall be presumed unless the contrary is proved, that the holder of the 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.

6. It is a well settled law that dishonour of cheque by itself is not a crime punishable u/s 138. To come within the purview of the section certain

requirements shall have to be fulfilled. They are: (1) the cheque has to be towards payment an amount of money for the discharge in whole or in

part of any debt or other liability; (2) the cheque is returned by the bank unpaid; (3) the reason for non-payment of the cheque should be

insufficiency of funds or amount of cheque exceeding the amount arranged to be paid from the account. However, before the offence can be said

to be made out the proviso to the section requires that: (a) the cheque must be presented to the bank within a period of six months from the date

on which it is drawn or within the period of its validity, whichever is earlier; (b) the payee or the holder in due course of the cheque makes a

demand for the payment of the amount of money under the cheque by giving a notice in writing to the drawer of the cheque within fifteen days of

information received by him from the bank regarding dishonour of the cheque; (c) the drawer of the cheque fails to make payment of the amount of

money within fifteen days of the receipt the aid notice. Then, explanation to Section 138 specifically clarifies that the debt or other liability means a

legally enforceable debt or other liability. Section 138 is attracted only if the cheque is issued for the discharge of a legally enforceable debt or

other liability. But Section 139 provides that the court has to presume, in a complaint u/s 138, that the cheque has been issued for a debt or

liability. The burden of proving that there was no existing debt or liability is on the Respondents. However, a discordant note was struck by a two-

Judge bench of the Apex Court in Krishna Janardhan Bhat case (supra) by holding that Section 139 merely raises a presumption in regard to the

second aspect of the matter; that existence of legally recoverable debt is not a matter of presumption u/s 139 of the Act; that it merely raises a

presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability. The controversy resulting

from this decision has now been finally resolved by a three-Judge Bench of the Apex Court in Rangappa Vs. Sri Mohan, The relevant portion of

the judgment is found at para 26, which read thus:

26. In the light of these extracts, we are in agreement with the Respondent claimant that the presumption mandated by Section 139 of the Act does

indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat may not

be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts

and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise

a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial

presumption which favours the complainant.

(Emphasis mine)

7. In the same judgment, the larger Bench also dealt with the standard of proof expected from the accused for rebutting such presumption as well

as the need or not for adducing evidence by him/her in this behalf and held as follows: (SCC p.454, para 12)

28. 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 a settled position that when an accused has to rebut the presumption u/s 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 doubts about the existence of legally

enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on materials submitted by the complainant in

order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

(Underlined for emphasis)

8. From the paragraph extracted above, it is now beyond controversy that it is not necessary for the accused to adduce or lead evidence to

discharge the reverse burden and can rely on the evidence brought on record to discharge such burden by preponderance of probabilities drawn

there from. In the instant case, on the authority of Rangappa case (supra), it is obvious that the seven cheques exhibited by the Petitioner have

raised a presumption of a legally enforceable debt or liability by the Respondent in favour of the Petitioner. The Respondent did not admittedly

adduce evidence to rebut this statutory rebuttable presumption raised against her. As already noticed in the aforesaid judgment, such presumption

can be rebutted by her by preponderance of probabilities drawn from the materials brought on record by the Petitioner and not necessarily by

adducing her own evidence. Therefore, the question to be determined is whether the materials available on record are sufficient to hold that the

Respondent has successfully rebutted the presumption against her? In my judgment, the answer must be in the affirmative. In the first place, there is

no corroborative evidence to substantiate the allegation of the Petitioner that the Respondent took any loan from him. No eye witness was

produced by him to corroborate his case in this regard. Secondly, he did not have any document to show that such a loan was taken by the

Respondent. If loan was indeed extended to the Respondent as claimed by him, where is the acknowledgement? No document was apparently

executed; no pro-note was executed; no receipt for the loan obtained; no interest charged; no date stipulated for the repayment. There is also no

proper explanation from the Petitioner as to why six cheques for different amounts were issued by the Petitioner on the same day: the story of the

Petitioner is, to say the least, quite intriguing. It is also not clear as to whether the loans amounts were paid to the Respondent at one go or on

different dates and if it was at one go, why several cheques for the loan(s) allegedly extended by him to her on same day and if it was on different

dates, why several cheques for different amounts were issued by the same person on the same day for the same loan transaction. Was the

Respondent taking six different loans on the same day? The Petitioner has miserably failed to come forward with satisfactory explanation on this

unusual story set up by him. The story advanced by the Petitioner that the Respondent, after signing and issuing the cheques, requested him not to

encash the same immediately but to wait for arranging the fund is also another incredible story, which defies explanation. For all these reasons, I

have no alternative to hold that the Respondent, on the materials brought on record by the Petitioner, has successfully rebutted the statutory

presumption against her by preponderance of probability and the surrounding circumstances. Consequently, the impugned judgment of acquittal

does not call for my interference but on different grounds.

9. The upshot of the foregoing discussion is that there is no merit in this revision, which is hereby dismissed. Let the parties bear their respective

costs. Transmit the L.C. record.