(2013) 04 CAL CK 0002

Calcutta High Court

Case No: C.R.A. No. 344 of 2012

In Re: Sunil Kumar Manna — APPELLANT

Vs

RESPONDENT

Date of Decision: April 26, 2013

Citation: (2013) 3 CHN 673

Hon'ble Judges: Toufique Uddin, J

Bench: Single Bench

Advocate: Sekhar Basu, Somopriyo Chowdhury and A. Mondal, for the Appellant;Biswajit Sardar, for the O.P. No. 1 and Sabir Ahmed, for the State, for the Respondent

Final Decision: Allowed

Judgement

Toufique Uddin, J.

This appeal arose out of judgment and order dated 22.9.11 passed by the 16th Court of learned Metropolitan Magistrate at Calcutta in Case No. C/904/2007 acquitting the respondent No. 1 u/s 255(1) of the Code of Criminal Procedure from the charge u/s 138 of the Negotiable Instruments Act, 1881. In the background of this appeal the fact in a nutshell is that the petitioner is carrying on business at 5, Nalini Seth Road, Calcutta-700 007 whereas the accused is a proprietor having its place of business at C/o. Mira Jewellers, Vill. & P.O. Shararhat, P.S. Falta, Dist. South 24 Parganas and also at Vill. & P.O. Belsingha, P.S. Falta, Dist. South 24 Parganas. The accused in discharge of his existing liability issued one A/c. payee cheque No. 21197 dated 12.8.2007 for Rs. 3,05,117/- drawn on Allahabad Bank, Falta Br., in favour of the complainant. The said cheque was signed by the accused. The cheque was presented for encashment within the validity period to his banker, Indian Overseas Bank, Sonapatty Br., Kolkata but it was returned being dishonoured on 24.8.2007 with the remark "insufficient fund". The bank returned the memo dated 24.8.2007. The debit advice dated 29.8.2007 and the cheque deposit slip were there. The complainant sent a demand notice to the accused person on 30.8.2007 through his lawyer demanding the amount. Postal receipts were also filed. The accused did not

receive the said notice dated 30.8.2007 which came back with the postal remark "refused" on 11.9.2007.

2. The accused entered into appearance. He was examined u/s 251 of the Code of Criminal Procedure. The substance of the allegations was read over and explained to him. He pleaded not guilty and claimed to be tried.

3. To contest this case the complainant examined two witnesses while the number is same on the side of the accused.

4. The accused person was examined u/s 313 of the Code of Criminal Procedure.

5. The defence case was the denial of offence with a plea of innocence.

6. On trial the learned Magistrate acquitted the accused person by the impugned judgment.

7. Sections 138, 139 and 140 of the Negotiable Instrument Act, 1981 read as follows:

S. 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 a 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 be extended to two years, or with fine which may extend to twice the amount of the 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.

S. 139 - Presumption in favour of holder.--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.

S. 140 - Defence which may not be allowed in any prosecution u/s 138.--It shall hot be a defence in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

8. Both sides presented their written arguments which are made part of the record.

9. The learned counsel for the appellant argued inter alia mainly over the following points.

10. The learned Metropolitan Magistrate, 16th Court, Calcutta acted with utmost material irregularity and judicial impropriety inasmuch as on the date of passing of the order on 22.9.11 behind the back of the appellant, certain documents being certified copy of the order passed by the learned Additional Sessions Judge, Diamond Harbour on 7.6.2010 in CRM No. 67 of 2010 and an information slip pertaining to pendency of CRR No. 183 of 2011 before the Hon''ble Court were executed into evidence without granting a chance to the appellant to controvert the same. Both the aforesaid documents were relied upon by the learned Magistrate. In the judgment acquitting the accused the Court held by giving reason that pendency of the aforesaid criminal revision shows that the final report submitted by the investigation agency declaring that there was no forgery in the cheques as alleged by the respondent herein have not reached final stage but CRR No. 183 of 2011 was finally not pressed by the respondent before the Hon''ble Court. Further, it was argued that CRM No. 67 of 2010 was filed by the respondent before the learned Additional Sessions Judge, Diamond Harbour challenging the order dated 13.5.2010 whereby a prosecution case u/s 211 IPC was launched against him by the concerned learned Magistrate. The order accepting final report giving clean-chit to the appellant regarding forgery was not under challenge in the revisional application. The revisional application was finally disposed of on 12.10.12 inter alia setting aside the order passed by the learned Magistrate launching prosecution u/s 211 IPC directly and the said order dated 12.10.12 was assailed before the Hon''ble Court by one Rabindra Nath Rudra, a co-accused in the case of forgery and on 29.1.13, liberty was given to proceed in accordance with section 340 of the Code of Criminal Procedure read with section 195 of the Code of Criminal Procedure against the respondent.

11. The learned counsel for the respondent argued that admittedly, the respondent had business transaction of silver ornaments with the appellant. Due to business transaction, the respondent issued two cheques being No. 211193 dated 27.4.2007 for Rs. 4028/- and No. 211194 dated 10.4.2007 for Rs. 4976/- respectively in favour of one Sujit Sen, a man of appellant''s company. But those two cheques were returned

due to bad hand-writing. The respondent issued fresh cheques being Nos. 211195 and 211196 in favour of Sujit Sen. The respondent issued the cheque of Rs. 5117/- being No. 21197 in favour of the present appellant Sunil Manna.

12. During issuance of those three cheques the respondent put his signatures only and hand-writings were of Sujit Sen or other who happens to be man of Sujit Sen. On 30.7.2007, the respondent came to know from the bank that those cheques issued by him amounted to Rs. 7,54,976/-; Rs. 1,94,028/- and Rs. 3,05,117/- respectively. Thereafter the respondent lodged a complaint giving birth to Falta P.S. Case No. 125 of 2007 under sections 468 /471 /420 /120B /506 /504 IPC against the appellant. It was alleged that the appellant and his agents after making criminal conspiracy added certain digits in three cheques i.e. they added 19 before the amount 4028, then added 75 before the amount 4976 and added 30 before the amount 5117 beyond the respondent''s consent.

13. Having considered the contention of both sides, I like to place my observation as follows:

14. The accused/respondent attempted to drift away the attention of the Court from the main issue. The issue is whether there is any legally enforceable debt and the complainant/appellant proves the same or whether the accused/respondent can have any benefit derived out of reverse onus clause by way of rebutting the presumption through the theory of "preponderance of probability". The filing of GR Case No. 1203 of 2007 arising out of Falta P.S. Case No. 125 of 2007 by the accused against the appellant or other case No. C888 of 2007 and C165 of 2007 filed by one of the associates of the appellant against the respondent or causing reinvestigation after submission of final report on 21.9.2009 at the behest of the respondent or filing a complaint u/s 211 IPC against the respondent/accused at the behest of the appellant are not material for the purpose of proper decision of this case. Those are neither connected with reverse onus clause nor the factum of discharge of liability towards the satisfaction of legally enforceable debt for reasons recorded below.

15. The stand taken by the respondent appears to be unbelievable. Why the respondents allowed to fill up the rest portion of the cheques by Sujit Sen or his man after putting his signature only has not been cleared. The respondent stated that the original cheques of Rs. 4028/- and Rs. 4976/- were returned due to bad handwriting. It is not the case that the respondent was illiterate. It is hardly acceptable that on blank cheques the respondent, being a sound business man put his signature only allowing others to fill up the cheque without putting the amount. This statement of the respondent has to be taken with a grain of salt not only but also with the scent of his maneuver to twist the case to achieve his ends. Moreover, the hand-writings of the cheques were sent to the hand-writing expert by the I.O. of the Falta P.S. Case No. 125 of 2007 filed by the accused/respondent against the appellant on the ground of forging amounts on the cheques. The expert submitted report which clearly indicates that there is no addition or alteration or interpolation

although it is consistent plea of the respondent that the cheque was forged and the amount of cheque of the appellant was inflated by putting 30 before the digits 5117 appearing in the cheque etc. When a scientific report has been given, there is nothing to smell a rat in it. It is not the contention of the respondent that the report of the handwriting expert is erroneous or influenced by any other consideration.

16. The respondent issued the cheque of Rs. 5117/- being No. 211197 in favour of the present appellant. On 30.8.2007, the respondent came to know from his Banker that three cheques issued by him were amounting to Rs. 7,54,976/-, Rs. 194028/- and Rs. 3,05,117/- respectively. The respondent tried desperately to stall the claim of the appellant on the plea of signing the blank cheque in good faith. But good faith yields place to malafides as revealed from materials and circumstances on record.

17. Let it be examined what the position is.

18. The complainant proved the cheques. Notice was sent through his lawyer demanding payment of the amount followed by refusal of the same by the respondent and so. Now, it has to be seen as to whether the respondent has been able to take advantage of reverse onus clause.

19. Presumption after issuance of cheques, it is true, is that there is a liability. But practically speaking the evidence from the side of the respondent appears to be insufficient. It is true that mere issuance of cheque by the accused only does not ipso facto prove that there is a debt or liability of the accused to the complainant. It creates only a presumption which is rebuttable.

20. In Rangappa Vs. Sri Mohan, the Hon''ble Apex Court held that the presumption mandated by section 139 includes a presumption that there exists a legally enforceable debt or liability. 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, section 139 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 dishonor of cheques, the rebuttable presumption u/s 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof.

21. The 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 a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the 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.

22. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. The courts below committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the Courts is not correct. Presumption of innocence of accused is a human right.

23. Some other decisions viz. K. Prakashan Vs. P.K. Surenderan, ; Kamala S. Vs. Vidyadharan M.J. and Another, and John K. John Vs. Tom Varghese and Another, may be taken into consideration for better appreciation of the position.

24. But here the defence case is otherwise.

25. It was contended by the learned counsel for the respondent that to humiliate and lower down the respondent to the estimation of the other, the appellant lodged a false case u/s 138 of the N.I. Act with a view to invoking extra-financial burden and mental pressure. The appellant'' agent Sujit Sen also lodged two other complaint cases against the respondent, one before the learned Metropolitan Magistrate, 2nd Court, Calcutta vide case No. C888 of 2007 and the other before the learned Judicial Magistrate, 3rd Court, Ranaghat, Nadia vide case No. C165 of 2007.

26. I am concerned only with the case at hand. The basis of defence of respondent is Falta P.S. Case No. 125 of 2007; corresponding to G.R. Case No. 1203 of 2007 alleging forgery of amount of cheques committed by the appellant/his agent. Police on investigation submitted final report. The respondent filed ''Naraji'' (Protest) petition. The Police reinvestigated the case twice and stuck to their gun by disbelieving the case of respondent.

27. Had this been proved, then the question of reverse onus clause at least though not fully but in part would have been discharged. Needless to mention that the learned trial Court wrote much after citing a good number of decisions but he did not come to the point properly and wrongly shifted the burden on the complainant/appellant.

28. We may have a look to section 103 of the Evidence Act which reads as follows:

S. 103. Burden of proof as to particular fact--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

29. The core of the dispute is the cheques. The respondent disputed the same. So, it is incumbent upon him to examine the expert over his report, Ext. D but it is not done by him.

30. It was contended by the learned counsel for the respondent that during investigation specimen signatures and handwritings of accused persons as well as defacto complainant were obtained but the I.O. did not take any initiative to obtain signatures and handwritings of one Biswanath and the married lady whose names were mentioned in para 4 of the FIR. The I.O. also did not take initiative to collect the names of the men of Sujit Sen which were very much required for investigation as the complaint alleged in the FIR that the handwriting of the cheque were of the men of Sujit Sen. The handwriting expert opined that the disputed writings marked Q. 4 to Q. 6 disagree with the handwriting of the accused person. So, there was commission of forgery. It is an untenable stand. He could have taken steps for examining the expert. Moreover, Q/1 to Q/3 appears to have been written by the same man i.e. the respondent as opined by the handwriting expert. So, the issue stands settled once for all against the respondent. By no stretch of imagination it can be held that the appellant forged the digits on the cheque. The respondent signed the cheque.

31. It was the case of the respondent that a dispute regarding impurity of silver arose between him and the appellant and as such before the Barobajar Swarno Shilpi Bachao Committee and a complaint was lodged and the appellant gave an undertaking and pursuant thereto the business transaction between them stood snapped from 1.3.2003 but again in 2007 the case at hand has been filed by the appellant falsely taking advantage of the mischievous deeds of his henchman. It cuts both ways. Why did the respondent issue cheque of Rs. 5117/- in 2007 to the appellant (according to his evidence before forgery of amount), there is no answer. This indicates that even in 2007 the respondent had business transaction with the appellant and that is why he issued such cheque. He cannot approbate and reprobate simultaneously. The possibility of remaining the dues unpaid to the appellant cannot be ruled out in view of the steps taken by the respondent.

32. The respondent stated in reply to the question u/s 313 of the Code of Criminal Procedure that since 1992-93 he knows the appellant. He used to purchase new ornaments by giving old ones and for such work the respondent used to pay labour charges to the appellant. It is expected that he will have books of accounts to show it but nothing of the sort has been proved in this case. He also inducted a story of purchasing a balance (owing balance) in respect of which he signed on four blank papers which was allegedly used by the appellant with ulterior motive. But there is no sound proof given by the respondent to that effect. Rather, Ext. 7 shows that on 14.8.2007, he issued a declaration that in satisfaction of debt he issued a cheque of Rs. 3,05,117/- on account of value of silver ornaments. It is not believable that by practicing fraud, force and misrepresentation Ext. 7 was obtained from the

respondent who appears to be a sensible business man.

33. The respondent accused when asked at the time of 313 examination, "would you say anything of your own?" He did not say anything over the report of the handwriting expert.

34. Therefore, the findings of the learned Trial Court having sufficient infirmities needs interference.

35. The impugned judgment dated 22.9.11 hereby is set aside.

36. Accordingly, the appeal stands allowed.

37. The respondent/accused is held guilty u/s 255(2) of the Code of Criminal Procedure for commission of offence u/s 138 of the said Act.

38. The O.P. No. 1 is sentenced to suffer rigorous imprisonment for 3(three) months and to pay double of the amount of concerned cheque to the appellant immediately failing which law will take its own course.

39. He is further directed to surrender before the learned Court below to serve out the sentence.

40. Let a copy of the judgment and the LCR be sent down to the learned Court below immediately. Urgent Photostat certified copies, if applied for, be supplied according to rules.