(2012) 07 CAL CK 0213

Calcutta High Court

Case No: C.R.A. 273 of 2012

Nikhil Chandra Mitra		APPELLANT
	Vs	
The State of West Bengal and Another		RESPONDENT

Date of Decision: July 27, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 139

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Probal Mukherjee, Mr. Arnab Mukherjee, Mr. Abhijit Bhadra and Ms. Madhurima Mukherjee, for the Appellant;Srijan Nayak and Mr. Raja Saha for the O.P. No. 2, for the Respondent

Final Decision: Allowed

Judgement

Kanchan Chakraborty, J.

The challenge in this appeal is to the judgment and order dated 14.7.2009 passed by the learned Chief Judicial Magistrate, North, 24-Paraganas, Barasat in C. 763 of 2006 thereby acquitting the respondent no. 2 Nishikanta Saha from the charge u/s 138 of the N. I. Act. The appellant, Nikhil Chandra Mitra lodged the complaint in the Court and had initiated the case against the respondent no. 2 u/s 138 of the Negotiable Instrument Act. The judgment impugned has been assailed, mainly, on the following grounds;

a) that the learned Magistrate erred entirely that the presumption can be drawn adversely against the holder of the cheque;

b) that the learned Court failed to appreciate the facts and circumstances of the case and the evidence in its true and proper perspective;

c) that the learned Court wrongly shifted the onus to prove on the appellant;

d) that the learned Court failed to give the appellant an opportunity to produce the documents which he wanted to file in course of trial in support of his case;

e) that the judgment impugned being otherwise bad in law, is liable to be set aside.

2. The appellant, Nikhil Chandra Mitra lodged a complaint before the learned Magistrate alleging therein that both he and the respondent no. 2 had business transaction with each other. The appellant supplied rice to the respondent no. 2 who in discharge of said liability in part, issued two account payee cheques bearing No. 713701 dated 6.3.2006 of Rs. 6 lakhs and cheque bearing No. 562670 dated 29.3.2996 of Rs. 2 lakhs. The said cheques were presented by the appellant in his Bank U.T.I. Bank Ltd., Baguihati Branch within the valid period. Both the cheques were returned dishonoured with remarks "excess arrangement" and "full cover not received". The cheques were returned by return memo dated 7.3.2006 and 4.7.2006, respectively.

3. The appellant sent a legal notice through his lawyer on 14.7.2006 for those two cheques to the respondent no. 2 demanding the cheque amount of Rs. 6 lakhs and Rs. 2 lakhs totaling Rs. 8 lakhs within 15 days from the date of receipt of the notice. The respondent no. 2 received the notice on 21.7.2006 but failed to make payment as demanded. Accordingly, the appellant herein lodged the complainant in the learned Court of the Magistrate for prosecuting the respondent no.2 u/s 138 of the N. I. Act.

4. The respondent no. 2 was arrayed to face the charge u/s 138 of the N.I. Act to which he pleaded not guilty and accordingly, the trial commenced. The appellant was examined as P.W. 1. The cheque dated 6.3.2006 bearing No. 713701 of Rs. 6 lakhs was marked Ext. 1 and the return memo received from Bank dated 7.3.2006 in respect of that cheque was marked Ext. 2. The another cheque dated 29.3.2006 of Rs. 2 lakhs was marked as Ext. 3 and the return memo of the Bank dated 4.7.2006 in respect of that cheque was marked as Ext. 4. The postal receipt and the A/D card in respect of demand notice and the copy of the demand notice were also admitted into evidence and marked Exts. 5, 6 and 7, respectively.

5. The complainant examined himself as P.W. 1. No witness was examined on behalf of the respondent no. 2. But one document was filed on behalf of the respondent, which was marked Ext. A. Ext. A is the copy of the letter written by the Advocate for the respondent no. 2 to the appellant Nikhil Chandra Mitra directing him to produce certain documents. The said letter dated 3.6.2009 was issued in course of trial. The learned Court upon consideration of the facts an circumstances of the case, came to a findings that the appellant failed to establish that the cheques in dispute were issued by the respondent no. 2 in discharge of any debt or liability enforceable in law. Accordingly, the learned Magistrate recorded acquittal, which has been impugned in this appeal on the grounds already stated above.

6. Mr. Mukherjee, learned Counsel for the appellant contended that there is no legal impediment to issue combined notice of cheques more than one if the description of the cheques and amounts of cheques are mentioned distinctly, properly and separately. The learned Advocate for the appellant has submitted further that in view of Section 139 of the N. I. Act read with Section 118 of the Act, it shall be presumed, unless contrary is proved, that the holder of the cheque received the cheque, of the nature referred to u/s 138, for the discharge, in whole or in part, of any debt or other liability. He contended that the learned Magistrate was entirely wrong in holding an adverse presumption against the holder of the cheque simply because he failed to file some documents which he had agreed to file on the demand of the respondent no.2 in course of trial. It has been contended further that when the signature of the respondent no. 2 on the cheque in dispute was an admitted fact, it was immaterial whether the same was filled in by another or not. The adverse presumption on that count ought not have been taken by the learned Trial Court against the appellant and in favour of the drawer of the cheque.

7. Mr. Nayak, learned Counsel for the respondent contended that that the notice itself was bad in view of the fact that the notice in respect of the cheque of Rs. 6 lakhs was sent beyond the period of 30 days as envisaged in Clause (b) of Section 138 of the N. I. Act. He contended further that the cheques were drawn by the respondent no. 2 as security deposit. The appellant/complainant failed to establish that those were issued in discharge of any legally enforceable debt or liability or that there was any transaction between the parties. Therefore, he contended that view of the learned Trial Court for not accepting the appellant''s case that the cheques were drawn by the respondent no. 2 in favour of the appellant in discharge of any debt or liability is correct and not required to be interfered with.

8. The points that fall for consideration are: -

A) Whether a combined notice of like nature is valid?

B) Whether the learned Magistrate was correct in coming to a cnclusion that the alleged cheques were not drawn by the respondent no. 2 in discharge of any debt or liability?

Point No. A.

9. There is no legal impediment in sending a combined notice. A notice may contain description of different cheques with specific dates, amounts and number. A combined notice, ifsofacto is not illegal. The question is when by such notice, a demand is made in respect of a cheque after the statutory period of 30 days from the date of receiving of the information about the dishonour of the cheque from the Bank, what would be the status of such a notice.

10. In such a case, in my humble estimate, the notice of the cheque which is well within the period of 30 days as envisaged in Clause (b) of Section 138 of the N. I. Act,

is to be given effect to. The learned Trial Court also has come to such a conclusion and, in fact, that view of the learned Trial Court has not been challenged. Consolidated demand notice would not invalidate the same in such a case.

11. Mr. Nayak, learned Counsel for the respondent has referred to the following decisions in support of his contention.

a) K.R. Indira Vs. Dr. G. Adinarayana,

b) Rahul Builders Vs. Arihant Fertilizers and Chemical and Another,

12. In K.R. Indira (Supra), the Hon''ble Court was pleased to hold that consolidated demand notice could not invalidate the same. But there should be specific demand made for payment of the amount covered by the cheque. In case specific demand for each cheque is not made separately and distinctly, the consolidated notice cannot be said to be in accordance with law and notice becomes invalidate resulting in acquittal of the accused.

13. In Rahul Builders (Supra), it was held that an omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not sub-serve the requirement of law.

14. There is no dispute as to the principles laid down by the Hon''ble Apex Court mentioned above. In the instant case, the factual aspects are quite different. The notice, which was marked Ext. 5 categorically, indicates that the two cheques were specifically mentioned in the notice with date and amount distinctly. Therefore, this notice cannot be said to be an omnibus nature of notice or a notice wherein demand has not been made specifically. It is true that one notice was not in conformity with Clause (b) of Section 138 of the N. I. Act because the information of dishonour of the cheque was received more than a period of 30 days from the date of issuing notice. That fact does not necessarily invalidates the notice in respect of the second cheque mentioned specifically with date and amount in the notice. The same was within the period as specified in Clause (b) of Section 138 of the Act. Therefore, in my opinion, the view of the learned Court in this regard appears to be correct.

Point No. B.

15. It was the case of the appellant in the learned Trial Court that he supplied rice to the respondent no. 2 and in discharge of existing liability in part, respondent no. 2 issued two cheques of Rs. 6 lakhs and Rs. 2 lakhs on two different dates which were dishonoured.

16. In course of examination in Court, the complainant stated that the cheques were bearing the signatures of the respondent no.2 but those were filled in by his office staff. In his cross-examination, he stated that the price of the rice he sold to the respondent was Rs. 11 lakhs out of which, the respondent paid Rs. 3 lakhs in cash

and paid Rs. 8 lakhs by two cheques. He did not produce any document showing supply of rice to the respondent but he stated categorically that he could produce document to that effect in Court. He denied that he did not supply rice to the respondent. He denied that he was given to signed blank cheques by the respondent no.2 as security.

17. In course of examination u/s 313 of the Cr. P. C., the respondent admitted that the signatures on the cheques in dispute were his signatures. But he had taken a plea that he issued two signed blank cheques which the appellant filled in with the help of the employee of the respondent. In course of trial, the Ext. A was issued to the appellant asking for some documents relating to supply of rice. Although the appellant stated in his cross-examination that he could produce the documents but, ultimately, did not produce the same. The learned Trial Court taken this fact exceptionally and had drawn adverse presumption against the appellant and came to a findings that the appellant failed to establish that there was any rice transaction in between the appellant and the respondent no.2 and the respondent no. 2, in discharge of any debt or liability, arising out of that transaction, issued two cheques which were dishonoured. He accepted the plea taken by the respondent that it was issued by him as security money.

18. This view of the learned Trial Court cannot be accepted at all. The cheques were, admittedly, signed by the respondent no.2. According to him, he had given two blank cheques. This fact appears to be not acceptable on the face of it. For a transaction of Rs. 11 lakhs, no business man would suppose to issue cheques of Rs. 8 lakhs as securities. This is neither practical nor believable. Again, presumption u/s 139 of the Act is to be drawn in favour of the holder of the cheque not in favour of the drawer of the cheque. Presumption is rebuttable and for rebutting such presumption, sufficient evidence is required. The learned Court had taken the Ext. A as a very important document and simply because direction given by Ext. A was not complied with, the learned Court accepted the plea taken by the respondent in the trial.

19. This Court does not inclined to share the view of the learned Trial Court. There is nothing on record to show that the appellant was given opportunity to file any document. The learned Court did not also direct the appellant to produce such documents relating to the transazction which was denied by the respondent no. 2 but by a letter (Ext. A) asked the appellant to produce such documents in Court. This opportunity ought to have been given to the appellant by the learned Trial Court who filed some documents in this appeal which this Appellate Court is not ready to accept at this juncture because the documents are to be produced in the learned Trial Court where the same are to be admitted into evidence properly in accordance with law and thereafter it would be considered by the Court as a piece of evidence after recording oral testimony, if required.

20. As regards the adverse presumption, the learned Counsel for the respondent referred to a decision of Kerala High Court in Joseph Vs. Gladis Sasi, reported in 4 (2011) CCR 326, a decision of Bombay High Court in Pioneer Drip Systems Pvt. Ltd. and Mr. B.V.V. Satyanarayana Managing Director, Pioneer Drip Systems Pvt. Ltd. Vs. Jain Irrigation Systems Ltd., and another decision of Bombay High Court in Ramkrishna Urban Cooperative Credit Society Ltd. Vs. Rajendra Bhagchand Warma, reported in 3 (2010) CCR 191.

21. I have carefully gone through of the decisions of the Bombay High Court as well as Kerala High Court. The factual aspect of the cases before the Bombay High Court and Kerala High Court and that of this case are quite different and distinguishable. The burden of proof always with the prosecution but onus shifts from time to time. When the cheques duly signed by the respondent were placed and the respondent admitted that those were his signatures and filled in by person of his office, the burden on the part of the complainant can be said to have been discharged. Onus shifts, in such a case, on the respondent to rebut the presumption. In order to rebut the presumption, the respondent invited the appellant to file some documents which the appellant agreed to file in course of trial but ultimately did not file. That cannot be the sole basis of rebuttal of presumption. In such a case, Court should give the complainant/appellant an opportunity to produce such document or documents which has been asked to be produced by his opponent in the trial. Rebuttal by proving contrary to the presumption by mere denial is not enough. So, in such a case, I think that the appellant should get an opportunity to produce documents in support of his case that he and the respondent no. 2 had actually entered a transaction for supply of rice at Rs. 11 lakhs and for that purpose only, the respondent issued two cheques in question. This is required because, specially in the back ground of this case where the respondent did not specifically stated as to why he had issued cheques towards security deposit of Rs. 8,00,000/- out of entire transaction of Rs. 11,00,000/- .

22. In view of the discussions above, the case is remitted back to the learned Trial Court with a direction to give the appellant/complainant an opportunity to produce documents in respect of the alleged transaction between him and the respondent. Upon filing such document(s), the learned Trial Court should examine the witnesses as required. The learned Court may also ask the respondent no. 2 to produce document regarding payment of security money and reason therefor. After taking evidence afresh on this issue only, the learned Court shall write a fresh judgment.

23. The judgment impugned is set aside and the appeal is allowed on limited grounds mentioned above. Urgent photostat certified copy of this order, if applied for, be given to the appearing parties upon compliance of necessary formalities.