Tedhi Singh vs Narayan Dass Mahant on 7 March, 2022

Author: K.M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.362 OF 2022
(Arising out of SLP (Crl) No.1963 OF 2019)

TEDHI SINGH ..APPELLANT

VERSUS

NARAYAN DASS MAHANT ..RESPONDENT

JUDGMENT

K.M. JOSEPH, J.

Leave granted.

2. The appellant calls in question the judgment of the High Court by which it dismissed the Criminal Revision No.129 of 2018 filed under Section 397 of the Code of Criminal Procedure, 1898 (for short 'Cr.P.C.) against the order of the Sessions Judge by which the Court in turn affirmed the order passed by the Chief Judicial Magistrate. The Chief Judicial Magistrate found the appellant guilty of having committed the offence under Section 138 of the Negotiable Instruments Act, 1881 Reason:

> (for short 'N.I. Act.'). The appellant stands sentenced to simple imprisonment for a period of one year. Further, the appellant is called upon to pay a compensation of a sum of Rs.7 Lakhs.

3. The complaint of the respondent was based on the allegation that in the month of August, 2011 the appellant was in urgent need of money and out of friendship he gave a sum of Rs.7 Lakhs and the cheque given by the appellant was dishonored. In the trial, following the complaint the appellant examined DW-1 to DW-4. They are Officers of four Banks. This was done by the appellant in an attempt at putting up what can be described in the words of the learned counsel for the appellant 'a probable defence'. It was an attempt by the appellant to show that the version of the complainant

that he had the financial wherewithal to advance a loan of Rs.7 Lakhs was not to be accepted. This is the matter which has been agitated by Ms. Sangeeta Bharti, learned counsel for the appellant. She would, in fact, complain that in the impugned judgment, the High Court has observed that it is not known as to what is the purpose for which DW-1 to DW-4 have been examined. It is appellant's case that the finding would clearly help the appellant advance the contention that this is a case where the High Court as also the two Courts have not appreciated the law which is laid down in regard to the effect of a 'probable defence'. She drew our attention to the judgment of this Court in Basalingapa Vs. Mudibasappa reported in (2019) 5 SCC

418. This Court, inter alia has held as follow:-

> "25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:
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> 25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
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> 25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence.

The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.5. It is not necessary for the accused to come in the witness box to support his defence."

4. She would therefore, point out in the facts of this case when the complainant was cross-examined, he had stated that the transaction took place on a particular date, namely, 5th of August, 2011 and he also deposed as follows:-

"….. The money was demanded in first week of August on the same date only. I had given money in August. I do not remember the date. Accused had demanded money from me on 5th August.

I have my bank accounts in State Bank Kullu, ICICI Kullu, PNB Kullu and Gramin Bank Kullu also. I cannot tell from where I had withdrawn the money.

I had withdrawn Rs.2 or 2.5 lacs. The rest of the money was with me, which I had given. Accused had given me the cheque in the end of August. When he gave me the cheque, then also only both of us were there. I have not brought the statement of account with me. It is wrong that Accused is not known to me. It is also wrong that Accused has not taken any money from me. It is also incorrect

that I do not have the financial position or capacity to pay such amount of money.

It is also incorrect that Accused had not demanded any money from me. It is also incorrect that I had not given any money to the accused. I do not know that the accused had lost his cheque book. Volunteered that the accused had himself given me the cheque. It is also incorrect that I had filled my name and amount in the lost cheque with accused had signed and kept for his family members to withdraw money in case of need and I had presented the said forged cheque. I had received reply to the notice.

It is incorrect that I have presented a false case on the basis of a forged cheque."

5. She would, therefore, point out that when the evidence adduced by the appellant through DW-1 to DW-4 would categorically establish that the version of the complainant-respondent that he had withdrawn a specific sum of Rs.2 or 2.5 Lakhs from the Bank and gave it the appellant along with the money he had and when this aspect is established to be false the entire case of the complainant would collapse and what is more important a probable defence has been made out by the accused. In such circumstances, the three Courts which held in favour of the complainant were entirely wrong and, in fact, the High Court as already pointed out has not even appreciated the very purpose of examination of the defence witnesses in this regard. Learned counsel for the appellant also pointed out that this is a case where contrary to the finding of the Trial Court a reply notice was in fact given by the appellant as admitted by the complainant.

6. Per-contra, Mr. Ajay Marwah, learned counsel for the complainant-respondent would draw our attention to the version which was sought to be built up by the appellant through DW-5 who incidentally happened to be the son of the appellant. He took us through the evidence and then made the point that the version of the appellant was that the signed cheque in question along with the cheque book was lost while it was being carried by DW-5 but he requests the Court to notice that neither DW-5 nor the appellant had made complaint of the loss of the signed cheque to either the Bank or to the Police. He points out that a perusal of the reply notice sent by the appellant would clearly establish that the respondent was known and friendly with the appellant. This again bolstered the case of the complainant that the complainant has helped the appellant in his time of need by giving the hand loan. He further points out that there is no case that the signature on the cheque is not that of the appellant. In this regard, in fact, the Courts below have also noted the fact that the appellant has not produced the evidence of the Official from the bank of the appellant to establish that any notice was given to the Bank regarding the alleged loss of the signed cheque. He further drew our attention to the statements under Section 313 of the Cr.P.C. given by the appellant. He would point out that neither in the reply notice nor in the statement given under Section 313 of the Cr.P.C., it is the appellant's case that the respondent did not have the financial capacity to give the hand loan. He further ends by saying that the appellant does not have a case regarding the capacity of the respondent to loan the amount which remained after deducting the amount referable to the withdrawal from the bank. He further would contend that the Court may bear in mind that three Courts have held against the appellant and no case is made out for interference.

7. It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that Court shall presume 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. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of 'probable defence' has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa (supra), this Court notes that Section 139 of the N.I. Act is an example of reverse onus [see (2010) 11 SCC 441). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist.

8. It is indeed true that there is some merit in the complaint of Ms. Sangeeta Bharti, learned counsel for the appellant that in the impugned judgment the High Court has not appreciated the real purpose of examining DW-1 to DW-4. She is also correct when she drew our attention to the accounts of the Gramin Bank i.e. Gramin Bank, Kullu to show that before the 5th of August, 2011 the appellant had stopped operating the account in the said bank and a very small and ignorable amount alone was available in the said account.

9. The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

10. We have gone through the nature of the evidence in this case. We also bear in mind the fact that three Courts have held in favour of the respondent. In this regard we bear in mind that though it is true that reply notice was sent by the appellant, therein he admits the case of the respondent that the parties were having a cordial relationship. In the reply notice the appellant has not set up any case that the respondent did not have the financial capacity to advance the loan. In fact even we notice that there is no reference to the loss of the cheque book or signed cheque leaf. No complaint was given of the loss of the cheque book or the signed cheque leaf either to the police or to the bank. In the evidence of DW5, the son of the appellant, the version given is that on 5.10.2011, PW5 had left

home with the cheque book of the appellant which had a cheque signed by the appellant for withdrawing money, if needed in the absence of the appellant. He set up the version that he drove away an unowned cow. in the field. Thereafter, while sitting in the bus he saw the cheque book was not with him. He further deposed that since his father was not at home he could not tell him about the incident and got engrossed in his study and forgot the incident. In his statement under Section 313 Cr.PC given on 10.01.2013, appellant has taken the stand that he informed the Bank. It is relevant to notice that DW5 has further deposed that when the appellant received the notice he asked him about the cheque book and then he told him about the incident of the loss of cheque book. Still, at the time when the reply notice was sent, the case is not set up about the loss of cheque book and about the cheque relied upon by the respondent being one which is brought into existence using the lost signed cheque leaf. We have already noticed that there is no evidence to establish that the appellant had informed the Bank about the loss of the cheque book containing blank cheque. In fact, In the statement under Section 313 Cr.PC. appellant had stated that this cheque book containing a blank cheque was lost. Appellant has no case that the signature on the cheque in question was not put by him.

11. We must hasten here and observe that this Court even exercising power under Article 136 of the Constitution may not refuse to interfere in a case where three Courts have gone completely wrong. The jurisdiction generated in an appeal under Article 136 is undoubtedly rare and extraordinary. Article 136 of the Constitution only confers a right to obtain special leave in rare and extraordinary cases. However, this is not to be understood as meaning that it is a clear case of even three Courts in unison falling into palpable error and thereby causing miscarriage of justice and yet this Court would not interfere.

12. However, we would think that in the totality of facts of this case the appellant has not established a case for interference with the finding of the Courts below that the offence under Section 138 N. I. Act stands committed by the appellant. We have been told that the amount of compensation in a sum of Rs.7 Lakhs which is relatable to the cheque amount has been deposited already in the Trial Court. However, we would think that the appellant should be granted relief in the form of substitution of the sentence of imprisonment of one year with a fine. An amount of Rs.5,000/-(Five thousand) commends itself to us as an amount which should suffice as substitution for the imprisonment. Apart from that, we would also direct that a further amount of Rs.15,000/- shall be paid as compensation to the respondent.

13. Accordingly, the appeal is partly allowed. While we uphold the conviction, we direct that sentence of imprisonment of one year shall stand vacated. However, the appellant shall stand sentenced to fine of Rs.5,000/- which he will deposit within a period of one month from today in the Trial Court. In case of default, the appellant shall undergo simple imprisonment for a period of one month. The appellant shall also deposit a sum of Rs.15,000/- as further compensation which can be withdrawn by the respondent. The deposit shall be made in the Trial Court within a period of four weeks from today.

The appeal is partly allowed as above. Pending application(s), if any, stands disposed of.

……..J. [K.M. JOSEPH] ……..J. [HRISHIKESH ROY] New Delhi 07th March, 2022