Akash Agrawal vs State Of Up And Another on 24 August, 2018

Equivalent citations: AIRONLINE 2018 ALL 3445

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Court No. - 15

Case :- APPLICATION U/S 482 No. - 24823 of 2018

Applicant :- Akash Agrawal

Opposite Party :- State Of Up And Another

Counsel for Applicant :- Rajesh Dutta Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Kumar Singh-I,J.

1. This application under section 482 Cr. P.C. has been filed seeking quashing of the order dated 24/05/2017 passed by the Additional Chief Judicial Magistrate, court No. - 8, Aligarh as well as entire proceeding of complaint case No. 296 of 2017, Zakir vs Akash Agrawal, under sections 138, Negotiable Instrument Act, PS Quarshi, District Aligarh.

2. The facts in brief of this case are that a complaint was presented by O P no. 2, Zakir son of Alla Bux in the trial court alleging therein that he had taken on rent a shop from one Smt. Rekha Agrawal alias Rekha Mittal and was in possession of the same since 1961 as a tenant. The owner of that shop namely, Rekha Mittal agreed to sell that shop in favour of applicant - accused Akash Agrawal and it appears that an oral tripartite agreement was held between the O.P. No. 2, Rekha Mittal and Akash Agrawal that in lieu of vacating the said shop, an amount of Rs. 12,50,000/- (twelve lakhs fifty thousand) shall be paid by accused applicant to the O.P. No. 2, in pursuance of which the sale deed appears to have been executed of the said shop in favour of Akash Agrawal by Rekha Mittal and an amount of Rs. 3,68,000/- (three lakh sixty-eight thousand) was paid by accused applicant to the

O.P. No. 2, while the remaining amount was paid by Akash Agrawal by way of issuing two cheques: one of Rs. 4,000,00/- being cheque No. 518963 dated 01/04/2016 and the other cheque of Rs. 4,82,000/- (four lakh eighty-two thousand) being cheque No. 518962 dated 01/07/2016 which were to be encashed from Punjab National Bank Branch, Railway Road, Aligarh. One of these cheques namely cheque No. 518963 was deposited by the O.P. No. 2 on 01/04/2016 in his bank account in Bank of Patiala branch, Kela Nagar, Civil lines, Aligarh, which got bounced due to insufficient amount on 24/05/2016. Thereafter, on assurance by the accused applicant that the said amount could be encashed by presenting the said cheque again, the same was deposited twice further but with the same result. Ultimately the O.P. No. 2 issued notice through his counsel the accused applicant stating that in case within 15 days of the said notice the said amount is not paid to him, he would initiate legal proceedings, but no reply was given of the said notice relating to filing of the present complaint, case regarding which is pending in the court of ACJM- IV, Aligarh. The other cheque issued by accused applicant for an amount of Rs. 82, 000/- dated 01/07/2016 was also presented by the O.P. No. 2 in his account in Bank of Patiala, Kela Nagar, Civil lines, Aligarh, regarding which the accused applicant informed the bank mischievously that its payment be not made because the said cheque had been stolen and, accordingly, the same was returned to him unpaid. When the accused applicant was approached by the O.P. No. 2 to know as to why he did so, O.P.No. 2 was threatened and was ill treated and, thereafter, he sent a notice to the accused applicant through his counsel dated 01/08/2016 mentioning therein that they should make the payment within 15 days of receipt of the said notice and should take back his cheque, but the accused applicant did not make the payment of the said cheque and misappropriated the said amount.

3. The record reveals that the learned trial court vide order dated 24/05/2017 summoned the accused applicant to face trial under Section 138 of the Negotiable Instrument Act in respect of non-payment of the amount of Rs.4,82,000/- (four lakh eighty-two thousand) vide cheque No. 518962 dated 01/07/2016 having bounced for insufficient amount on the basis of evidence recorded by the trial court under sections 200 Cr. P.C. as well as 202 Cr.P.C.

4. The learned counsel for the applicant has assailed the impugned order stating that he had been falsely implicated. The real facts are that the applicant purchased shop No. 8 by registered sale deed dated 4/03/2016 from Rekha Agarwala, owner of the said property. On 19/03/2016, his cheque book containing cheque Nos. 518961 to 518980 went missing from his shop, information regarding which was given by him to police station concerned and also the publication was made regarding that in the newspaper on 27/04/2016. In the 2nd week of August 2016 the applicant had received notice given by the O.P. No. 2 and had sent its proper reply. The O.P. No. 2 had earlier filed another complaint under Section 138 Negotiable Instrument Act regarding cheque No. 518963 of Rs. 4,000,00/-, bearing complaint case No. 243616, PS Civil lines, in which summoning order dated 27/02/2017 was passed by ACJM, court No. 4, Aligarh, against which the applicant had filed Criminal Miscellaneous Application under Section 482 Cr. P.C. no. - 18493/2018, Akash Agrawal vs State of U.P. and another, in which the further proceedings of the case has been stayed vide order dated 24/05/2018. It is further mentioned that the applicant had not given cheque in question to the O.P. No. 2, he was a known person, who used to visit the shop of the applicant and was also a witness in the sale deed of the said shop, who has misused the said cheque by filling amount of Rs.

4,82,000/-. As per the averment of the complainant there was no legal liability in discharge of which the said cheque is alleged to have been issued and that the O.P. No. 2 is neither owner nor does he have any interest in the said shop. The alleged cheque is not issued in discharge of any legally enforceable liability. In the return memo of the cheque it is mentioned "kindly contact drawer/drawee bank and please present again", hence the cheque is not dishonoured due to insufficient fund. Therefore the impugned order deserves to be set aside.

5. The learned counsel for the applicant has relied upon Rajkumar Khurana vs State of (NCT of Delhi) and another, (2009) 6 Supreme Court Cases 72. The facts of the case are that appellant who was drawer of the cheque in question reported to the police as well as to the bank that two unfilled cheques which had been signed by him, were lost. When the cheque in question was presented for payment, the bank returned the same with remarks, "said cheque reported lost by drawer". The issue was whether dishonour of cheque on this ground constituted an offence under Section 138. It was held that the court below while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act, was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by respondent No. 2 or closure report filed by the Superintendent of Police in the F.I.R. lodged by the applicant against him. Further it was held that the contention before the court had been raised that the applicant did not have sufficient found in his bank account. Such an allegation had not been made in the complaint petition, therefore, it was for the bank to say as to whether the amount was available in the account of the applicant or not because the complainant was not supposed to have knowledge in this regard. In these circumstances, it was held that the complaint petition did not disclose an offence under Section 138 of the Act.

6. It would be appropriate to refer to the relevant provision here i.e. Sections 138 and 139 of the Act which are as follows:-

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.-
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> 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 provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:
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> 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 purposes 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 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.]"

7. From the above Sections, it is apparent that the following ingredients need to be satisfied for offence under Section 138 of the Act:-

(a) Cheque is drawn by the accused on an account maintained by him with a banker.

(b) The cheque amount is in discharge of a debt or liability.

(c) The cheque is returned unpaid for insufficiency of funds or that the amount exceeds the arrangement made with the bank, the offence stands committed the moment, the cheque is returned unpaid.

8. Further steps as laid down by way of proviso are distinct from the ingredients of the offence which the enacting provision creates and makes punishable. Thus an offence within the contemplation of Section 138-A is complete with the dishonour of the cheque but taking cognizance of the same by any Court is forbidden so long as the complainant does not have the cause of action to file a complaint in terms of clause (c) of the proviso read with Section 142.

9. In Dashrath Roop Singh Rathod Vs. State Of Maharashtra (2014) 9 SCC 129, overruling the law set forth by the Supreme Court previously, identified following ingredients of offence under Section 138 of the Act:-

(I) Drawing of the cheque;

(II) Presentation of the cheque to the bank;

(III) Returning the cheque unpaid by the drawee bank;

(IV) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;

(V) The failure of the drawer to make payment within 15 days of the receipt of the notice.

10. Once the cheque is issued in favour of the complainant then burden shifts upon the accused to prove that the sum which was mentioned in the cheque was not due towards the complainant. The presumption of innocence is a human right and doctrine of reverse burden introduced by Section 139 of the Act should be delicately balanced. Such balancing act would largely depend upon the factual matrix of the each case, the material brought on record and having regard to the legal principles governing the same. This has been held in the judgement of Krishna Janardan Bhat Vs. Dattatraya G. Hegde (2008) 4 SCC 54. Further in M.S. Narayana Menon @ Mani Vs. State of Kerala And Others. (2006) 6 SCC 39, the hon'ble Apex Court has held that initially the burden of proof is on accused to rebut the presumption under Section 139 of the N.I. Act by raising a probable defence if he discharges the said burden, the onus, thereafter, shifts on the complainant to prove his case, therefore, in the light of this judgement, the burden to prove the innocence appears to be upon the applicant/accused in case he takes plea that the cheque was lost.

11. The Hon'ble Apex Court in Kishan Rao Vs. Shankargouda 2018 (SCC On Line) SC 651 came across an appeal filed before it against order of High Court dated 18.03.2016 by which judgement, Criminal Revision Petition filed by the respondent/accused was allowed by setting aside the order of conviction and sentence recorded against the accused under Section 138 of N.I. Act 1881. The brief facts of this case were that complainant and the accused were known to each other and had good relations between them. The accused had approached the complainant for a loan of Rs. 2,000,00/- for the purpose of his business and had compromised to repay the same within one month. The said amount of loan had been paid by the complainant to the accused and for its repayment, the complainant issued post dated cheques which got bounced with endorsement "insufficient funds". The Apex Court held that no evidence was led by the accused in his defence that cheque was stolen and, accordingly, both the courts below had rejected his plea and, therefore, Apex Court held that it does not see any basis for the High Court coming to the conclusion that accused had been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. However, the presumption under Section 139 can be rebutted on the evidence of P.W.1 himself, has not been explained by the High Court and in this backdrop, it was held that the High Court committed error in setting aside the order of conviction in exercise of its revisional jurisdiction and the same was set-aside and the trial court's judgement was affirmed. In this case reliance has been placed by the Apex Court on several important judgements delivered by it particularly with respect to the Section 139 N.I. Act i.e. Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513, in which along with Section 139 of the N.I. Act, consideration was also made of the relevant provisions of the Evidence Act.

12. The relevant paragraphs are quoted herein below:-

> "14. Section 139 of the Act provides that 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.
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> 15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

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18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

13. The Apex Court held that accused may adduce evidence to rebut the presumption but merely denial regarding existence of debt shall not serve any purpose and relevant paragraph 20 of the judgement is as follows:-

> "20.The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular

circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act."

14. The other judgements relied upon is Rangappa Vs. Shri Mohan 2010 (11) SCC 441 in which the three judge bench of the Supreme Court had occasion to examine presumption under Section 139 of the Act and held that in case, the accused is able to raise probable defence which creates doubt with regard to the existence of debt or liability, the presumption may fail.

15. The following para Nos. 26 and 27 are reproduced herein below:-

"26. In 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 (supra) 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.

27. Section 139 of the Act 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 dishonour of cheques, the rebuttable presumption under Section 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 or proof."

16. In view of above position of law, it has to be seen by this Court as to whether the law which has been tried to be relied upon by the learned counsel for the applicant may give any benefit to the applicant? Before this Court expresses any opinion in this regard, it may also be pointed out that the said judgement is a final judgement and other judgements which are cited by this Court are also the final judgements in which the law has been interpreted with respect to Sections 138 and 139 of the Act and not the position of law at the initial stage when only summoning order has been passed which is being challenged.

17. In the case at hand, the main emphasis laid by the learned counsel for the applicant is that no illegal liability has arisen with respect to discharge of which, the said cheque is alleged to have been issued by the complainant because the complainant is not owner of the shop in question which has been purchased by the accused from one Rekha Mittal, therefore, there was no occasion for the complainant to issue any cheque of the alleged amount. It would be pertinent to mention here that the said argument does not appeal to reason because it is a matter of fact regarding which evidence would be required to be adduced by the complainant to prove that there was a tripartite agreement among the complainant, the owner of the shop Rekha Mittal and the accused applicant in which it was decided that the complainant would be paid an amount of Rs. 12,50,000/- by the accused applicant for vacating the possession of the shop in question which the accused has purchased by way of sale-deed from its owner, Rekha Mittal. No finding on this fact may be given at the initial stage of summoning unless evidence has been led by the complainant and the accused is provided opportunity in rebuttal to deny the same. Further it may be mentioned that whether this liability of payment of an amount of Rs. 12,50,000/- would be treated to be a legal liability for the discharge of which cheque could have been issued by the accused in favour of the complainant is also a matter on which only the trial court can give finding in the light of settled law and the same cannot be decided in proceedings under Section 482 Cr.P.C. on the basis of mere affidavits.

18. The other main argument which was vehemently made by the learned counsel for the applicant is that the cheque in question was in-fact lost/stolen and the same has been misused by the complainant regarding which the accused had informed the police also by giving an information in writing, although he has admitted that no F.I.R. has been recorded by police in this regard and further he stated that the said fact had been got published in newspaper as news item also by him, therefore, the complainant could not be held entitled to be paid any amount nor any case could lie under Section 138 of the Act. Again it would be pertinent to mention here that these facts that the

cheque in question was lost by the accused which has been misused by the complainant is a matter of fact. In the pleadings it has come that whole cheque book had been lost out of which only two cheques appear to have been misused as alleged by the accused. It is little intriguing to note as to why a person who gets the whole cheque book which was lost by the accused would misuse only two cheques and not others. What happened to those other cheques, there is no averment in the pleadings. Further it has not been clarified by the accused applicant as to in what circumstances only two cheques were kept signed or blank by him or whether on those cheques, the signatures of the accused applicants were forged and, thereafter, these cheques were misused, all these facts need to be made clear after leading evidence on these points in rebuttal by the accused applicant.

19. In the light of position of law made clear above, it is quite evident that the complainant has already discharged his burden by producing the impunged cheque which he alleges to have been issued by the accused applicant in his favour bearing his signatures, hence, initial presumption of the said cheque having been issued in favour of the complainant is already there which needs to be rebutted by the accused. The law cited above by this Court also makes is clear that these points may be determined only after evidence is laid by the respective parties according to the burden/onus of proof on them which keeps shifting at different stages and appreciation of such kind of evidence is possible to be made only during trial.

20. In view of the above analysis, this Court finds that the impugned order which is being challenged by the learned counsel for the applicant does not suffer from any lacuna at this stage and, therefore, this Court does not find any force in the arguments of the learned counsel for the applicant.

21. This application deserves to be dismissed and is, accordingly, dismissed.

Order Date :- 24.8.2018 A. Mandhani