

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Revision No. 156 of 2012

Rang Lal Ram, son of Late Jitan Ram, resident of Industrial Area,
Balidih, P.O.- Balidih, P.S.- Marafari, District- Bokaro

... .. **Petitioner**

Versus

1. The State of Jharkhand
2. Balmiki Choudhary, son of Late Indradeo Choudhary, resident of
Azad Nagar, P.O.-Shivandih, P.S.- Marafari, District- Bokaro

... .. **Opp. Parties**

CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioner : Mr. A. K. Sahani, Advocate
For the Opp. Party-State : Mr. P. D. Agarwal, Advocate
For the Opp. Party No.-2 : Mr. Sanjay Kumar, Advocate

C.A.V. on 05.03.2021

Pronounced on 16.03.2021

1. Heard Mr. A. K. Sahani, learned counsel appearing on behalf of the petitioner.
2. Heard Mr. P. D. Agarwal, learned counsel appearing on behalf of opposite party-State.
3. Heard Mr. Sanjay Kumar, learned counsel appearing on behalf of opposite party No.-2.
4. This revision has been filed for the following reliefs: -

“This criminal revision has been filed challenging the judgment dated 01.02.2012, passed by learned Sessions Judge, Bokaro in Cr. Appeal No. 81 of 2011, whereby he has affirmed the judgment of conviction and the order of sentence dated 28.07.2011, passed by the learned Judicial Magistrate, 1st Class, Bokaro in C.P. Case No. 434 of 2004 (T.R. No. 266 of 2011) whereby the petitioner has been convicted for the offence under Section 138 of the Negotiable Instruments Act, 1881 and has been sentenced to pay a fine of Rs. 1,20,000/- out of which Rs. 60,000/- has been directed to be given to the complainant/opposite party No. 2 by way of compensation and in default of payment of fine, he has been directed to undergo simple imprisonment for a period of six months.”

Arguments of the petitioner

5. Learned counsel for the petitioner submits that it was the specific case of the complainant himself that he was to invest in the

business of the accused and in lieu of that, he would be entitled to get 40% profit. He further submits that there have been no accounts regarding profit and the cheques were issued only by way of security and not against any existing debt or liability. The further point which has been argued by the learned counsel for the petitioner is that it is come in the trial court's judgment that the notice was served upon the son of the petitioner and therefore it is submitted that the notice was not served upon the petitioner. He submits that these aspects of the matter have not been properly considered by the learned courts below and accordingly both the judgments are perverse and fit to be set-aside.

6. Learned counsel for the petitioner has relied upon the judgment passed by the Hon'ble Supreme Court reported in *(2014) 12 SCC 539* para-12 onwards.

Arguments of the opposite party-State

7. Learned counsel appearing on behalf of opposite party-State has relied upon a judgment passed by the Hon'ble Supreme Court reported in *(2007) 14 SCC 750* to submit that there is no illegality or perversity in the impugned judgments passed by the learned courts below regarding finding of service of notice upon the petitioner. He submits that there can be a number of ways in which the accused can avoid service of notice and in such situation, the Hon'ble Supreme Court has held that the moment the accused appears before the learned court below, he has an opportunity to pay the amount by stating that he had not received the notice regarding bouncing of cheque. He further submits that there is no scope for re-appreciation of evidence particularly when the notice as per the petitioner himself was served upon his son who was residing with him.

Arguments of the opposite party No.-2

8. Learned counsel appearing on behalf of opposite party No.-2 submits that the learned courts below have rightly appreciated the materials on record and have come to concurrent findings of fact that all the basic ingredients for offence under Section 138 of the Negotiable Instruments Act, 1881 have been satisfied and accordingly, there is no scope for re-appreciation of evidence and coming to a different finding. He further submits that otherwise also there is presumption of law in connection with existing debt when a cheque is

issued and the reverse burden has not been discharged by the petitioner. He submits that there is no illegality and perversity in the impugned judgments and therefore the present petition is fit to be dismissed.

Findings of this Court

9. The prosecution case, in brief, is that the accused in the month of February, 2003 approached the complainant for financial accommodation as the accused was going to receive two work orders. The accused agreed to give to the complainant 40% of the profit to be accrued out of said purchase orders. The complainant advanced Rs. 1,00,000/- (Rupees One Lakh) to the accused for carrying out the job, but the accused did not pay back the money to the complainant and in the first week of January, 2004 on the request of the complainant, the accused issued a cheque of Rs. 49,500/- dated 31.01.2004 and promised to pay rest of the amounts in installments within March, 2004. The said cheque was deposited in the bank on 07.02.2004, but the same was dishonored on account of "insufficient fund". On receipt of aforesaid information, the complainant immediately met the accused at his residence and told him about the dishonor of the cheque. The accused requested the complainant not to take any legal action and issued a fresh cheque of Rs. 55,000/- with a request not to produce the same in the bank till first week of March, 2004. On 10.03.2004, another cheque was issued by the accused amounting to Rs. 5,000/-. The complainant was requested by the accused to deposit the said two cheques of Rs. 55,000/- and Rs. 5,000/- after 21.03.2004. On 28.03.2004, the accused requested the complainant not to produce the said cheques before the bank for encashment as the accused was unable to arrange sufficient funds. Thereafter, the complainant received a letter from the accused intimating the complainant that cheque issued by the accused was issued as a security and the accused asked for another Rs. 50,000/- for investment. After receiving the said letter dated 27.03.2004 of the accused, the complainant met the accused at his residence on 07.04.2004 and the accused informed the complainant that he wrote the letter dated 27.03.2004 on wrong advice of his friend and the accused sought three months from the complainant for depositing sufficient fund in his bank account. On 30.07.2004, the accused informed and confirmed that there are

sufficient funds available in his bank account . Accordingly, the complainant deposited the said two cheques dated 16.02.2004 and 10.03.2004 for an amount of Rs. 55,000/- and Rs. 5,000/- respectively which were dishonored on 02.08.2004 on account of “insufficient fund”. The complainant issued notice to the accused through his Advocate on 17.08.2004 informing about dishonor of cheques and for payment within 15 days. The said notice was sent to the accused through registered post as well as through courier service. Further case of the complainant is that both the letters were served upon the accused on 19.08.2004 and thereafter more than 15 days had elapsed and the accused did not pay the cheque amounts to the complainant, hence the complaint petition was filed.

10. The learned Chief Judicial Magistrate, Bokaro summoned the accused on 16.02.2005 to face trial for offence under Section 418 of Indian Penal Code and Section 138 of Negotiable Instruments Act, 1881 and subsequently charges were also framed under Section 418 of IPC and Section 138 of Negotiable Instruments Act, after recording the evidence before charge. The charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

11. The complainant had examined altogether two witnesses and exhibited the following materials as exhibits: -

- (i) Cheque No. 0265373 dated 30.01.2004 marked as Exhibit-1
- (ii) Memorandum issued by Vijaya Bank relating to Cheque No. 265373 dated 30.01.2004 of Rs. 49,500/- marked as (Exhibit1/1)
- (iii) Deposit slip of cheque No. 265373 marked as (Exhibit1/2)
- (iv) Cheque No. 265372 dated 16.02.2004 of Rs. 55,000/- marked as (Exhibit-2)
- (v) Memorandum issued by Vijaya Bank relating to cheque No. 265371 dated 10.03.2004 of Rs. 5,000/- and cheque No. 265372 dated 16.02.2004 of Rs. 55,000/- marked as (Exhibit-2/1)
- (vi) Deposit slip of cheque No. 265372 in Canara Bank marked as (Exhibit 2/2)
- (vii) Cheque No. 265371 marked as (Exhibit-3)

- (viii) Deposit slip of cheque No. 265371 in Canara Bank, Bokaro Steel City Branch marked as (Exhibit-3/1)
- (ix) The letter dated 27.03.2004 of accused Ranglal Ram written to the complainant Balmiki Chaudhary marked as (Exhibit-4)
- (x) Legal notice issued by the complainant to the accused Ranglal Ram marked as (Exhibit-5)
- (xi) Letter issued by the learned Advocate of the complainant to the Sub-Post Master, Sub-Post Office, Balidih, Bokaro Steel City, Bokaro marked as (Exhibit-6).

12. As per the impugned judgements, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he admitted that M/s. Kala Enterprises belongs to him and he also admitted that he gave in writing to the complainant to give 40% of his profit. He also admitted having written a letter to the complainant requesting for another Rs. 50,000/- over and above Rs. 1,00,000/- taken by him and told that he has nothing to say in his defence. The accused did not choose to adduce any evidence in his defence.

13. The learned trial court, after considering the evidences recorded a finding that on 16.02.2004, the accused gave a cheque of Rs. 55,000/- and on 10.03.2004, he gave another cheque of Rs. 5,000/- to the complainant and both the cheques were presented by the complainant for encashment on 31.07.2004 which were dishonored because of "insufficient fund". The complainant issued notice dated 17.08.2004 within 30 days of the dishonor of cheque through his Advocate, but within 15 days after the receipt of the notice, the accused did not pay the cheque amounts. The learned court below considered the presumption that the holder of a cheque received the cheque for discharge of his debt/other liability and after considering the materials on record convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 but acquitted him for the charge punishable under Section 418 of the Indian Penal Code.

14. The specific case of the accused before the learned lower appellate court was that the learned trial court failed to consider that the cheque was issued in a matter of investment in the business of the accused and was not in discharge of any debt and accordingly,

Sections 138 to 142 of the Negotiable Instruments Act are not attracted. The said argument was opposed from the side of the prosecution before the learned lower appellate court. The learned lower appellate court dealt with the argument regarding applicability of Sections 138 to 142 of the N.I. Act and was of the view that there is no bar in applicability of Section 138 of the N.I. Act to any cheque issued regarding debt or any liabilities arising out of investment in the business between the parties and rejected the plea of the accused regarding non-applicability of Sections 138 to 142 of the N.I. Act. The learned lower appellate court also considered the contention of the accused regarding legality of the notice marked as Exhibit-5 and was of the view that Exhibit-6 shows that Sub-Post Master, Balidih Post Office had made an endorsement to the effect that the registered letter No. A-976 dated 17.08.2004 was already delivered to the payee on 19.08.2004 and the Exhibit-5 revealed that the amount of cheque was specifically mentioned in the said notice. Hence, the learned lower appellate court found that there was no illegality in the notice marked as Exhibit-5 issued by the lawyer of the complainant and after considering the aforesaid aspects of the matter, the plea regarding legality of the notice was also rejected.

15. Before this Court, the learned counsel appearing on behalf of the petitioner has raised a specific plea by referring to para-8 of the trial court's judgment and has submitted that it has been recorded by the learned trial court that the notice was served upon the son of the petitioner on 19.08.2004 and accordingly, he has submitted that since the notice has been served upon the son of the petitioner, the same cannot be said to be service of notice upon the petitioner.

16. This Court has considered both the judgments passed by the learned courts below and it is apparent therefrom, that the legal notice regarding bouncing of cheque was sent through registered post as well as through courier service and the learned trial court at para-8 of its judgment has considered the service of legal notice through registered post i.e. through post office as well as the notice sent through courier service. In fact, the learned trial court has recorded that the post office has given in writing that notice i.e. Exhibit-5 and registered letter No. A-976 dated 17.08.2004 was delivered to the payee on 19.08.2004 for which a certificate of the post office was also exhibited and marked as

Exhibit-6 and it is only in connection with the notice sent through courier service that it has been recorded that the same was served upon Umesh Kumar, who is the son of the petitioner.

17. Thus, this Court finds that notice was sent through two modes; once through registered post and another through courier service and so far as the registered post is concerned, the same was served upon the petitioner for which the certificate of the post office i.e. Exhibit-6 was exhibited and so far as the courier service is concerned, it is only this courier notice which was served upon the son of the petitioner. This Court finds that there is consistent finding of the learned courts below in connection with service of the registered notice regarding cheque bouncing upon the petitioner after due appreciation of the materials on record particularly Exhibit-5 and Exhibit-6.

In the aforesaid view of the matter, the contention of the learned counsel for the petitioner that the notice was served upon the son of the petitioner and not upon the petitioner is devoid of any merit.

18. In the judgment passed by the Hon'ble Supreme Court reported in *(2014) 12 SCC 539 (Indus Airways Private Limited and Others vs. Magnum Aviation Private Limited and Another)*, it was held that payment through cheque in the nature of advance payment indicated that at the time of drawl of the cheque, there was no existing liability and accordingly in such circumstances no case under section 138 of Negotiable Instruments Act , 1881 can be made out.

19. In the instant case, the specific case of the complainant was that he was to invest in the business of the accused and in lieu of that it was agreed he would be entitled to get 40% of the profit and subsequently the accused *inter alia* issued the aforesaid two cheques. Admittedly, in the present case, the accused has not led any defence evidence. This Court is of the considered view that considering the nature of transactions between the parties and read with the presumption under Section 139 of the Negotiable Instruments Act that the cheque was issued against discharge of existing debt or other liability, the argument of the petitioner that the same was issued by way of security has no legal basis and accordingly, this Court finds that the accused could not discharge his onus against the presumption of cheque having been drawn in discharge of liability.

20. This Court further finds that so far as the other point raised by the petitioner, that there have been no accounts regarding profit and the cheques were issued only by way of security and not any existing debt is concerned, the same is also fit to be rejected. This Court finds that the learned court below has dealt with the plea of the petitioner regarding applicability of Sections 138 to 142 of the N.I. Act and in view of the presumption raised under Section 139 of the N.I. Act, the aforesaid plea of the petitioner has no legal basis. Admittedly, the petitioner did not adduce any defence evidence. There is no material on record to show that the reverse burden upon the petitioner regarding the cheque having been issued against a debt or any liability has not been discharged at all and therefore the presumption under section 139 of Negotiable Instruments Act, 1881 remained intact.

21. Accordingly, both the points which have been raised by the petitioner during the course of argument are devoid of any merit and are hereby rejected in absence of any perversity or illegality in the impugned judgments passed by the learned courts below.

22. This Court finds that the learned courts below have not committed any error, illegality or perversity in convicting the petitioner for bouncing of the aforesaid two cheques.

23. Accordingly, this revision petition is dismissed.

24. The bail bonds furnished by the petitioner is hereby cancelled.

25. Let the records be sent back to the court concerned.

26. Let this order be communicated to the learned court below through FAX/e-mail.

(Anubha Rawat Choudhary, J.)

Mukul/-