

Ashok Baugh Vs. Kamal Baugh and Another

Ashok Baugh Vs. Kamal Baugh and Another

SooperKanoon Citation : sooperkanoon.com/1178419

Court : Delhi

Decided On : Oct-06-2015

Judge : Ashutosh Kumar

Appeal No. : CRL.L.P. No. 358 of 2012

Appellant : Ashok Baugh

Respondent : Kamal Baugh and Another

Judgement :

1. The present leave to appeal is directed against the judgment and order dated 03.04.2012 passed by the Learned Additional Sessions Judge, Tis Hazari Courts, in Crl. A. No. 51/2011 whereby the judgment and order of conviction by the Trial Court namely, Metropolitan Magistrate, sentencing the Respondent no.1 to suffer Simple Imprisonment for 9 months and pay a sum of Rs. 15 Lacs as compensation to the complainant/petitioner and in default of such payment to undergo Simple Imprisonment for 3 months, has been reversed and the Respondent no.1 has been acquitted.

2. The dispute is between two real brothers over the issue of repayment of a loan which was given by the petitioner to the Respondent.

3. The facts of the case are as hereunder.

4. The petitioner advanced a loan of Rs. 5 Lacs to Respondent no.1 in the year 1991 for the purposes of helping him set up a business venture. The aforesaid loan was agreed to be repaid by the Respondent with interest at the rate of 12% p.a. accruing till the date of repayment. The Respondent issued a cheque on 20.04.1999 for an amount of Rs. 7,50,000/- in favour of the petitioner, payable at United Bank of India, Timarpur, Delhi towards repayment of the aforesaid loan along with interest. The cheque issued by the Respondent was not honoured because of insufficiency of funds in the account of the Respondent. The Respondent failed to pay the amount despite the legal notice and also denied, by way of reply to the notice, his liability to pay the amount. A complaint case thereafter was lodged. The Trial Court issued summons to the Respondent who pleaded not guilty and claimed trial.

5. In order to prove his case, the petitioner examined himself as CW1 and another witness Harinder Singh as CW2.

6. The petitioner, after recounting his case, deposed before the court that he did not remember the exact date when he had given Rs. 5 Lacs as loan to the Respondent no.1. He has admitted of being an income tax payee but did not show the amount of Rs. 5 lacs as loan in his income tax return of the corresponding year. The amount in question was paid from his and his wife's personal savings, which amount was lying in his house. He did not obtain any receipt of the loan at the time of the payment. The annual income of the petitioner was stated to be, as per ITR return of 1991, Rs. 1,25,000/- p.a.

7. The petitioner has denied before the Trial Court the suggestion that he was working as Manager in Northern Railway Agency, Noida. The suggestion that he along with one Bharat Bhushan, had removed the blank cheques from the office of the accused/Respondent from his briefcase, was vehemently denied. He has further stated that he did not make any written demand, but only asked orally to return the amount. The Respondent/accused himself offered to pay Rs. 7,50,000/- which was accepted by him as full and final payment of all dues. The petitioner has denied that his wife Shashi had ever taken any loan from the Respondent/accused and that she owed any money to him. The petitioner has

admitted that he used to do liaison work for the accused.

8. Harinder Singh, who was examined as CW2, has testified to the fact that petitioner was never employed with the Respondent/accused. He has deposed that the petitioner has a big business of forwarding agency with the railways.

9. The Respondent no.1 offered his evidence as DW3 by way of an affidavit. He has stated that his financial position was always better than the petitioner. The petitioner could not have advanced a loan of Rs. 5 Lacs. On the contrary, the Respondent no.1 gave loan to the petitioner and his wife in the year 1991 and 1992 to the tune of 41,000/-. The aforesaid advances were shown by the Respondent in his Income Tax Returns which was duly proved by Kailash Nath Bhargav, Advocate (DW2), who was the common advocate for the petitioner and the Respondent.

10. The Respondent has further stated that under certain circumstances, he had agreed to induct the son of the petitioner as a partner along with him and another brother i.e. Pradeep Baugh, with an agreement that such partnership would be dissolved after the marriage of the son of the petitioner. However the partnership was deliberately not dissolved even after the marriage of his son. Thus, a notice of dissolution of partnership was given to the son of the petitioner. That was the starting point of the dispute. After the dissolution of the partnership firm referred to above, the signed cheques of the Respondent were misused by the petitioner, his son, and his friend Bharat Bhushan. A false complaint was also lodged by the petitioner against him vide FIR No. 850/1999 (PS Malviya Nagar) for offences under Section 341/506/34 IPC. The aforesaid case was rejected as being false. There Respondent therefore denied his liability.

11. In his 313 statement the Respondent has again denied his liability to pay.

12. The Trial Court disbelieved the story of the Respondent that the blank signed cheques of the Respondent were stolen and later misused. The Trial Court was of the view that on framing of notice under Section 251 of the Cr.P.C. on 23.02.2011, the Respondent has replied as I plead not guilty and claim trial. I had given cheques in good faith which were blank signed ?; which reply was in teeth of the

defence taken by the Respondent that the cheques in question were the stolen/lost cheques. Coupled with this, the statement of the Respondent in cross-examination that no payment was made to railways by cheques at any point of time only advanced the contention of the petitioner/complainant that there was no necessity of keeping blank signed cheques.

13. The Trial Court rejected the proposition of the Respondent that in the absence of the loan being reflected in the Income Tax Return of the petitioner, there could be no presumption of the advance of loan and therefore the existence of any legally enforceable debt on the Respondent was doubtful. The Trial Court was of the view that it was for the Respondent to rebut the presumption under Section 139 of the NI Act.

14. As a result thereof, the Respondent was convicted under Section 138 of the NI Act and was sentenced to undergo simple imprisonment of a period of 9 months and was directed to pay a compensation of Rs. 15 Lacs i.e. double the cheque amount to the petitioner/complainant and in default of such payment, to further suffer simple imprisonment for 3 months.

15. The appellate court, on the contrary, took note of the fact that the petitioner had not obtained any receipt at the time of advancing the loan; had not shown the said amount in his income tax returns; had failed to produce any books of account or any proof to demonstrate his paying capacity; non-rebuttal by the petitioner of the fact of the Respondent/accused having advanced loan to the petitioner/complainant and his wife and which loan was shown in the ITR of the Respondent; failure of the petitioner to explain Ex.DW3/1, the information given by the Respondent to his bank about the loss of his blank signed cheques which included the cheque in question; such information having been provided to the bank on 29.05.1998 i.e. prior to the date of the cheque as well as the date of the legal notice, and so on and so forth.

16. On the aforesaid facts, the appellate court upturned the finding of the Trial Court and held that the Respondent was successful in rebutting the presumption of any enforceable legal debt, for the discharge of which, the cheque in question was allegedly issued by him.

17. In reply to the notice under Section 251 of the Cr.P.C., the Respondent pleaded not guilty and stated that he had issued the cheques in good faith. The appellate court was of the view that when the Respondent spoke about the issuance of cheques in good faith, he actually meant that such cheques were fraudulently misused; thus there being no distinction between his plea of no liability and his statement that the cheques were given in good faith. The Trial Court judgment was set aside and the Respondent was, therefore, acquitted.

18. In order to appreciate the contention of the parties it is necessary to examine the provisions of Section 118 (a), 138 and 139 of the NI Act.

Section 118 - Presumptions as to negotiable instruments Until the contrary is proved, the following presumptions shall be made:--

(a) consideration--that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

* * * *

Section 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 provisions 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 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.

19. For the application of the provisions of Section 138 of the NI Act, three ingredients are required to be satisfied i.e., (i) that there should be legally enforceable debt; (ii) that the cheque should have been drawn from the account of the bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and (iii) the cheque so issued is dishonoured for insufficiency of funds.

20. Under Section 139 of the NI Act, unless the contrary is proved, the holder of a cheque shall be presumed to have received the cheque in discharge of any debt or other liability.

21. Sub clause (a) of Section 118 of the NI Act, inter alia provides that unless the contrary is proved, a drawn up negotiable instrument, if accepted, has to be presumed to be for consideration.

22. In *Goa Plast (P) Ltd. vs. Chico Ursula D'souza and Anr.*, (2003) 3 SCC 232, the Supreme Court has held that the provisions of Section 138 to 142 of the NI Act, is for the purpose of giving credibility to negotiable instruments in business transactions. In view of Section 139 of the NI Act, it had to be presumed that a cheque is always issued in discharge of any debt or other liability. The presumption could be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

23. In *Krishna Janardhan Bhat vs. Dattatraya G. Hegde*, (2008) 4 SCC 54, the Supreme Court had the occasion to deal with the aforesaid provisions of the Act. In the aforesaid decision, the Supreme Court took the view that Section 139 of the NI Act merely raises a presumption in regard to the cheque having been issued in discharge of any debt or liability but not the existence per-se of a legally recoverable debt.

24. However, in *Rangappa vs. Sri Mohan*, (2010) 11 SCC 441, a three judge bench of the Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in the favour of the complainant.

25. In *Rangappa vs. Sri Mohan (Supra)*, Section 139 of the NI Act is stated to be an example of a reverse onus clause which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and largely falls in the arena of a civil wrong and therefore the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof. A reverse onus clause requires the accused to raise

a probable defence for creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of preponderance of probabilities and not beyond shadow of any doubt ?.

26. Keeping the above proposition of law in mind, on an analysis of the facts, the scale of balance tilts in favour of the Respondent (accused). The Respondent appears to have rebutted the presumption under Section 139 of the NI Act of the existence of a legally enforceable debt by establishing that there was no receipt of the loan; such advance was not shown in the ITR return of the petitioner complainant; paying capacity of the complainant being doubtful and the Respondent/accused himself of having advanced loan in the past to the petitioner/complainant and his wife.

27. The petitioner/complainant could not, on the other hand, satisfy the requirement of law in discharging the onus, in the second instance, regarding the plea of the Respondent of no liability or non-existence of legally enforceable debt. A beleaguered attempt was made by the petitioner to salvage his case when it was stated that despite information to the bank by the Respondent on 29.05.1998 about missing of the blank signed cheques, no categorical direction was given to the bank for stopping the payment. This further damages the case of the prosecution as no such direction to the bank only evinces that there was no existence of any debt and the Respondent did not anticipate that one of such lost cheques would be misused by his own brother, the complainant. The response of the accused in reply to the notice under Section 251 of the Cr.P.C., regarding his desire to be tried as he had issued the cheques in good faith, was in no way different from or in juxtaposition with the stand of the Respondent that the cheques were lost/misplaced/stolen. The appellate court rightly held that such statement only meant that the cheque was signed in good faith for some other purpose, but it was misused. The aforesaid statement cannot be read as if the cheque was given in good faith to the petitioner/complainant in discharge of any legally enforceable debt.

28. The Respondent has been able to rebut the presumption of the existence of any legally enforceable debt in a very strong way.

29. Consequently leave to appeal is declined.

30. Petition is dismissed but without costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com