

Hemant Dhawan Vs. the State and Another

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Court : Delhi

Decided On : Feb-23-2012

Judge : Suresh Kait

Appeal No. : CRL.A. 842 of 2005

Appellant : Hemant Dhawan

Respondent : The State and Another

Judgement :

SURESH KAIT, J.

(Oral)

Cri. M.A. 10615/2005 (Delay)

For the reasons explained, delay stands condoned.

Criminal M.A. stands disposed of.

Cri. M.A. 10616/2005

Not maintainable.

Criminal M.A. stands disposed of.

Crl. A. 842/2005

1. At the outset, it is pertinent to mention here that the petitioner has filed the instant Appeal as noted above in the year 2005.
2. The amendment in Section 372 were inserted by Act 5 of the 2009 Section 29 w.e.f 31.12.2009 vide which the right of the aggrieved party accrued to file the Appeal against the acquittal order.
3. Order sheet reveals that vide order dated 14.05.2009, passed by Predecessor Court to the effect that instant matter be treated as L.P.A / Revision.
4. However vide order dated 28.09.2010, it is clarified by another Predecessor Court that leave to Appeal has not been granted.
5. In my view, instant matter has wrongly numbered in the category of Crl. Appeal, whereas the challenged against the acquittal order would have been filed by way of revision only as the instant petition pertains to year, 2005 and the amendments came into force in the year 2009.
6. Therefore, the Registry of this Court is directed to renumber the instant matter in the category of Revision Petition.
7. Coming to the instant case, petitioner has sought to set aside the impugned judgment dated 31.05.2005 passed by Id. Trial Court, whereby the Id. Trial Court has acquitted the respondent from the charges under Section 138 NI Act.
8. The petitioner has taken a ground that Id. Trial Court has failed to appreciate the arguments of the Id. Counsel for the petitioner to the effect that plea of the respondent regarding loss of cheque or theft of cheque is concocted and afterthought, as the respondent was having opportunities to lodge his protest regarding loss / theft of cheque when he came to know about the same.
9. Id. Counsel for the petitioner has submitted that the pleas taken by the respondent is after thought and in order to create defence in his favour. However, the respondent never chooses to do with the afovesaid acts and

ultimately after recording of statement under Section 281 Cr.P.c., he produced a witness in defence as DW-1, the alleged hand-writing expert, and only then for the first time at the state of final arguments on being moving an application for examining the hand-writing expert, which was allowed by the Id. Trial Court, despite being objection taken by the present petitioner.

10. It is further submitted that respondent no. 2 had moved an application to examine the hand-writing expert, only when the criminal complaint filed against the present petitioner with respect to the theft of the above-referred cheque, was dismissed by the trial court and not getting any counter-relief from that complaint. Respondent no. 2 moved an application before the Id. Metropolitan Magistrate for examining hand writing expert in order to create a false defence.

11. The petitioner has taken further ground that Id. Trial Court has wrongly read the provisions of Section 139 of N.I. Act and has wrongly made the petitioner liable to prove his case under the provisions of Section 139 of N.I. Act, the burden of proving the same has been shifted. 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 a nature referred to in Section 138 N.I. Act for the discharge, in whole or in part, or any debt or other liability.

12. I note, in post notice evidence, first witness examined by the complainant is CW-1, Lal Sahib Mishra, Clerk from Standard Chartered Bank, who proved the statement on account Ex.CW1/P1 and Cheque return register Ex.CW1/P2 on the record. He has denied the suggestion that the respondent / accused had requested them to stop the payment of cheque.]

13. CW2 Ashok Mahajan, Manager, Punjab and Sindh Bank, Krishna Nagar proved the statement on account of the complainant Ex.CW2/A.

14. Petitioner / complainant in his statement as CW3, has reiterated his complaint case. He has stated that while giving the cash loan in question, respondent / accused gave him three post-dated cheques. However, in his cross-examination he has categorically conceded that the cheque in question taken by him as security of the loan given by him. He has also said that after the

dishonor of the cheques, he lodged FIR against the respondent / accused.

15. He has further conceded in his cross-examination, that he had neither taken any receipt nor ever executed any pronote of the alleged loan of Rs.7 Lacs. He has also conceded that he was not a partner in the Electronic Showroom and had an annual income of about Rs.1 Lac.

16. He has further conceded that he arranged Rs. 7 Lacs out of the sale of some property, and also shown the loan of Rs.7 Lacs in income tax return, however, no such proof was ever filed by him. He has also stated that all the columns of cheque were filled up by the respondent / accused in his presence.

17. He has also admitted that the respondent / accused replied to the legal notice issued by him.

18. Ld. Trial Judge has further recorded that during the course of arguments, first contention raised the by the defence counsel is that the cheque in question was stolen from the shop and was subsequently misused for filing this case.

19. In this regard, it is observed that there is nothing on record to suggest that accused ever lodged any FIR in respect of the alleged theft of cheque prior to its presentation and dishonour.

20. Although copy of the complaint under Section 380 of Indian Penal Code, 1860 Ex.CW3/DA is placed on record, but admittedly this complaint was dismissed by Id. MM.

21. It is further observed that respondent / accused had not issued any letter to his bankers for getting the payment for alleged stolen cheques stopped. In this regard, the respondent / accused has tried to justify the inaction on his part by saying that he was not aware of the specific details of the stolen cheques or their whereabouts. It is conceded that respondent came to know about the theft of cheques only after receiving the demand notice in this case.

22. The Ld. Trial Judge has observed that the story of the theft of cheque in question was not found satisfactory and believe-worthy as far as the forging of

signatures is concerned. Because of the fact that signatures appearing on the cheque in question was signed by the Bankers of the respondent/ accused, M/s. Standard Chartered Bank since it is nowhere mentioned on the dishonoured memo that the signatures appearing on the cheque differ from the specific signatures.

23. In this regard, the respondent / accused has examined hand writing expert DW Deepak Jain. According to his report, the signatures appearing on the cheque in question are not that of the respondent / accused i.e. Sanjay Bahari, but this hand-writing expert has conceded in his cross-examination that since the signatures appearing on the cheque have been partially erased, they are not fit for comparison.

24. Ld. Trial Judge has further recorded that even the defence has not been able to conclusively proved on record that the signatures appearing on the cheque in question are forged and fabricated, but still by virtue of Supreme Court Judgment in **C. Anthony vs. K.I. Raghavan Nair, 2003 (1) Crimes 76 (SC)** once the accused has denied to have borrowed any money from the complainant besides drawing of the cheque in favour of the complainant and has claimed that it was stolen, Hon'ble Supreme Court has observed that in such a situation, complainant is required to prove the advancement of the money to the accused.

25. Ld. Trial Judge find that there is no iota of evidence which would suggest that the complainant ever advanced a loan of Rs.7 Lacs to the respondent / accused, but also claimed that the cheque in question was drawn by the respondent / accused in his presence. It is believed by the hand-writing expert that three different inks were used in filing up the cheque.

26. In his cross-examination, the complainant has conceded that cheques were filled by the respondent / accused in his presence particulars in cheque was also filed up by the accused person.

27. Finding no evidence, the Id. Metropolitan Magistrate has concluded that the complainant has failed to make out a case of conviction against the

respondent/accused.

28. Ld. Counsel for the petitioner has further submitted that after filing the complaint, the onus is on the respondent/accused to prove that he had not to pay the cheque amount to the complainant. It is not the onus of the complainant to prove that the debt was legally enforceable.

29. Keeping the above discussion into view, I find no discrepancy in the impugned judgment, therefore, no merit in the case.

30. Instant petition is accordingly dismissed.

31. No order as to costs.

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