



In the Court of the Sessions Judge, Dhanbad.

**Present:- Ram Sharma,
Sessions Judge,
Dhanbad**

Dhanbad Dated 29th day of June, 2024

Criminal Appeal No.66/2024

CNR : JHDH01-004498-2024

In the matter of :-

Ajay Kumar Mehta,
S/o Late Rajendra Kumar Mehta,
R/o Flat No.607, Urmila Tower,
P.S.-Bank More, District-Dhanbad. **Appellant**

Versus

1. Ranjeet Sharma,
S/o Late Nawal Sharma,
R/o Vikash Nagar, Near B.C.C.L. Quarter,
Shastri Nagar (West), Dhobatand,
P.S.-Bank More, District-Dhanbad.
2. The State of Jharkhand. **Respondents**

J U D G M E N T

1. The appellant (hereinafter referred to as "complainant" has preferred the present appeal against the judgment dated 22.2.2024 passed by the Court of Ms. Pooja Pandey, J.M. 1st Class, Dhanbad in C.P. Case No.2053/2014 whereby and where under the learned Magistrate, Dhanbad was pleased to acquit respondent no.1 (hereinafter referred to as

“accused”) for the offence punishable under section 138 of Negotiable Instruments Act (in short” the N.I. Act”).

2. Brief facts of the case are that complainant is one of the partners of M/s Vishal Plywoods having its office and place of business at Shastri Nagar, Dhanbad and deals with various types of interior decorative materials, plywoods, sunmica, A.C.P., aluminum sections and hardware etc. On 5.5.2014 & 19.6.2014, accused purchased materials *vide* delivery *challans* dated 16.4.2014 & 23.4.2014 amounting to Rs.16,92,632/- and assured to make the payment within a few days. As per the promise, accused gave a cheque no.084095 dated 7.7.2014 for Rs.16,92,636/- drawn on Central Bank of India, Dhansar, Dhanbad but when the said cheque was presented to the Bank for encashment on 7.7.2014, the same got dishonoured on 8.7.2014 with remarks “funds insufficient”. It is further stated that complainant served a legal notice dated 14.7.2014, which was replied by Sri Hussain Haikal, Advocate on behalf of the accused *vide* reply dated 19.7.2014 denying his liabilities, hence, the complaint case.

3. Under the compelling circumstances, a C.P. Case No. 2053/2014 was filed before the Court below under section 138 of the N.I. Act & section 420/406 I.P.C. On 26.3.2015, the Lower Court found a *prima-facie* case under section 138 of the N.I. Act against the accused and directed the complainant to file requisite for issuing summon against him.

4. On 4.7.2015, a surrender/bail application was filed on behalf of the accused. Since the offence punishable under section 138 of the N.I. Act was bailable in nature,

accordingly, bail was granted to him on furnishing bail bond of Rs.5,000/- with two sureties of like amount.

5. On 7.12.2018, substance of accusation for the offence under section 138 of the N.I. Act was read over and explained to the accused in Hindi to which he pleaded not guilty and claimed to be tried.

6. The complainant examined two witnesses *i.e.* **CW-1 (Kirshna Chaurasiya) & CW-2 (Ajay Kumar Mehta)**. The complainant also exhibited following documents during the course of trial:-

Ext-1	Original cheque no.084095 dated 7.7.2014 for Rs.16,92,636/-
Ext-2	Cheque Returning Memo dated 8.7.2014
Ext-3 to Ext-3/5	Signatures of complainant (appellant) on complaint petition
Ext-4 to Ext-4/3	Four invoices
Ext-5 to Ext-5/3	Two <i>Challans</i>
Marked-X & X/2	Three set of photocopy of notice
Marked-X/1	Photocopy of reply of notice

7. After complainant's evidence, the accused was examined under section 313 Cr.P.C.

8. No oral or documentary evidence was adduced on behalf of accused.

9. After hearing the learned counsels of both the parties and considering the evidence and other material placed on record, the Trial Court *vide* judgment dated 24.1.2024 acquitted the accused for the offence punishable under section 138 of the N.I. Act.

10. Feeling aggrieved and dissatisfied with the impugned judgment dated 22.2.2024 the present acquittal appeal has been filed on behalf of the complainant.

11. It is submitted by the learned counsel of the complainant that a legal notice dated 14.7.2014 was sent to the accused by speed post which was duly replied by him through his counsel on 19.7.2014, but the Court below did not consider this fact and arrived at a wrong conclusion. It is further submitted that accused has not disputed the legal notice sent on behalf of the complainant, therefore, the Court below ought to have considered the same in his favour. It is further submitted that accused has not disputed his signature on the alleged cheque, therefore, a presumption under section 139 of the N.I. Act arises in his favour. Since, the accused has not rebutted the presumption in any manner, hence, the finding should have been returned in favour of the complainant. It is further submitted that accused did not examine any witness nor examined himself in witness box to rebut the presumption and prayed to set aside the impugned judgment.

12. On the other hand, learned counsel of the accused simply argued that the present appeal is not maintainable in this Court and the same ought to have been filed before the Hon'ble High Court in terms of section 378 of Cr.P.C.

13. I have considered the respective submissions of both parties and also carefully examined the record. In order to appreciate the contentions of both parties, following points needs to be determined by this Court:-

“(I) Whether the appeal against acquittal for the offence punishable under section 138 of N.I. Act would lie to the Sessions Court or to the Hon’ble High Court?

(II) Whether the complainant is under an obligation to prove the legal notice when the same is duly served upon the accused and replied by him?”

14. Before, I proceed further it would be relevant to note certain provision of Cr.P.C which are, relevant to address point no.(I). The word ‘complaint’ and the word ‘victim’ have been defined by clauses (d) and (wa) of section 2 of Cr.P.C. The ‘complaint’ means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation:- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant, (wa) “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expressions “victim” includes his or her guardian or legal heir.”

Section 372 Cr.P.C :- No appeal to lie unless otherwise provided-No appeal shall lie from any judgment or order of a Criminal Court

except as provided for by this Code by any other law for the time being in force.

Section 372 Cr.P.C was amended w.e.f 31.12.2009 whereby a proviso was added. It would be advantageous to reproduce the amended section 372 Cr.P.C which reads as under :-

“372. No appeal to lie unless otherwise provided.-No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

15. A bare reading of the proviso inserted to Section 372 Cr.P.C, it is evident that there are following three circumstances in which the victim shall have the right to prefer an appeal against any order:

- (a) acquitting the accused;
- (b) convicting for lesser offence;
- (c) imposing inadequate compensation.

16. Similarly, we are also concerned with Section 378, which provides for appeal in case of acquittal. The provisions contained in Section 378, read as follows:-

“378. Appeal in case of acquittal-(1)
Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),-

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Force Establishment constituted under the Delhi Special Force Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.

(3) No appeal to the High Court under sub-section (1) or sub-section (2) shall be

entertained except with the leave of the High Court.

4. If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

17. Prior to the amendment in section 372 Cr.P.C there was no specific provision for the victim. By way of amendment in section 372 Cr.P.C the proviso was added to enable the victim to file a statutory appeal against any order passed by the court acquitting or convicting the accused for a lesser offence or imposing inadequate compensations and further providing that such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

18. The Larger Bench of our Hon'ble High Court in case of **Tuklal Yadav Vs. State of Jharkhand reported in 2018(4) JLJR**

245 held that the complainant, whether the State or a private person, who is also the victim as defined under Section 2 (wa) of the Cr.P.C, if aggrieved by the judgment/order of acquittal passed by the Trial Court, shall have the only remedy against the order/judgment of acquittal passed by the Trial Court, to seek special leave of the High Court under Section 378(4) of the Cr.P.C, and in case the special leave is granted, to file appeal in the High Court itself”.

19. In view of the judgment of the Hon’ble Larger Bench, it is clear that in case of appeal against the acquittal by the trial court, the complainant is required to seek special leave of the Hon’ble High Court in terms of provision of Section 378 (4) of Cr.P.C.

20. In case of **Anup Kumar Jha Vrs. State of Jharkhand, Acquittal Appeal (C) No. 33/2019** the Hon’ble Court relied upon the judgment passed by the Hon’ble Supreme Court in case of **Mallikarjun Kodagali (dead) through LRs Vrs. State of Karnataka and Others (AIR 2018 SC 5206)** in which the Hon’ble Supreme Court held in para-77 & 78 which reads as under:-

“77. “Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa) of the Cr.P.C would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court

was maintainable and ought to have been considered on its own merits."

78. "As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar.

The language of the proviso to Section 372 of the Cr.P.C is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word 'complaint' has been defined in Section 2(d) of the Cr.P.C and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C is concerned."

21. The Hon'ble Supreme Court of India in the case of **Naval Kishore Mishra Vs. State of Uttar Pradesh** reported in **AIR ONLINE 2019 SC 418** held in para-14 which read as under:-

14-"The legal position enunciated in Mallikarjun Kodagali (d) though legal representatives (supra) would show that the appellant had a right to file the appeal and in fact no leave has to be sought in such a situation. Thus, the appeal has to be dealt as a regular appeal.

22. Considering the aforesaid judgment passed by the Hon'ble Apex Court, the Hon'ble High Court in **Anup Kumar Jha Vs. State of Jharkhand (Supra)** was of the view that there is no

requirement of special leave under section 378(4) Cr.P.C and the victim as defined under section 2(wa) will be entitled to file an appeal to which an appeal ordinarily lies against the order of conviction and in this case appellate forum being the Sessions Judge.

23. In view of the above, it can safely be said that this acquittal appeal against the impugned judgment dated 18.9.2020 passed by the learned S.D.J.M. Dhanbad would lie to the Sessions Court. Accordingly, **point no.(I) is decided in favour of the complainant.**

24. **Point No.(II) "Whether the complainant is under an obligation to prove the legal notice when the same is duly served upon the accused and replied by him?"**

Before adverting to answer the above point, I would like to reproduce the provisions of section 138 of the N.I. Act, which is as under:-

"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 purpose of this section, “debt or other liability” means a legally enforceable debt or other liability.”

25. A reading of the aforesaid provisions would make it clear that where a cheque is drawn towards discharge of any debt or other liability is returned back unpaid by the Bank, it is mandatory on the part of the complainant or the holder of the cheque in due course to give a notice in writing to the drawer of the cheque within 30 days of the receipt of information from the Bank regarding dishonour of the cheque. If the drawer of the cheque fails to make the payment of the cheque amount within 15 days from the date of receipt of the said notice, the cause of action for the purpose of filing a complaint under section 138 of the N.I. Act would start there from. In the case on hand, the cheque no.084095 (Ext-1) dated 7.7.2014 for Rs.16,92,636/- drawn on Central Bank of India, Dhansar, Dhanbad was presented to the Bank for encashment, but

the same was returned dishonoured *vide* Bank returning memo dated 8.7.2014 (Ext-2) with remarks "funds insufficient". As per the copy of the legal notice dated 14.7.2014 (Marked "X" for identification) was sent to the accused for making the payment of the cheque amount, which was duly replied by him through his counsel Sri Hussain Haikal, Advocate on 19th July, 2014 (Marked "X/1" for identification). A reading of the reply dated 19.7.2014 would suggest that the same was sent for the notice dated 14.7.2014, hence, it stands established that complainant had apprised the accused regarding dishonour of the cheque through legal notice dated 14.7.2014, but the Court below arrived at a conclusion that original notice and the postal receipt were not filed and exhibited during the course of evidence, which creates doubt whether the notice was sent to the accused or not or whether it was received or not or the said notice was dispatched or not? Since, the accused has replied the legal notice, therefore, no such question arises. The question of dispatch of notice would arise when the same is disputed by the accused. In the case on hand, accused himself replied the said notice. In that eventuality, there is no need to prove the legal notice because by replying the same it stands proved that a notice of dishonour of cheque was in fact served upon him. The Court has also recorded a finding that two notices were sent to the accused. The legal notice dated 14.7.2014 is the first notice which was suitably reply by the accused and the second notice dated 1.8.2014 is nothing but a reminder/rejoinder to reply dated 19.7.2014. In my considered view, the Court below has not considered the

aforesaid facts in correct perspective and recorded an incorrect finding. Accordingly, **the point no.(II) is decided in favour of the complainant.**

26. Regard being had to the facts and circumstances of the case, the impugned judgment dated 22.2.2024 passed by the Court below is hereby **set aside**. Accordingly, the present appeal stands **allowed**. Let the matter be remitted back to the Court concerned with direction to pass afresh judgment after hearing both parties without influencing with the observation made herein above.

A copy of this judgment alongwith L.C.R. be sent to the Court concerned.

File be consigned to Record Room.

(Ram Sharma)
Sessions Judge
29.06.2024
J.O. Code-JH00553

Dictated and Corrected by me.

(Ram Sharma)
Sessions Judge
29th June, 2024
J.O. Code-JH00553