Cash Transaction Exceeding Rs. 20K Does Not Nullify The Transaction In S.138 NI Act Case: Karnataka High Court

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IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH
G. BASAVARAJA; J.
CRIMINAL REVISION PETITION NO. 2011 OF 2013; 18 NOVEMBER, 2022
GAJANAN KALLAPPA KADOLKAR *versus* **APPASAHEB SIDDAMALLAPPA KAVERI**

Petitioner by Deepak S Kulkarni, Advocate

Respondent by B V Somapur, Advocate

O R D E R

1. This criminal revision petition is filed under Section 397(1) r/w Section 401 of Cr.P.C. seeking to set aside the judgment dated 31.10.2012 passed by the II Addl. District and Sessions Judge, Belgaum, in Crl.A.No.13/2012 confirming the judgment of conviction and order of sentence passed by the JMFC II Court, Belgaum, in C.C.No.1592/2009 dated 09.09.2011 wherein the revision petitioner has been convicted for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'NI Act') and sentenced to pay a fine of Rs.1,28,000/- in default to undergo a simple imprisonment for 6 months.

1.1 [Note: The revision petitioner/accused has preferred 15 separate revision petitions against the judgments of the Court below including the above case in Crl.R.P.Nos.2011-2025/2013 in respect of dishonor of 15 cheques amounting to Rs.1 lakh each, separate judgment is passed in each case.].

2. The parties are referred to as per their ranks in the trial court.

3. The relevant facts of the case leading to this revision petition are as under:

3.1 The Complainant is the permanent resident of Anjaneya Nagar, Belgaum and the accused is his neighbour and close friend. The accused was running a business of Glass and plywood under the name and style "M/s. Gajanan Glass and Plywoods." In the month of January 2007, the accused approached the complainant seeking financial assistance of Rs.15 lakhs to meet his personal commitments and for business purpose. As the complainant was on good terms with the accused, who was also a neighbour, he agreed to advance a hand loan of Rs.15 lakhs to the accused. Between January 2007 and June 2007, he advanced a hand loan of Rs.15 lakhs to the accused and that accused agreed to repay the hand loan within six months from the date of last advancement. However, after repeated requests, the accused issued 15 cheques for Rs.1 lakh each towards repayment of the hand loan availed of by him. The cheque was issued for Rs.1 lakh bearing No.580497 dated 09.10.2009 drawn on State Bank of Mysore, M.M. Extension, Belgaum, towards discharge of said hand loan. The complainant has presented the said cheque for encashment through his banker i.e., HDFC Bank, Belgaum, on 10.10.2009 and the said cheque was dishonored with an endorsement of "**exceeds arrangements**" on 10.10.2009. Thereafter, the complainant issued a legal notice to the accused on 23.10.2009 calling upon him to make payment of the entire cheque amount within 15 days from the date of receipt of notice; the said notice was duly served to the accused on 26.10.2009, but he failed to make good of the cheque amount. Hence, the complainant has filed a complaint under Section 200 of the Cr.P.C. against the accused for the commission of an offence punishable under Section 138 of the NI Act.

4. The learned Magistrate after taking cognizance has recorded the sworn statement of the complainant and registered the case against the accused and summons was issued to the accused. In response to the summons, the accused appeared before the court; a plea was recorded under Section 251 of Cr.P.C and the accused pleaded not guilty and claimed to be tried.

5. To prove the guilt of the accused, the complainant has examined himself as P.W.1 and placed reliance on six documents, which were marked as Exs.P-1 to P-6. On closure of the complainant's side evidence, a statement under Section 313 of Cr.P.C. is recorded to explain the incriminating evidence that appeared against the accused. The accused has denied the same and has not chosen to lead any defence evidence. On hearing the arguments, the learned Magistrate convicted the accused for the commission of an offence punishable under Section 138 of the NI Act and sentenced him to pay a fine of Rs.1,28,000/-. Further, learned Magistrate has directed that out of fine amount, Rs.1,25,000/- is ordered to be paid to the complainant by way of compensation.

6. Being aggrieved by this judgment of conviction dated 09.09.2011 in C.C.No.1592/2009 on the file of JMFC II-Belgaum, the accused has preferred an appeal before the II Addl. District and Sessions Judge, Belgaum, in Crl.A.No.13/2012, which came to be dismissed on 31.10.2012. Being aggrieved by the judgment of conviction, the accused has preferred this revision petition.

7. As per the order dated 25.06.2013, the sentence passed by the JMFC II, Belgaum, in C.C.No.1592/2009 dated 09.09.2011, which was confirmed in Crl.A.No.13/2012 on 31.10.2012 by the II Addl. District and Sessions Judge, Belgaum, was suspended and the petitioner was ordered to be released on bail on execution of a personal bond of Rs.25,000/- with one solvent surety for the likesum to the satisfaction of the trial court.

8. On 02.09.2013, this Court passed an order stating that the petition is admitted subject to deposit of 50% of the cheque amount within 4 weeks. Further, it is ordered that the respondent be permitted to withdraw the same on such deposit upon furnishing security to the satisfaction of the registry. But the revision petitioner/accused has not complied with the order of this Court. Hence, on 02.06.2014, this Court has passed an order as under:

"Office objections in all these cases not complied in spite of granting four opportunities. The order sheet discloses that the order was passed by this Court on 02.09.2013. Since that day, the petitioner never made any attempt to comply the office objections. No reasons also have been properly assigned.

Therefore, I am of the opinion that granting of further time would definitely send a message to the petitioner that he can take the order of the Court for a ride. Therefore, I am of the opinion, the noncompliance of the order should be treated seriously for vacating the interim order granted by this Court.

Accordingly, in all the above said cases the interim order granted suspending the sentence passed by the Trial Court is hereby vacated."

9. Even after passing the above order, the accused has not complied with the order of this Court. However, the learned counsel appearing on behalf of revision petitioner has submitted his arguments. The respondent has appeared before the Court through learned Advocate - Sri.B.V.Somapur. The said learned Advocate has filed a memo for retirement with a copy of notice, postal receipt and acknowledgement.

On perusal of the memo for retirement, this Court passed an order permitting the counsel for the respondent to retire from the case and even then, the respondent has not appeared before the Court. Hence, arguments on behalf of the respondent is taken as "NIL".

10. Sri.Deepak S. Kulkarni, learned counsel for the revision petitioner has submitted his arguments that the courts below have not appreciated the evidence on record in a proper perspective manner. The complainant has failed to prove the payment of amount of Rs.15 lakhs. There is no exact date of the payment of amount of Rs.15 lakhs in the notice or in the complaint. It is stated that the transaction between the complainant and the accused effected between January 2007 and June 2007. During the course of cross examination of P.W.1, he has stated that he has paid an amount of Rs.5 lakhs for 3 times for a total of Rs.15 lakhs. Further, it is stated that the accused has executed a bond for having received an amount of Rs.15 lakhs; however, the said bond was not produced before the Court. Further it is submitted that the complainant is a Commercial Tax Officer and the accused is a proprietor of M/s.Gajanan Glass and Plywoods. The complainant, being the Commercial Tax Officer had insisted the accused to issue 15 signed blank cheques of Rs.1 lakh each for the purpose of paying tax in respect of the business of M/s.Gajanan Glass and Plywoods. Accordingly, the accused had issued 15 signed blank cheques in favour of the complainant without receiving the amount from the complainant and all the 15 cheque leaves did not have one serial number sequence and had different numbers in the cheque leaves. The complainant has not shown the transaction of Rs.15 lakhs in his income tax returns. In view of Section 269SS of the Income Tax Act, if the transaction amount is more than Rs.20,000/-, such transaction shall be made through cheque or demand draft, but the complainant has stated that he has paid the amount of Rs.15 lakhs in cash. Further, he has submitted that the accused need not enter the witness box to substantiate his defence. It is the duty of the complainant to discharge his burden as to the payment of the amount, but the complainant has failed to discharge his burden. Hence, he sought for allowing this revision petition. To substantiate his arguments he has relied on the following decisions rendered in the cases of ***GURUMALLESH v. G. RAMESH*** reported in **2019 Cr.R. 481 (KANT.)** and ***LAHU v. DHANAJIIRAO RAMCHANDRA HAIBATI,*** reported in **2019 Cr.R. 461 (KANT.)**.

11. The nature of power of this Court in revision is the same as that of the Court below; however, such revision power is given to prevent the gross and palatable failure of justice and it should not be exercised in such a way as to give a right of appeal where such a right is excluded by the Code. Further, in order to substantiate the correctness, legality and proprietary of the finding, I have examined the evidence of the complainant and documentary evidence.

12. After the receipt of legal notice issued by the complainant, the accused has not sent any reply notice to the complainant. The accused has not explained anything in the statement under Section 313 of the Cr.P.C. as to why he has not replied to the legal notice issued by the complainant and has also not adduced any defence evidence in this regard. If the accused has sent a reply notice as to the alleged money transaction between the complainant and accused, the complainant would have narrated the exact date of the alleged transaction in the complaint. For the first time in the cross examination of P.W.1, when a question was raised to the complainant regarding the same, he has then answered as to the date of the alleged transaction of Rs.15 lakhs. The appellate court has observed the decision of the Full Bench of the

Hon'ble Apex Court relied on by the learned counsel for the revision petitioner in the case of ***KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE*** reported in **(2008) 4 SCC 54** and also observed the decision of the Hon'ble Apex Court rendered in the case of ***RANGAPPA v. SRI MOHAN*** reported in **AIR 2010 SC 1898**.

13. A perusal of the evidence placed by the complainant makes it clear that accused issued the cheques in favour of complainant for Rs.1 lakh each dated 09.10.2009, same was presented by the complainant for encashment and it was returned with the shara that "**exceeds arrangement**" as per Ex.P-2 on 10.10.2009. The complainant has issued a legal notice as per Ex.P-3 on 23.10.2009 by registered post receipt as per Ex.P-4 calling upon the accused to make payment within 15 days from the date of receipt of said notice. The said notice has been issued by the Registered Post and was duly served on 26.10.2009; however, the accused has not paid the cheque amount. As a result, on 08.12.2009, the complainant filed a complaint under Section 200 of Cr.P.C. for the commission of an offence punishable under Section 138 of the NI Act.

14. The appellate court has also observed that the complainant has financial capacity to advance the hand loan to the tune of Rs.15 lakhs to the accused and this version of the complainant is supported by Ex.P-6. Considering the facts and circumstances of the case and relying on the decision of the Hon'ble Apex Court in the case of ***RANGAPPA vs SRI MOHAN*** reported in **AIR 2010 SC 1898**, the courts below have come to the conclusion that the complainant proved the guilt of the accused.

15. It is the contention of the accused that the complainant has not pleaded as to the transactions of the debt and has prayed for the dismissal of this complaint. In this regard, I have gone through the latest decision of Hon'ble Apex Court in the case of ***P.RASIYA v. ABDUL NAZER AND ANOTHER*** **[Crl.A.Nos:1233-1235/2022]** wherein their Lordships have observed as under:

"By the impugned common judgment and order, the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that, in the complaint, the Complainant has not specifically stated the nature of transactions and the source of fund. However, the High Court has failed to note the presumption under Section 139 of the N.I. Act. As per Section 139 of the N.I. Act, 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 discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court. The High Court has also failed to appreciate that the High Court was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below.

8. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court is not sustainable and the same deserves to be quashed and set aside."

15.1 On the aforesaid plinth, the defence theory urged by the accused cannot be considered as it is observed that the presumption under Section 139 of the NI Act is

a statutory presumption and once the signature and cheque are not in dispute, it will be presumed that the cheque was issued for discharge of any debt or other liability in favour of the complainant/holder of the cheque. The complainant is not required to spell out in the complaint the nature of transaction or source of fund, since the onus is on the accused to prove that the cheque was not issued towards discharge of any debt or other liability.

16. I have gone through the judgment relied by the learned counsel for the revision petitioner in the case of ***GURUMALLESH v. G. RAMESH*** reported in **2019 Cr.R. 481 (KANT.)**. The pleadings of the complainant and the defence taken by the accused are not consistent with the facts of the case on hand. The accused has taken the defence of lost cheque and he was able to show that there was no legally enforceable debt and simultaneously, as complainant has failed to prove the existence of legally enforceable debt, the alleged act would not attract Section 138 of the NI Act, as it won't constitute an offence. Hence, the lower appellate court reversed the judgment of conviction.

16.1 Another judgment relied upon by the learned counsel for the revision petitioner in the case of ***LAHU v. DHANAJIRAO RAMCHANDRA HAIBATI*** reported in **2019 Cr.R. 461 (Kant.)**, the theory of defence pleaded is “lost cheques” and the accused was acquitted on the ground that there was a basic defect in the complaint itself for not pleading the transactions for lending amount. Therefore, on the basis of these decisions, this Court cannot interfere with the impugned judgment passed by the Courts below.

17. As regard to the non-production of bond said to have been executed by the accused, as admitted by P.W.1 in the cross examination, it is not fatal to the case of the complainant. When the complainant has discharged his burden that the cheques have been issued in discharge of legally enforceable debt, the burden lies on the accused to rebut the presumption under Section 139 of the NI Act. However, the accused has failed to rebut the said presumption by placing the probable defence.

18. Another defence taken and vehemently argued by the learned counsel for the petitioner is that, in view of Section 269SS of the Income Tax Act if the transaction amount is more than Rs.20,000/-, such transaction shall be made by cheque or demand draft. Since the complainant has not paid the amount through the cheque or the demand draft, the alleged transaction cannot be called as legally recoverable debt. On this ground, he has sought for acquittal of the accused.

18.1 Section 269SS was inserted in the Income Tax Act by Finance Act 1984 with effect from 01.04.1984, but the same came into effect from 01.07.1984. The Income Tax Department, in the course of searches carried out by them from time to time, recovered large amounts of unaccounted cash from certain tax payers and often the tax payers gave explanations for their unaccounted cash to the effect that they had borrowed loans or received deposits made by other persons. Sometimes, it was noticed, that the unaccounted income was also brought into the books of accounts in the form of loans and deposits, and later they would obtain confirmatory letters from other persons in support of their explanation. The Department was not able to unearth the source of such unaccounted cash. Therefore, in order to plug the loopholes and to put an end to the practice of giving false and spurious explanations by tax payers, a new provision was inserted in the Income Tax Act debarring persons from taking or accepting from any other person any loan or deposit otherwise than by account-payee

cheque or account-payee bank draft, if the amount of such loan or deposit, or the aggregate amount of such loan or deposit, is Rs.10,000/- or more. The amount of Rs.10,000/- was later revised as Rs.20,000/- with effect from 01.04.1989.

18.2 Section 269SS of the Act 1981 reads as follows:

"S. 269SS. Mode of taking or accepting certain loans and deposits No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor) any loan or deposit otherwise than by an account payee cheque or account payee bank draft, if

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by-

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(a) Government;

(b) Any banking company, post office savings bank or cooperative bank;

(c) Any corporation established by a Central, State or Provincial Act;

(d) Any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)

(e) Such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.

Explanation----For the purposes of this section ---

(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;

(ii) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);

(iii) "loan or deposit" means loan or deposit of money."

18.3 Section 276DD was inserted in the Act by the Finance Act, 1984 which came into effect from 01.04.1984 and which reads as under :

"S. 276DD. Failure to comply with the provisions of section 269SS --- If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine equal to the amount of such loan or deposit.".

18.4 Subsequently, Section 271D, which is the penal clause in the Act which provides for imposition of penalty for failure to comply with the provisions of Section 269SS was introduced with effect from 01.04.1989 omitting Section 276DD with effect from the same date. In the original Section 276DD, in case of imposition of punishment, the term of imprisonment was also prescribed which could extend to two years. But, subsequently, by the introduction of Section 271D, the punishment of imprisonment was taken away and the failure to comply with the provisions of Section 269SS could only be visited with a penalty of fine equal to the amount of loan or deposit to be taken or accepted. Section 271D as incorporated with effect from 01.04.1989 reads as follows :

"271D. Penalty for failure to comply with the provisions of section 269SS ---

(1) If a person repays any deposit referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be liable to pay, by way of penalty, a sum equal to the amount of the deposit so repaid.

(2) Any penalty imposable under subsection (1) shall be imposed by the Deputy Commissioner."

19. The constitutional validity of Sec. 269 SS was challenged in the case of the ***ASST. DIRECTOR OF INSPECTION INVESTIGATION v. KUM. A.B.SHANTH*** **[(2002) 6 SCC 259**, the Apex Court upheld the constitutional validity of Sec. 269 SS and observed thus: the object of introducing Section 269SS is to ensure that a tax payer is not allowed to give a false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving a false explanation for the same. During search and seizures, unaccounted money is unearthed, and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of Section 269SS was to curb this menace. As regards the tax legislations, it is a policy matter, and it is for the Parliament to decide in which manner the legislation should be made. Of course, it should stand the test of constitutional validity.

20. The High court of Karnataka in ***MR. MOHAMMED IQBAL vs MR. MOHAMMED ZAHOOR*** decided on 12th July, 2007 and reported in **ILR 2007 KAR 3614 = 2008 (1) Kar.L.J. 338,** has observed in para 11 that the contravention of Section 269SS of the Act though visited with a stiff penalty on the person taking the loan or deposit, nevertheless, the rigor of Section 271D is whittled down by Section 273B, on proof of bonafides. It cannot therefore be said that the nature of the transaction brought before this court could be declared illegal, void, and unenforceable.

21. The Madras High Court in the case of ***K.T.S.SARMA, SESHASAYEE BROTHERS (P) LTD. v. SUBRAMANIAN, PROP. KUMAR VIDEOS*** reported in **2001 SCC Online Mad. 520**. This was a suit for recovery of money, which was decreed by the Trial Court. In appeal, the defendant raised the issue of whether the amount advanced by the plaintiff by way of cash is legal and recoverable in view of Section 269SS of the Income Tax Act. The submission of the defendant/appellant was that the contract between the parties was unlawful, and the same was also hit by Section 23 of the Contract Act. It was contended that the agreement was void and could not be enforced. While rejecting the said plea of the defendant/appellant, the Madras High Court, inter alia, observed:

"24. From the decisions relied upon by either side and the discussions made above, it is made clear that maxim "in pari delicto" cannot be made applicable in the following circumstances:

(i) Section 269 SS of the Income Tax, which falls under Chapter XX-B, opens with the caption "Requirement as to Mode of acceptance, payment or repayment in certain cases to counteract evasion of Tax." As such, this chapter and the Section are introduced with main object to prevent the evasion of tax. In the absence of any evasion of tax, the borrower (the defendant) in the case cannot take shelter under the Section and he is liable to repay the amount.

(ii) As Section .269 (SS) is vested with penalty under Section. 271(D) of the Income Tax Act, the object of imposing penalty is merely to the protection to the Revenue, and then the contract will not be regarded as prohibited by implication.

(iii) If it was not the object of the parties at the time when the transaction was entered into to circumvent or to defeat the provisions of the Income Tax, the contract is not void".

21.1 The High Court of Delhi at New Delhi in Crl.L.P.No.559/2015 between ***SHEELA SHARMA vs MAHENDRA PAL***, decided on **2nd August, 2016,** has observed in para.28 of the judgment that ,*"In the present case, the object of the parties when the transaction was entered into cannot be said to be to circumvent or defeat the purpose of the Income Tax Act. The defendant would not have issued the cheque in question had the object of the loan transaction been to defeat the provisions of the Income Tax Act".*

21.2 Hence, the said contravention of Section 269SS of the Income Tax Act does not make the alleged transaction void. The concerned authorities can take necessary action against the complainant for non compliance of Section 269 of the Income Tax Act. Only on that ground, this Court cannot interfere with the impugned judgment passed by the Courts below.

22. Another contention of the accused is that the complainant was a Commercial Tax Officer at the time of alleged transaction and that the accused was the proprietor of M/s.Gajanan Glass and Plywoods. The complainant being the Commercial Tax Officer, has insisted the accused to issue 15 signed blank cheques of Rs.1 lakh each for the purpose of paying tax in respect of the business of M/s.Gajanan Glass and Plywoods. Accordingly, the accused has issued 15 signed blank cheques and filed a false complaint against the accused. This is the most absurd defence taken by the accused without the application of mind and accused being an entrepreneur has better knowledge as to the procedure for payment of income tax.

23. If really the accused has issued 15 signed blank cheques to the complainant, the accused ought to have explained as to why the complainant has insisted him to issue 15 signed blank cheques. The accused has not explained on what date and time the complainant has insisted and on what date the accused has issued those cheques to the complainant. The accused chose not to reply to the legal notice demanding payment of the loan by the complainant. Even the accused has not taken any legal steps against the complainant for misuse of the alleged signed blank cheques. It is the contention of the accused that the complainant being a Commercial Tax Officer, cannot insist the accused or anybody to issue signed blank cheques in any legal transactions. The accused need not issue signed blank cheques to the complainant in any circumstances. However, it is the defence of the accused that he has issued 15 signed blank cheques to the complainant; such an improbable defence set up by the accused cannot be accepted.

24. The Courts below have properly appreciated the evidence on record in a proper perspective with the provisions of law regarding presumption in detail. Both the Courts below have observed the decision of the Hon'ble Apex Court and passed the impugned judgment in accordance with law. On re-evaluation of the entire evidence placed on record, I do not find any illegality in the impugned judgments. In my opinion, the judgments and orders impugned in these revision petitions are not suffering from any legal infirmity occasioning grave injustice to the petitioner, calling for interference.

24.1 Revision petition is without merit and is liable to be dismissed. Resultantly, the respondent is held guilty of the commission of offence under Section 138 of the NI Act. Accordingly, the impugned judgments do not call for any interference by this Court.

Hence, I proceed to pass the following:-

O R D E R

1) The criminal revision petition is ***dismissed***.

2) The registry is directed to transmit the records to the trial court along with a copy of this order.