
R.N.R.

Before Gurdev Singh, J.

M/S GOYAL GAS AGENCY,—Petitioner

versus

M/S SAT PARKASH & SONS AND ANOTHER,—Respondents

CrI. R. No. 1722 of 2007

18th April, 2011

Negotiable Instruments Act, 1881—Ss. 138 & 141—General power of attorney holder of a Gas Agency issuing cheque to discharge liability of that concern—Dishonour of cheque—Whether liable to be convicted for issuance of cheque—Held, yes—Accused failing to prove original compromise allegedly entered between him and complainant—No illegality in findings of Courts below convicting accused u/s 138 of N.I. Act.

Held, that for the first time, the copy of the compromise Ex.D10 was placed on the record during the statement of said Notary Public and at that time exhibiting of the said document was duly objected to. That objection was never decided by the trial Court at that time nor at the time of final pronouncement of the judgment. In such eventuality, it cannot be held that once the document has been exhibited, the admissibility thereof cannot be gone into. It is now well settled that mere exhibition of a document does not dispense with the proof thereof. No doubt Subhash Chand has made his statement about the execution of the original compromise by the parties, but the original was never proved on the record. In the compromise itself, it is mentioned that the original was given to Sat Parkash, who is one

of the partners of the complainant firm and that an attested copy thereof was given to the accused. Even if it is so, the accused was required to get the original compromise produced in the Court and in case of failure of Sat Parkash to produce the same, to seek permission from the Court to lead secondary evidence. In the absence of permission of the Court to prove the compromise by means of secondary evidence that attested copy cannot be looked into. According to Sections 91 and 92 of the Evidence Act, if the contents of any compromise or agreement are reduced into writing then no amount of oral evidence is admissible for proving the execution, conditions and contents thereof except the document itself.

(Para 9)

Further held, that the findings recorded by lower Courts below are neither illegal, nor perverse nor the same can be said to be the result of misreading of the evidence. There is no ground for interference in the conviction and sentence of the accused recorded by those Courts.

(Para 11)

C.B. Goel, Advocate with A.S. Virk and Nitin Jain, *Advocates, for the petitioner.*

L.M. Suri, Senior Advocate with Ivneet Singh Pabla, *Advocate, for respondent No. 1.*

GURDEV SINGH, J. (ORAL)

(1) The petitioner/accused, M/s Goyal Gas Agency, has filed the present revision through its power of attorney R.D. Goyal, against the judgment dated 13th September, 2007,—*vide* which the appeal filed by him against the judgment dated 4th May, 2006 passed by CJM, Kurukshetra, convicting him for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) and sentencing him to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 5,000 and in default thereof, to undergo rigorous imprisonment for a period of three months and to pay compensation of Rs. 6 lakhs under Section 357 of Cr. P.C., was dismissed and the revision preferred by the respondent/complainant for enhancement of the sentence and the compensation was also dismissed.

(2) The facts, in brief, are that the complainant-M/s Sat Parkash and sons, a partnership firm, filed complaint through one of its registered partner Ajay Kumar under Section 138 of the Act against M/s Goyal Gas Agency, sole proprietorship concern, through its power of attorney R.D. Goyal and its proprietor Dashoda Devi, contending therein that the accused received different amounts from him on different dates through cash and cheques to the extent of Rs. 7,18,540. In discharge of his liability, the accused issued two cheques for Rs. 50,000 and Rs. 1 lakh bearing Nos. 105679 and 105681 dated 29th June, 1995 and 10th July, 1995, respectively. The accused was requested many a times to discharge whole of his liability and he issued another cheque No. 173368 dated 30th June, 1995 for Rs. 4 lakhs drawn on Union Bank of India, Kurukshetra, which on presentment to the banker of the accused was dishonoured on account of insufficient funds in his account,—*vide* memo dated 13th July, 1995. Legal notice dated 27th July, 1995 was served upon the accused through registered post and under postal certificate and the same was replied by him,—*vide* reply dated 12th August, 1995, sent through registered post. In spite of issuance of notice, the amount of the cheque was not paid. In support of the complaint, preliminary evidence was produced and on the basis thereof, the CJM found sufficient grounds for proceeding against R.D. Goyal, who was summoned accordingly,—*vide* order dated 17th February, 1997. On his appearance in the Court, notice of offence was served upon him, to which he pleaded not guilty and claimed trial. To prove his guilt the complainant examined himself as PW-1 and Manhar Shukul, Accountant (PW-2). After the evidence was closed by the complainant, the accused was examined by the trial court and his statement was recorded under Section 313 of the Cr. P.C. The incriminating circumstances appearing against him in the complainant's evidence were put to him in order to enable him to explain the same. He denied all those circumstances and pleaded his innocence. He stated that one of his cheque book in respect of the account No. 16082, containing cheque No. 173351 to 173375 was lost about which he had given application to the police on 30th May, 1995 and at the same time, he had written to the bank to stop the payment of those cheques. In spite of that, the amounts of cheque Nos. 173367 and 173369 were paid by the bank in collusion with each other and both these cheques are dated 1st June, 1995. In these circumstances, there was no question of issuing cheque No. 173368 dated 30th June, 1995. There was a dispute regarding money

dealings with the complainant in which a compromise was entered on 26th June, 1995 (Ex. D.10) and the factum of the loss of the cheque book was mentioned in that compromise. *Vide* that compromise, it was undertaken by the complainant that he will not misuse the said cheque and still the same was done by him. The accused was called upon to enter on his defence and he examined Dharam Pal (DW-1), Manhar Shukul (DW-2), Balbir Singh (DW-3), Dina Nath Arora (DW-4), Prabhu Ram (DW-5), Subhash Chand (DW-6), Sushil Kumar (DW-7), Raghbir Chand (DW-8), Atam Parkash (DW-9) and Upender Nath (DW-10).

(3) I have heard learned counsel for both the sides.

(4) It has been submitted by the learned counsel for the petitioner/accused that the cheque in question is purported to have been issued by M/s Goyal Gas Agency, which was sole proprietorship concern owned by Dashoda Devi. Even the complaint was filed against that concern. Therefore, the petitioner/accused could not have been convicted for the offence under Section 138 of the Act. In fact, the cheque book containing the cheque in dispute was lost about which the accused had made a complaint to the police and had also written a letter to the bank to stop the payment thereof. On account of the dispute between the parties, a compromise was entered into on 26th June, 1995 in which the complainant admitted misuse of the cheque. All these facts were duly proved on the record by leading cogent evidence, consisting of the statement of the witnesses, who attested the compromise and the notary public from whom the copy of that compromise (Ex. D. 10) was got attested. That compromise makes it very much clear that the cheque in question was fabricated by the complainant and, therefore, no liability can be fastened to the accused on the basis thereof.

(5) Learned counsel for the complainant/respondent tried to controvert all these submissions of the learned counsel for the petitioner/accused by contending that it is the case of the accused himself that he is the general attorney of the sole proprietorship concern and the cheque in question was signed by him in order to discharge the liability of that sole proprietorship concern. He being the signatory of the cheque was criminally liable to be proceeded against. He cannot escape his liability by contending that he is the only power of attorney of that sole partnership concern. He also contended that the original compromise was never proved in the Court

and the attested copy Ex. D. 10 was objected to when the same was tendered in evidence. At the most, it can be said that this is the secondary evidence and in the absence of the permission of the court, the same could not have been produced. Moreover, it is very much clear from the other evidence produced by the accused that this compromise is a fabricated document as the same does not find mentioned in the reply given by the accused to the notice served upon him.

(6) The first question to be decided is, whether R.D. Goyal, petitioner/accused, could have been convicted on the ground that he issued the cheque as general attorney of M/s Goyal Gas Agency. Section 141 of the Act deals with the offences committed by the companies. As per the Explanation appended thereto, Company means a body corporate and includes a firm or other association of individuals. This section has nothing to do with the sole proprietorship concern. The accused himself proved on record the power of attorney (Ex. D.11) executed in his favour by Dashoda Devi, the alleged sole proprietor of M/s Goyal Gas Agency. *Vide* this power of attorney Dashoda Devi constituted the petitioner/accused as her lawful general power of attorney in respect of managing and supervising all the affairs of M/s Goyal Gas Agency. Though the cheque in question is stated to have been issued by the said concern but the same was issued under the signatures of the petitioner/accused. By virtue of the said power of attorney, he stands substituted for the sole proprietor and made himself criminally liable by issuing the cheque under his signatures. In fact, in view of the stand taken by the accused by leading evidence in his defence, it does not lie in his mouth that he cannot be made liable for the acts so committed by him. The alleged compromise was entered into by him in his personal capacity in which he mentioned the cheque in dispute also. The summoning order was passed only against him which was never challenged by him by way of any revision etc. At no stage during the trial he came out with the plea that he cannot be made liable for issuance of cheque on the ground that the same was issued by him on behalf of the sole proprietorship concern. In fact, he has been claiming himself to be the owner of this concern. He proved on record the copies of the letters written by him to the police and the Manager of Union Bank of India. In those letters, he had written that he was the owner of the said gas agency. Therefore, the trial court and the appellate court did not commit any illegality while convicting him under Section 138 of the Act.

(7) Though the accused examined a number of witnesses for proving the compromise alleged to have been entered into between him and the complainant, but the execution thereof was in fact proved by Subhash Chand (DW-6), who had put his signatures on the same as an attesting witness. The original compromise was not proved on the record and it was only the photostat copy attested by Dina Nath Arora, Notary Public, which was proved. Learned counsel for the accused has tried to rely upon the judgment of the Hon'ble Supreme Court in **Dayamathi Bai versus K.M. Shaffi (1)** in support of his contention that the objections, if any, can be said to be regarding the mode of proof and not regarding the admissibility of the document and once the document has been exhibited and admitted by the Court, the complainant cannot take objection that the same cannot be looked into. It was held that the objection as to the mode of proof falls within procedural law. Therefore, such objection can be waived.

(8) In the above said case (Dayamathi Bai's case), it was the certified copy of the document which was produced in evidence and it was found that the certified copy itself was not inadmissible. It was the mode of proof that was irregular and insufficient. The document was exhibited without any objection from other side.

(9) The position in the present case is different. For the first time, the copy of the compromise Ex. D.10 was placed on the record during the statement of said Notary Public and at that time exhibiting of the said document was duly objected to. That objection was never decided by the trial court at that time nor at the time of final pronouncement of the judgment. In such eventuality, it cannot be held that once the document has been exhibited, the admissibility thereof cannot be gone into. It is now well settled that mere exhibition of a document does not dispense with the proof thereof. No doubt Subhash Chand has made his statement about the execution of the original compromise by the parties, but, as already said above, the original was never proved on the record. In the compromise itself, it is mentioned that the original was given to Sat Parkash, who is one of the partners of the complainant firm and that an attested copy thereof was given to the accused. Even if it is so, the accused was required to get the original compromise produced in the Court and in case of failure of Sat Parkash to produce the same, to seek permission from the Court to lead secondary evidence. In the absence of permission of the Court to prove the compromise

by means of secondary evidence that attested copy cannot be looked into. According to Sections 91 and 92 of the Evidence Act, if the contents of any compromise or agreement are reduced into writing then no amount of oral evidence is admissible for proving the execution, conditions and contents thereof except the document itself. Once the above said conclusion has been reached at, the submissions raised by the learned counsel for the accused loses its relevance.

(10) Moreover, a minute perusal of the evidence produced on the record itself makes it clear that this compromise appears to be a fabricated document. Even the story put forward by the accused that the cheque book containing cheque No. 173351 to 173375 was lost does not inspire any confidence. He came out with two different stories regarding the same. In his application made to the police Ex. D.11, he stated that the said cheque book was lost from his possession. In his application made to the bank, mark D he stated that the cheque book has been misplaced by him. It is pertinent to note that both those letters are of the same day i.e. 30th May, 1995. These letters do not find any mention in the compromise Ex. D.10 which was purported to have come into existence on 26th June, 1995. It is also to be noted that before filing the complaint, notice Ex. C5 was served upon the accused, which was replied by him through his counsel. That reply was proved on record as Ex. PK, which is dated 12th August, 1995. This compromise even does not find mention in that reply. Had any such compromise been in existence on that day, the same must have been mentioned in the reply, as it was a material document to be referred therein.

(11) After having examined the record of the trial court and the appellate court critically, this Court has come to the conclusion that the findings recorded by this courts are neither illegal, nor perverse nor the same can be said to be the result of misreading of the evidence. There is no ground for interference in the conviction and sentence of the accused recorded by those courts,

(12) There is no merit in the revision and the same is dismissed.

(13) This order be certified to the trial court for taking appropriate action.

(14) Records of the trial court be returned forth with.