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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A No.237-MA of 2013
Date of Decision: 13.05.2015

Col. S.S. Rathi **......Petitioner**

Vs

Prem Deswal **.....Respondent**

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. J.S. Virk, Advocate
for the applicant.

Mr. Himanshu Upadhyay, Advocate and
Mr. Rajiv Sharma, Advocate
for the respondent.

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1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

<u>RAJ MOHAN SINGH, J.</u>

[1]. Appellant has assailed judgment dated 19.01.2013 passed by Judicial Magistrate Ist Class, Karnal whereby respondent has been acquitted in a complaint under Section 138 of Negotiable Instruments Act (for short 'the Act').

[2]. Respondent filed complaint before Judicial Magistrate Ist Class, Karnal with allegations that accused/respondent took a loan of Rs.3,50,000/- by cheque and cash from the complainant/appellant for construction of school building in Delhi. In order to discharge his liability, accused issued cheque No.026672 dated 31.03.2007 in a sum of Rs.1,29,000/-, cheque No.026673 dated 30.04.2007 in the

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sum of Rs.74,000/- and cheque No.649471 dated 31.03.2007 in a sum of Rs.1,00,000/-. Thereafter accused requested the complainant not to present the cheque for encashment till January 2007 as he was not having sufficient funds in his account. When the cheques were presented by complainant for encashment with the Banker then same were returned with remarks of insufficiency of funds. The dishonour of cheques were informed vide memo dated 16.07.2007. Statutory notice was given on 14.07.2007 by registered post calling upon accused to make payment, but the accused failed to make payment within stipulated period and thereafter complaint was filed. After due compliance of notice accusation, complainant led evidence in the form of his statement as CW-1 besides tendering affidavit as CW1/A and also cheques Exs. C-1, C-2 and C-3 and memo Exs. C-4 and C-5 and memo of Uco Bank as Ex.C-6. Legal notice Ex.C-7, postal receipts Ex.C-8 and Registered A.D.s Ex.C-9. Complainant also got examined Ashok Goel, Clerk PNB, Karnal as CW2 who has deposed that cheques on presentation were dishonoured and also proved copy of bill registered report collection as on 21.05.2010 Ex.CW/A and statement of account for the period 01.01.2007 to 21.05.2010 Exs. CW2/B.

[3]. The statement of accused was recorded under Section 313 Cr.P.C. in which he pleaded his ignorance and alleged false implication. In the defence, accused got examined Pankaj Kumar Deputy Manager, Axis Bank as DW1, who tendered the statement of account Ex.DW1/A of the petitioner for the period 01.02.2006 to

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31.03.2006. Accused himself appeared as DW-2 and also examined Dharmendra as DW-3 who tendered affidavits Exs. DW2/A and DW3/A respectively. Nitin Chawla, Assistant Manager, Axis Bank was also examined as DW-4 who tendered statement of account for the period of 01.01.2006 to 31.12.2006 and 01.01.2007 to 31.12.2007 Ex.DW4/A.

[4]. After closing evidence of the parties, trial Court heard the case on merits. Learned counsel for the appellant asserted the factual details and submitted that accused had committed an offence in terms of Section 138 of the Act. Accused took stand that though his signatures are appearing on the cheques but mere issuance of cheque does not constitute an offence under Section 138 of the Act because it has to be proved that issuance of cheques were in discharge of legal debt or liability. The amount was claimed to be not legally enforceable debt because cheques were issued as security cheques and not in discharge of his legal debt or liability.

[5]. Learned counsel for the respondent stressed upon that contents of the complaint show that complainant lent an amount of Rs.3,50,000/- to the accused by cheque and cash. The complainant has himself admitted in cross-examination that he has issued a cheque for Rs.1,50,000/- drawn at UTI Bank (now Axis Bank) and cheaqe of Rs.1,00,000/- drawn at Punjab National Bank but in the statement of account of the complainant Ex.CW2/B and Ex. DW4/A there are no entries which could prove that he has advanced an amount of Rs.2,50,000/- by way of cheques drawn at respective

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Banks as alleged by him.

[6]. Taking note of aforesaid fact, it has been argued that advancing loan of Rs.3,50,000/- is not proved as alleged by the complainant rather it corroborates the plea of accused that cheques were given as security. Cheques were not issued in discharge of any legally recoverable debt. With reference to date of cheque, presentation, return of cheque by memo, there cannot be any dispute with regard to maintainability of the complaint. But the presumption that cheque was issued in the discharge of legally enforceable debt was other liability is a rebuttable presumption in order to bring home guilt of accused, the complainant has to prove the following ingredients:-

> "The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course within a period of 15 days of the receipt of such notice."

[7]. Section 139 of the Act merely raises a presumption in favour of holder of a cheque in as much as legally recoverable debt is not a matter of presumption under Section 139 of the Act. The presumption is in favour of holder of a cheque that the same has been issued for discharge of any debt or other liability. In ***Krishan Janardhan Bhat v. Dattatraya G. Hedge, 2008(4) SCC 54***, it was held that proviso appended to the said Section provides for compliance with legal requirement before a complaint can be acted upon by Court of law.

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[8]. It is also a settled principle of law that accused has constitutional right to remain silent. The standard of proof in criminal case as well as in civil case are on different footing. In criminal case it must be proved beyond all reasonable doubts, whereas in civil case it is based on preponderance of evidence. The inference of preponderance of probability can be drawn not only from the material brought on record but with reference to circumstances upon which case is rested.

[9]. In ***Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal, 1999(2) RCR (Civil) 615***, the Hon'ble Supreme Court has held that once execution of promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable in nature. Defendant is always at liberty to prove no existence of a consideration for raising a probable defence. If initial onus is discharged by defendant that the existence of consideration was improbable or doubtful then onus would shift upon the plaintiff obligating him to prove as a matter of fact that passing of consideration really existed and failure of discharge onus would entrail rejection of claim of the plaintiff.

[10]. In ***M/s Narayana Menon @ Mani v. State of Kerala and another, 2006 (3) R.C.R. (Crl.) 504***, it was held by the Apex Court that proviso appended to said Section provides for compliance of legal requirements before a complaint can be acted upon by the Court. Section 139 of the the Act merely raised a presumption in

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respect of second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act, rather it merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability.

[11]. In ***Hiten P. Dalal v. Bratindranath Banerjee, 2001(3) RCR (Crl.) 460***, the Apex Court has also incorporated in the context of Section 118 of Evidence Act that it provides inter alia that unless contrary is proved, it shall be presumed that negotiable instrument was drawn for consideration. Presumption under Section 138 of the Act is that where any cheque drawn by a person on on account for payment for discharge in whole or in part of any debt is returned by the drawer bank, person shall be deemed to have committed an offence of the aforesaid provisions in terms of Section 114 of the Evidence Act. Sections 138 and 139 of the the Act and Section 18 of the Evidence Act are to be read homogenous manner.

[12]. In ***C. Keshavamuthy v. H.K. Abdul Zabbar, 2013(5) Law Herald (SC) 3622***, the Apex Court has held that presumption under Section 139 of the Act includes the presumption of existence at a legally enforceable debt or liability. The burden is on the accused to disprove the allegation once a *prima facie* case is made out by the complainant.

[13]. Accused has to rebut the presumption under Section 139 of the the Act. The standard of proof for doing so is that of preponderance of probabilities. If accused is able to raise a

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probable defence then it creates doubt about the existence of legally enforceable debt or liability. In such situation prosecution can fail. This view was again endorsed in ***K. Subramani v. K Damodara Naidu, 2015(1) SCC 99.***

[14]. The question is once the accused admitted his signature on the cheque but was able to prove the cheque to be a security cheque then the accused is entitled to the benefit and presumption presumed stands rebutted. The view expressed in ***Vijay v. Laxman and another, 2013(1) RCR (Civil) 980*** explains the position.

[15]. After going through the material on record it has been found that the complainant has changed his stand on both occasions. In the cross-examination complainant deposed that he had advanced the loan of Rs.2,50,000/- through cheque drawn at UTI Bank i.e. in the amount of Rs.1,50,000/- and again through a cheque in a sum of Rs.1,00,000/- drawn at PNB. The statement of account of the complainant placed at record vide CW2/B and DW4/A for the relevant period have not supported the case of the complainant. No entry in the entire statement of account was found which could show Rs.1,00,000/- was withdrawn by the complainant in the form of cheque rather he was not having an amount of Rs.1,00,000/- in account for the relevant period. Similarly in respect of amount of Rs.1,50,000/- the stand of the accused was not ventilated by means of statement of account.

[16]. The Court has perused the entire statement of account and it was found that no cheque was ever drawn for a amount of

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Rs.1,50,000/- by the complainant. From the evidence on record it was concluded by the trial Court that no amount is found to have been advanced by the complainant to the accused as a loan.

[17]. However, there cannot be any doubt that the accused has specifically admitted in his cross-examination that he had issued the cheques. The necessary date, name and signature on the cheques are not handwriting of the accused but the same is not sufficient to attract culpability in terms of Section 138 of the the Act. The ingredients must be satisfied to show that drawer of the cheque shall issue cheques in discharge of any debt or liability or in whole or in part. The cheques were duly proved by admission of the accused. But at the same time accused has successfully proved that the complainant has not advanced the loan in the manner as alleged by him in complaint. The cheques were not issued in discharge of any legal debt or liability, therefore, accused cannot be punished with the aid of Section 138 of the Act.

[18]. Resultantly finding no merit in the appeal, the same is dismissed being totally bereft of merits.

May 13, 2015 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

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