IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-396-MA-2013
Date of decision: 02.03.2015

The Hisar Tulsi Coop. Non-Agricultural Thrift & Credit Society Limited, 1539, Urban Estate-II, Hisar

.... Applicant/Appellant(s)

Versus

Suman Lata Chaudhary

.... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

1) Whether Reporters of the 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?

Present: Mr. Anurag Jain, Advocate, for the applicant.

Mr. Jitender Dhanda, Advocate, for the respondent.

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PARAMJEET SINGH, J. (ORAL)

The instant application has been filed under Section 378(4) Cr.P.C. for grant of leave to appeal against the impugned judgment dated 16.05.2012 passed by the Judicial Magistrate Ist Class, Hisar whereby complaint filed by the applicant under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'the Act') has been dismissed and respondent has been acquitted of the notice of accusation issued against her.

Brief facts of the case are to the effect that a complaint was filed by the applicant-complainant under Section 138 of the Act alleging that the complainant which is a registered Society, deals in advancing loans to the employees of various insurance, Central Govt. employees on interest, repayable in easy monthly installments. The Secretary of the above named Society, who is authorized by the Managing Committee of the Society vide Resolution dated 01.12.2012, submitted that allegedly, a loan had been advanced to the accused/drawer of the cheque-Mrs. Suman Lata Chaudhary, but she failed to repay the same and a sum of Rs.99,570/- including interest upto 23.11.2002 was outstanding against her. However, one fine day, a cheque bearing No.818210 dated 23.11.2002 amounting to Rs.99,570/-, drawn on Hisar Sirsa Kshetriya Gramin Bank, Hisar was issued in favour of the Society, with an intention and assurance to discharge the existing outstanding liability. Accordingly, the cheque in question was presented in a bank at Hisar for clearance, but the same was dishonoured vide Memo dated 25.11.2002 with the remarks "Insufficient Funds". In consequence thereof, the drawer of cheque i.e. the accused was informed qua its dishonour vide Legal Notice dated 28.11.2002 issued by way of registered post, affording her time to clear the dues, but in vain. Therefore, the complaint was filed.

On the basis of preliminary evidence, notice of accusation for commission of an offence punishable under Section 138 of the Act was served upon the accused-respondent to which she pleaded “not guilty” and claimed trial.

The complainant, in order to prove his case, examined himself as CW1. Thereafter, statement of the respondent-accused under Section 313 Cr.P.C. was recorded wherein she pleaded complete innocence and false implication.

The trial Court, after appreciating the evidence, acquitted the respondent of the notice of accusation, served upon her, vide impugned judgment dated 16.05.2012. Hence, this application for grant of leave to appeal.

I have heard learned counsel for the parties and gone through the impugned judgment.

The trial Court, after appreciating the evidence on record, observed as under:-

> *“10. The position of law is that the Complainant-Holder-in Due Course is bound to prove the essential ingredients of Section 138 of the Act in accordance with law. Once proved, but the Drawer of Cheque refuses to have drawn the cheque for discharge in whole or in part of any debt/other liability, then the Holder in Due Course is under a mandate to prove that the alleged debt/liability was “legally enforceable debt/other liability” (Explanation to Section 138 of the Act). Only then, the Presumptions under Section 138 and 139 of the Act are available to the Complainant (Holder-in-Due Course). The effect of these presumptions is to place the evidential burden on the Drawer/Accused of proving that*

the cheque was not received by the Complainant towards the Discharge of any existing liability. The Burden resting on the accused in such a case would not be as light as it is where a presumption is raised under Section 114 Evidence Act. The words "unless the contrary is proved" which occurs in the provision makes it clear that the Presumption has to be rebutted by "proof" and not by a bare explanation which is merely plausible. ***(Hiten P. Dalal vs. Bratindranath Banerjee 2001 (3) RCC, 195 (SC).*** *It is pertinent to mention that the Standard of proof on the Accused is that of Preponderance of Probabilities by leading direct or by reference to the circumstances upon which the Complainant relies.* ***(Krishna Janardhan Bhat Bs. (Versus sic.) Dattatrya (2008) 4 SCC 54).*** *During the trial, if the Accused proved to have discharged the initial burden of proof showing the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift on the complainant who will be obliged to prove it as a matter of fact and upon its failure to prove, would disentitle him to the grant of relief on the basis of negotiable instrument.*

11. Therefore, the Complainant-Holder of the Cheque is under the mandate of law to discharge the initial burden of proof beyond reasonable doubt. On detailed analysis of the case of the Complainant, it is observed that the Society failed to specify the amount of loan allegedly advanced to the Loanee. Similarly, the date, month or even the year of advance of loan to its alleged Member-Accused namely Smt. Suman Lata Chaudhary, finds no mention in the complaint. However, *mere photocopies of Loan Agreement (Ex.P10) and other incidental documents (Ex.P8, Ex.P9, Ex.P11 and Ex.P12) have been placed on record but on bare perusal, thereof, it is apparent that all the aforesaid documents of loan allegedly executed by the Accused Smt. Suman Lata have not been signed by the same person. Even otherwise, on comparison of the signatures of the Drawer, on the cheque and various documents of loan (discussed above), it can be safely concluded that each signature has been appended in different hand, as such the documents are suspicious and inadmissible in evidence. Hence, as the alleged fact of execution of loan agreement has been denied, it was incumbent upon the complainant to produce all the original documents in lieu, thereof.*

12. It is pertinent to quote the settled law in ***Darshan Kaur vs. Amritsar Primary Co-operative Agricultural Development Bank Limited, Amritsar and another 2010 (2) PLR 289 (P & H) (Referred to 1992(2) CCC 568 (SC)*** *that Photostat of a document is neither a Primary, nor a Secondary evidence-original document is primary evidence and copy thereof can be held as Secondary evidence in accordance with the provisions of Section 65 of the Evidence Act, 1872.*

13. Further, that if a party withholds the best evidence presumption should always be drawn against him as parties are supposed to lead best evidence ***(2001 (3) Civil & Rent Judicial Reports 224 (P & H).***

14. Therefore, as the Complainant-Society failed to prove its case beyond doubt qua advancement of loan and also withheld, material documents of Agreement of Loan allegedly executed between the parties, an adverse *inference was liable to be drawn against it. Whereas, it was essential for the holder of the cheque to prove that the existing debt/other liability was a legally enforceable debt/other liability, but, no such endeavour appears to have been made.*

15. It is a settled law in ***Krishna Janardhan Bhatt Vs. Dattatraya G. Hegde 2008 (1) LJR 559 (SC)*** *qua Dishonour of cheque-Complainant alleged that he advanced Rs.1.50 lacs to accused-Accused convicted-Conviction set aside-Held. Complainant could not prove that he had so much money to advance-Payment of money to accused not proved by any documentary evidence-Defence, that a blank cheque came into hands of complainant during business transactions and the complainant filled up the amount and misused it, believed.*

16. Simiarly, is the law laid down by the Hon'ble Supreme Court in ***John K. John Vs. Tom Varghese and another 2007 RCR (Cril) 807 (SC)*** *that Holder in Due Course/Complainant was bound to prove the advance of money to the Drawer of the cheque by way of cogent evidence and in case he failed, it is fatal to the complainant.*

17. It is further pertinent to mention that in view of the Letter, dated 18.7.1994 (Mark-A) of the Registrar, Cooperative Societies, Haryana, Chandigarh issued to the Managing Director. All the Central Co-operative Banks in the State; General Manager; National Banks for Rural and Agriculture Development, Chandigarh and Chief Auditor, Co-operative Societies, Haryana, Chandigarh, duly forwarded to the Complainant-society, *as well as the copy of the Order, dated 10.1.2012 pronounced by the Assistant Registrar, Cooperative Societies, Hisar (Mark-E), the Account Statement (Ex.P12) had been prepared illegally and arbitrarily by calculating a total of interest upon interest and excessive rate of interest on the principal amount, together. Hence, the one and only Document of Account Statement (Ex.P12) relied upon by the Complainant-Society, to justify the legally enforceable liability of Drawer, cannot be held to have been prepared in accordance with law, but arbitrarily. Moreover, when the Society, also failed to adjust the payment of Rs.24,000/- and Rs.26,000/- already paid by the accused vide Demand Drafts, bearing No.219586 and 219587, dated 3.6.2011 and 6.6.2011 respectively (Mark-C & D), or even deny/rebut the assertion, the aforesaid Account Statement (Ex.P12) cannot be considered to be a reliable piece of evidence, hence is held inadmissible in the eyes of law.*

18. On the basis of the above discussion, it is thus, concluded that the Complainant-Holder failed to discharge the initial burden of proof in accordance with law and also could not establish that the cheque had been issued to discharge a legally enforceable debt/other liability. As such, it was not entitled to the Presumption under Section 138, 139 and 118 of the Act.

*19. It has been observed in **Krishna Janardhan Bhat Versus Dattatraya G. Hegde 2008 (4) SCC 54,** that Court must be on guard to see that merely on application of presumption as contemplated under Section 139, the same may not lead to injustice or mistaken conviction. Further, that other principles of*

> *legal jurisdiction namely presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced- such balancing acts would largely depend upon the factual matrix or each case, the material brought on record and having record to legal principles governing the same.*
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> *20. Since, the initial burden to prove the complaint stands not discharged, the accused need not prove the non-existence of any debt/liability or non-existence of consideration, to evade liability. Hence, when neither the advance of loan, nor existence of any legally enforceable debt/liability was proved, the complainant-Holder could not be held entitled to recover the cheque amount from the accused as the same is deemed to have been issued merely as a security in case of non-payment of loan. Resultantly, the accused cannot be held guilty for an offence under Section 138 of the Act. Thus, the complaint in hand deserves to be Dismissed and the Accused is entitled to be Acquitted of the Notice of Accusation served. Bail bonds and surety bonds also stand discharged."*

The Hon'ble Supreme Court in ***Muralidhar @ Gidda & Anr. vs. State of Karnataka*** 2014(2) RCR (Criminal) 507 has held as under:

> *"10. **Lord Russell in Sheo Swarup vs. King Emperor [AIR 1934 Privy Council 227]** highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said, "the High Court should and will always give proper weight and*

consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in Surajpal Singh v. State; {AIR 1952 SC 52], while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed, "the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in ***Tulsiram Kanu v. State; [AIR 1954 SC 1], Madan Mohan Singh v. State of U.P.; [AIR 1954 SC 637], Atley v. State of U.P.; [AIR 1955 SC 807], Aher Raja Khima v. State of Saurashtra; [AIR 1956 SC 217], Balbir Singh v. State of Punjab; [AIR 1957 SC 216], M.G. Agarwal v. State of Maharashtra; [AIR 1963 SC 200], Noor Khan v. State of Rajasthan; [AIR 1964 SC 286], Khedu Mohton v. State of Bihar; [(1970) 2 SCC 450], Shivaji Sahabrao Bobade v. State of Maharashtra; [(1973) 2 SCC 793],***

Lekha Yadav v. State of Bihar; [(1973) 2 SCC 424], Khem Karan v. State of U.P.; [(1974) 4 SCC 603], Bishan Singh v. State of Punjab; [(1974) 3 SCC 288], Umedbhai Jadavbhai v. State of Gujarat; [(1978) 1 SCC 228], K. Gopal Reddy v. State of A.P. ; [(1979) 1 SCC 355], Tota Singh v. State of Punjab [1987(2) R.C.R. (Criminal) 35: (1987) 2 SCC 529], Ram Kumar v. State of Haryana; [1994(3) R.C.R.(Criminal) 631 : 1995 Supp (1) SCC 248], Madan Lal v. State of J&K; [1997(4) R.C.R.(Criminal) 89: (1997) 7 SCC 677], Sambasivan v. State of Kerala; [1998(2) R.C.R.(Criminal) 693 : (1998) 5 SCC 412], Bhagwan Singh v. State of M.P.; [2002(2) R.C.R.(Criminal) 593 : (2002) 4 SCC 85], Harijana Thirupala v. Public Prosecutor, High Court of A.P.; [2002 (3) R.C.R.(Criminal) 861 : (2002) 6 SCC 470], C. Antony v. K. G. Raghavan Nair; [2002(4) R.C.R. (Criminal) 750 : (2003) 1 SCC 1], State of Karnataka v. K. Gopalakrishna; [2005(2) R.C.R.(Criminal) 20 : (2005) 9 SCC 291], State of Goa v. Sanjay Thakran; [2007(2) R.C.R.(Criminal) 458 : (2007) 3 SCC 755] *and* ***Chandrappa v. State of Karnataka; [2007(2) R.C.R. (Criminal) 92: 2007(1) Recent Apex Judgments (R.A.J.) 841: (2007) 4 SCC 415].*** *It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering* *the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."*

Learned counsel for the applicant has failed to show any error in law or on facts on the basis of which interference can be made by this Court in the judgment under challenge.

As such, application for leave to appeal is dismissed on merit.

(PARAMJEET SINGH)
JUDGE

02.03.2015
parveen kumar