

CRM-A-573-MA-2014

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-A-573-MA-2014
Date of decision: 14.05.2015

M/s Chawla Enterprises through its Proprietor

.... Applicant/Appellant(s)

Versus

M/s Harjot Enggl. Works and others

.... 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. K.K.Madan, Advocate,
for the applicant.

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 28.01.2014 passed by the Judicial Magistrate Ist Class, Jalandhar whereby complaint filed by applicant under Section 138 of the Negotiable Instruments Act has been dismissed and respondents have been acquitted of the notice of accusation issued against them.

Brief facts of the case are that a complaint was filed by the

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applicant-complainant under Section 138 of the Negotiable Instruments Act, 1881 alleging that accused No.1 is a partnership firm and accused Nos.2 to 4 are its partners. They are incharge of and responsible to the firm for the conduct of its business. Accused purchased on credit pig iron from the complainant from time to time and according to account books of the complainant a sum of ₹24,58,589/- is outstanding balance which is payable by the accused to the complainant and in order to discharge the part of their liability the accused issued a cheque bearing No.588887 dated 01.10.2009 for a sum of ₹3,00,000/- drawn on Oriental Bank of Commerce, S.C.O-44, Opp. District Secretariat, Ladowali Road, Jalandhar, in favour of the complainant with the assurance that same would be honoured on presentation. However, on its presentation the said cheque was returned back dishonoured vide memo dated 27.03.2010 with remarks "Insufficient Funds". Upon this, complainant got issued legal notice dated 24.05.2010 to the accused under Section 138 of the Negotiable Instruments Act through registered post as well as U.P.C. calling upon the accused to make the payment within the stipulated period of 15 days, but the accused failed to do so. Hence, the complaint was filed.

On the basis of preliminary evidence, notice of accusation for commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 was served upon the accused-respondents to which they pleaded 'not guilty' and claimed trial.

The complainant, in order to prove his case, examined himself

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as CW1. Thereafter, statements of the respondents-accused under Section 313 Cr.P.C. were recorded wherein they pleaded complete innocence and false implication.

The trial Court, after appreciating the evidence, acquitted the respondents of the notice of accusation, served upon them, vide impugned judgment dated 28.01.2014. Hence, this application for grant of leave to appeal.

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

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

“10. I have considered the contentions of the learned defence counsel as well as the learned counsel for the complainant. Out of the arguments advanced by learned counsel for the parties, the following points of determination arises:-

- 1. Whether the non-signatory of a cheque can be made liable for an offence U/s 138 of Negotiable Instruments Act?*
- 2. Whether there is difference between sleeping partners and active partners for determining their liability U/s 138 of Negotiable Instruments Act?*
- 3. Is there any vicarious liability under the criminal law?*
- 4. Whether the cheque in question has been issued by the accused to discharge any legally*

enforceable liability?

POINT NO:1

11. *It was the contention of learned defence counsel that the non-signatory of a cheque cannot be made liable for an offence under section 138 of Negotiable Instruments Act. In this respect Hon'ble Kerala High Court has held in **Mymoonath Beevi v. State of Kerala, 2006(1) Civil Court Cases 161 (Kerala)**, that when the offence is committed by a firm, the criminal liability is not confined to the signatory of the cheque alone but also to non-signatories also provided the other conditions in that regard are satisfied. These necessary conditions are that complainant must specifically make an averment in his complaint describing the role of each partner who are made accused in the complaint i.e. they are incharge of and responsible for the affairs of the accused firm. Thus in the absence of this averment partners who are not signatories to the cheque in question cannot be made liable. In the present complaint, complainant has mentioned in his complaint that accused no.2 to 4 are incharge and responsible for the affairs of the accused firm. But in contrary to it, accused has stated that accused no.2 and 3 are only sleeping partners and not active partners and has stated that accused no.2 is having his own separate business in the name of M/s Amanjot Engineers and its Certificate of Incorporation is Mark-A. Moreover complainant has admitted in his cross-examination that he has not mentioned in his complaint the specific role of each partner. In addition to it perusal of Ex.32 i.e. the reply to the legal notice sent*

by the accused to the complainant firm reveals that accused has specifically mentioned the fact that accused no.2 and 3 are not the active partners of the firm and are only sleeping partners, but still complainant has filed the present complaint against them. In order to controvert the same, complainant has not produced on record any single evidence.

POINT No.2:-

*11. The question regarding difference between sleeping partners and active partners in a partnership firm has been duly answered in various authorities making the picture clear that there exists such difference. But as far as the liability of sleeping partners, who are non-signatories of the dishonoured cheque, under section 138 of Negotiable Instruments Act is concerned, Hon'ble Kerala High Court in **Biju Jacob v. Annie Mathew, (Kerala), 2004(3) R.C.R.(Criminal) 453**, has held that in case of dishonour of cheque by a Partnership firm, Sleeping partners and non-signatories should not be prosecuted on vague and sweeping assertion in the complaint that they were incharge and responsible to the firm for conduct of business- Provisions of Section 138 of the Negotiable Instruments Act are being invoked as a measure of oppression against sleeping partners who have nothing to do with the day -to – day transactions of firm. The whole array of partners are forced to face indictment by simply showing them also as accused persons in the their capacity as partner of the firm. It is the duty of the Magistrate taking cognizance to alertly apply their mind and come to the conclusion whether sufficient*

circumstance are there to persuade them to entertain the threshold satisfaction. Materials must be insisted to satisfy the conscience of the court that there are sufficient grounds to proceed against non-signatories/partners . Failure to make such insistence would necessarily reduce Section 138 of the Negotiable Instruments Act to an engine of oppression in the hands of unscrupulous complainant. Since in the present complaint, despite averring that all the accused are incharge of the and responsible to the affairs of the accused firm , no specific averment has been made describing their role in the accused firm, as such it can be said that complainant has not fulfilled the requirements of law to make all the accused liable.

POINT NO.3:-

12. *In this respect, learned counsel for the accused has stated that there is nothing like vicarious liability in the criminal law. In this respect, Section 141(1) of Negotiable Instruments Act specifically provides that if the person committing the offence is a company, every person who, at the time of the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Moreover, Hon'ble Supreme Court of India in **Aneeta Hada v. M/s Godfather Travels &Tours Pvt. Ltd. 2012(3) Civil Court Cases 121 (S.C.)**, has held that if a person who commits offence under section 138 of Negotiable Instruments Act is a company, the company as well as every person incharge of and responsible to the company for the conduct of business*

of the company at the time of the commission of the offence is deemed to be guilty of the offence. Thus it is clear that vicarious liability exists in case of offence committed under section 138 of Negotiable Instruments Act subject to the fulfillment of certain conditions.

POINT NO.4:-

13. *In this respect learned counsel for the accused has contended that complainant has failed to prove that the cheque in question has been issued by accused to discharge the legally enforceable liability. In order to controvert the same, complainant examined himself as CW1 and has stated that accused purchased pig iron from the complainant firm on credit and sum of Rs.24,58,589/- is due against the accused as per the Statement of accounts of the complainant firm which is Ex.C-13 and invoices for the goods purchased are Ex.C-1 to Ex.C-12. But on the other hand learned counsel for the accused has stated that these bills are forged and fabricated as accused stopped taking goods from the complainant firm and the cheque in question which have been given being blank signed as security for the earlier purchases are misused by the complainant firm to file the present complaint. Moreover, learned counsel for the accused has stated that complainant has failed to prove the fact that there exists any legal liability against the accused. Perusal of cross-examination of complainant has revealed that he has admitted the fact that the bills as alleged by him which are Ex.C1 to Ex.C12 are issued by one Raman, Clerk of the complainant firm, but complainant has failed to examine him. Moreover he has also admitted that bills are to be signed by the purchaser also, but on the other hand he has also admitted that the*

bills produced by him are not signed by the accused, but again alleged that these are signed by the employees of the accused firm. Thus from above it is clear that these bills are not proved on record by the complainant.

14. *As far as the presumption under Section 139 is concerned it provides that:-*

“It shall be presumed, unless the contrary is proved that the holder received the cheque, of the nature referred to Section 138, for the discharge, in whole or in part, of any debt or other liability”.

15. *However this presumption is not an absolute and can be rebutted firstly by leading cogent evidence and secondly by cross examination of the complainant or by finding a lacuna in the evidence of the complainant. In this present complaint accused has created a doubt about the story of the complainant and thus remained successful in rebutting the presumption under section 139/118 of Negotiable Instruments Act.*

16. *Thus from the above discussion and testimony of CW-1 the case of the complainant appears to be a doubtful story as the complainant has failed to discharge his onus to prove the issuance of cheque bearing No. 588887 dated 01.01.2009 for a sum of Rs. 3,00,000/- in lieu of legally enforceable liability by accused. As such ingredients of Section 138 of Negotiable Instruments Act stands not proved.*

17. *Moreover it is the cardinal criminal jurisdiction that the prosecution has to stand on its own legs and to bring home the guilt of the accused beyond the shadow of reasonable doubt. Prosecution in no ways can take the benefit in defence version. Thus in light of*

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this principle, it can be concluded by saying that complainant has failed to bring on record the guilt of the accused under Section 138 of Negotiable Instruments Act. As such the accused is ordered to be acquitted. Bail bonds and surety bond stands discharged. File be consigned to the record room and same will be revived as the and when accused who were declared proclaimed offenders are arrested or surrender before the court.”

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

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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.

14.05.2015
parveen kumar

(PARAMJEET SINGH)
JUDGE