IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-625-MA-2014
Date of decision: 14.07.2015

Kotak Mahindra Bank Ltd.

.... Applicant/Appellant(s)

Versus

Mrs. Avantika Grover

.... 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. A.S.Virk, Advocate, for the applicant.

Mr. Salil Bali, 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 31.01.2014 passed by the Judicial Magistrate Ist Class, Ludhiana whereby complaint filed by applicant-complainant under Section 138 of the Negotiable Instruments Act (in short, 'N.I.Act') has been dismissed and respondent-accused has been acquitted of the notice of accusation issued against him.

Brief facts of the case are that a complaint was filed by the applicant-complainant under Section 138 of the N.I.Act alleging that respondent-accused approached the complainant and requested for vehicle loan and he also executed an agreement/contract to this effect. The accused in order to discharge his legal enforceable liability, issued cheque bearing No.101841 dated 01.08.2011 for ₹7,00,000/- drawn on Central Bank of India, Jalandhar Cantonment, Punjab, in favour of complainant. The complainant presented the said cheque to its bank, but the same was dishonoured vide Memo dated 03.08.2011 with remarks "Opening Balance Insufficient". The complainant got served legal notice which was duly received by the accused, but the accused did not make the payment. 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 N.I.Act was served upon the accused to which he pleaded 'not guilty' and claimed trial.

The complainant, in order to prove its case, examined its authorized signatory i.e. Sh. Vivek Vashisth as CW1. Thereafter, statement of the accused under Section 313 Cr.P.C. was recorded wherein he pleaded complete innocence and false implication.

The trial Court, after appreciating the evidence, acquitted the accused of the notice of accusation, served upon him, vide impugned judgment dated 31.01.2014. 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:-

> *"14. It was for the complainant to prove that the cheque in question was not misused by the complainant but the accused has given him in return of her loan amount and he has not tampered and forged but the accused has given him in this position only. It was also burden upon the complainant to prove the loan amount taken by the accused. Moreover burden lies upon the complainant to prove that he has a valid power of attorney and the present cheque has not been given as a surety of loan taken by the husband of the accused but she herself has approached to the complainant bank for this loan and in return of this loan she has issued this cheque. But the Attorney of the complainant bank in his cross-examination, has admitted the accused has approached the bank for vehicle loan and accordingly after executing the loan agreement/contract No. 345880/- to this effect the accused issued the cheque in question to the complainant bank which on presentation to the bank got dishonoured but strange enough that neither the complainant has placed on record the Loan Agreement which he is alleging in his complaint nor he prove on record that any kind of loan has been taken by the accused from the complainant bank and it is also*

very strange that he could not produce any documentary proof regarding the same. The complainant has placed on record five documents as Ex C 1 to EX.C 5 as Attested Copy of the Resolution, Original Cheque, Returning Memo, Legal Notice and Postal Receipt meaning thereby that the complainant has failed to prove on record the loan alleged by him in the complaint, moreover during his cross examination he has admitted that. From the perusal of file it has been transpired that the complainant in his complaint has not mentioned as what was the date, month, year of advancement of loan and it is also very strange that in his complaint the complainant has not mentioned what is the total amount of loan and how many installments of what amount has been fixed and whether the present cheque has been issued by the accused was for part payment or for full amount. Moreover even during his cross examination when the counsel for the accused asked him about the loan agreement and about the Original of Power of Attorney Power of Attorney he himself admitted that he has not placed on record any loan agreement even later on till the argument he has placed it on record, but during his cross he himself admitted that he does not know about the date, time of loan and he also admitted all the facts of defence taken

by the accused in her statement under Section 313 Cr.P.C. Moreover it is also very strange that the Attorney of the complainant bank has not bothered about the evidence given by him as in his affidavit which he has tendered after substitution he himself has filed it in routine manner where he himself has mentioned the accused by mentioning 'HE' which shows the kind of *conduct of the Attorney. So all these facts create serious doubt about the case of the complainant. The accused in his evidence has not examined any witness but relied upon the evidence of the complainant. This very valuable admissions in the cross-examination of the complainant lends corroboration to the defence version rendered by the accused.*

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16. The Apex Court in ***Krishna Janardhan Bhat Versus Dattatraya G.Hedge*** *2008(1) Criminal Court Judgment 531 has very clearly held that:-*

> *"We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctorine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."*

17. Now applying to this case, the principle laid down by the Apex Court, it may be very safely concluded that the presumption in favour of the drawer stands very effectively rebutted. This court has very valid reasons to believe that the complainant has failed to prove on record the Loan Agreement and the loan amount taken *by the accused on the basis of which has placed his claim and filed the present complaint against the accused. He further failed to prove on record that the present cheque in question has been given by the accused in discharge of legal liability and by filing it in his hand. But it is that the accused who has given this cheque as a security of loan repayment taken by her husband but the complainant has by tampering it and misused the cheque by forging it and by filing the amount of his choice and gave the cheque for encashment even without knowledge and consent of the accused. The Hon'ble Supreme Court of India has held in the case of* ***"ICDS (V) Been Shabeer"*** *that even a guarantor can be made liable under 138 of Negotiable Instruments Act, but In the present case the complainant has not taken this ground had it be so then the fate of the case would have otherwise but he failed to prove his case beyond reasonable doubt.*

18. The defence counsel has stated that the complainant has misused the cheque in question which has been given to him for the security of loan amount taken by her husband and the complainant also failed to prove on record the loan agreement alleged by him in his complaint. He also failed to prove on record whether the accused has issued him the cheuqe for the part payment of for the full payment of loan in question in discharge of legal liability. Hence all these facts also did not favour the case of complainant and the complainant failed to prove his case beyond the shadow of reasonable doubt.

19. Thus once the accused has rebutted the presumption under Section 139 of the Negotiable

Instruments Act, the onus lay upon the complainant to lead further evidence to prove that the disputed cheque was actually given to him to discharge the liability. But the facts and circumstances of the case clearly go to show that present cheque is a sham transaction aimed at harassing the accused.

20. Thus, it is established from the facts and circumstances of the case that the presumption attached under Sections 118 and 139 of the Negotiable Instruments Act stand effectively rebutted. It is established on file that the accused did not have legal liability to discharge. In these premises, it may be very safely concluded that the complainant has failed to establish the charge made by him against the accused.

21. The provisions of Section 138 of the Negotiable Instruments Act are penal in nature and the complainant is required to prove the guilt to the accused to the hilt, which the complainant has miserably failed to prove. The law on the point is fairly settled that when two view are possible on the evidence adduced by the parties, the view which is favourable to the accused should be adopted as has been held in ***Thippriripati Iyaiah Versus State of Andhra Pradesh*** *2007(5) RCR 221.*

22. In the instant case, the complainant has miserably failed to prove any legal liability against which the cheque was issued by the accused. Rather the defence version that there was no legally enforceable debt inspires confidence. As such, the complainant has failed to prove his case against the accused for the commission of an office punishable under Section 138 of the Negotiable Instruments Act, 1881. The complaint *stands dismissed and the accused is acquitted of the charge framed against him. His bail bond and surety bond stand discharged. The file, after needful, be consigned to record-room."*

Perusal of the impugned judgment clearly reveals that loan was taken by the husband of the respondent and cheques of the respondent were taken by the bank as collateral security. In fact, there is no legal liability against the petitioner. There is no document on the file to show that the respondent was a guarantor in this case.

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.*
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> *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

14.07.2015
parveen kumar