IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-750-2015 (O & M)
Date of Decision: 31.03.2015

M/s Bal Krishan Som Pal and another

... Petitioner(s)

Versus

Sushil Kumar

... 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. Parminder Singh-I, Advocate, for the petitioners.

Mr. Rahul Sharma, Advocate, for the respondent.

Paramjeet Singh, J.

Present criminal revision has been preferred by the petitioners against judgment dated 07.02.2015 passed by the Additional Sessions Judge, Ludhiana, thereby dismissing the appeal filed by the petitioners against the judgment of conviction and order of sentence dated 06.12.2012 passed by the Sub Divisional Judicial Magistrate, Khanna, vide which the petitioners-accused and accused-Sompal have been convicted for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'N.I.Act') and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹ 5,000/-, in default to undergo rigorous imprisonment for one month.

In nutshell, the case set up by the complainant as emanating from the record is to the effect that petitioner no.2-accused no.2, Dharam Pal, and accused-Som Pal are the partners of accused no.1. Both the accused were known to the complainant and they borrowed money from the complainant and agreed to pay interest @ 18% per annum. An amount of ₹ 9,47,421/- as on 01.04.2003 was outstanding against the accused apart from interest @ 18% per annum. After acknowledging the outstanding amount, accused issued copy of statement of account to the complainant for the year 2002-03. In order to discharge their legal liability in part, out of the outstanding amount, accused-Dharam Pal being partner of partnership firm, petitioner no.1 in consultation with accused no.3-Som Pal issued cheque No.823368 dated 01.05.2004 for ₹3,25,000/- and cheque No.823369 dated 01.06.2004 for ₹ 3,25,000/- drawn on State Bank of India, Branch Rampura Phul, of their account No.01000060387 which was duly signed by accused no.2 as a partner of partnership firm. Accused nos.2 and 3 were the incharge of the business and responsible for day to day business of partnership firm-accused no.1. The complainant presented cheque no.823368 dated 01.05.2004 and cheque no.823369 dated 01.06.2004 to his banker which were dishonoured by the drawee bank with the remarks 'account closed'. After the receipt of dishonoured cheque as well as memo, complainant got issued notice dated 11.07.2004, registered on 12.07.2004 under registered post as well as UPC requiring the accused to make the payment of the dishonoured cheque within 15 days of the receipt of the notice. The registered notice sent to the accused was received back with the report that house was closed and not met in spite of repeated visits, but notice sent under UPC was not received back. The accused did not make the payment within statutory period, 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 NI.Act was served upon the accused to which they pleaded "not guilty" and claimed trial.

To prove his case, the complainant himself stepped into the witness-box as PW 3 besides examining Chiranjiv Nanda, official from SBOP, Khanna as PW 1 and Banwari Lal, Record-Keeper, SBI, Rampura Phul as PW 2.

Statements of the accused were recorded under Section 313 Cr.P.C. The accused denied all the incriminating circumstances appearing against them in the complainant's evidence and claimed to be innocent. In their defence, the accused examined Charanjit Singh, official from SBI, Rampura Phul as DW 1, accused-Som Pal as DW 2, accused no.2-Dharam Pal as DW 3.

During the defence evidence, accused-Dharam Pal moved application under Section 311 Cr.P.C. for recalling complainant-Sushil

Kumar (PW3) for further cross-examination which was allowed and complainant-Sushil Kumar was further cross-examined.

Vide impugned judgment of conviction and order of sentence dated 06.12.2012, the trial Court convicted and sentenced the petitioners and accused-Sompal, as aforesaid. Against that, the petitioners and accused-Sompal filed separate appeals before the Additional Sessions Judge, who accepted the appeal of accused-Sompal and acquitted him of the notice of accusation served upon him, however, dismissed the appeal filed by the petitioners. Hence, this criminal revision.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the petitioners has vehemently contended that cheques in question were not issued in discharge of any legal liability, therefore, the offence under Section 138 of N.I.Act is not made out against the petitioners. Learned counsel further contended that in the year 2003, cheque-book of the petitioners-accused firm namely M/s Bal Krishan Som Pal containing 32 cheques i.e. cheques no.823368 to 823400 was lost and the petitioners had intimated the bank vide application dated 14.10.2003 (Ex.D-2). The complainant-firm had forged and fabricated the said cheques by filling up the wrong amount in the same which was not due against the accused. The complainant has not proved the source of amount allegedly advanced to the petitioners. The complainant stated during his cross-examination that he had advanced the loan amount to the petitioners through drafts and cheques at Khanna and Rampura Phul, but no evidence was adduced to prove the alleged transaction of loan. Learned counsel further contended that the complainant has not disclosed the date of demand of loan and giving of loan in his complaint and in his evidence. The complainant has failed to prove the signatures of the accused on the cheques. Both the courts below have not taken into consideration that the complainant had failed to produce any document regarding the amount due towards the petitioners. Both the courts below have misread the evidence and findings recorded by both the courts below are result of misreading of evidence and non-application of mind.

Per contra, learned counsel for the respondent vehemently opposed the contentions of learned counsel for the petitioners and supported the impugned judgments.

I have considered the rival contentions of learned counsel for the parties.

Before dealing with contentions raised by learned counsel for the parties, it would be appropriate to reproduce the relevant provisions. Sections 118 (a) and 139 of the N.I.Act read as under:

> *"118. Presumption as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made*
>
> *(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed,*

negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;"
"139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

The provisions of the N.I.Act lay down that initially, the complainant has to prove the existence of debt and other liabilities and thereafter the burden shifts upon the accused to prove that the cheque was not issued towards discharge of a lawful debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully.

Admittedly, the loan transaction was not reduced into writing, but later on, accused-Dharam Pal issued account statement (Ex.P-1) showing his outstanding liability towards complainant. The petitioners-accused claim that alleged account statement (Ex.P-1) is forged and fabricated document. But, the complainant while appearing into witness-box as PW 3 has not been cross-examined about the genuineness or fabrication of account statement (Ex.P-1). Both the courts below have rightly held that the complainant has been able to set up a foundation for raising presumption under Section 139 of the N.I.Act.

Admittedly, both the cheques in question belong to accused no.1-firm and petitioner no.2-Dharam Pal is the proprietor of said firm.

The petitioners have taken a defence that cheque book containing cheque nos.823368 to 423400 was lost and bank authorities were informed accordingly vide application dated 14.10.2003 (Ex.D-2). To prove this fact, the petitioners examined DW 2 Sompal and DW 3 Dharam Pal. DW 3 Dharam Pal tendered his affidavit Ex.DB in his evidence and deposed that he and complainant are known to each other and have close relations. Both of them have been in business dealings with each other since 1985. He also stated that cheques in question were never issued against any legal liability towards the complainant, but the same were got filled up by the complainant by forging and fabricating the same and the documents produced by the complainant are forged and fabricated. However, certified copy of judgment dated 15.11.2011 passed by the Additional Sessions Judge, Barnala placed on record reveals that a complaint under Section 138 of the N.I.Act was filed by one Satpal against the accused on the basis of cheque no.823372 dated 01.01.2004 and no.823373 dated 01.06.2004 issued by accused-Dharam Pal. DW 3-Dharam Pal (accused) admitted that he was convicted and sentenced for the issuance of above said two cheques. These two cheques bearing nos.823372 dated 01.01.2004 and 823373 dated 01.06.2004 belong to the cheque book containing 32 cheques stated to be misplaced by the petitioners. The petitioners could not explain as to how signatures of accused-Dharam Pal came to exist on the aforesaid cheques if cheque book was lost.

It is pertinent to mention that complainant has not produced any partnership deed of M/s Bal Krishan Som Pal to show that Som Pal was partner of the above mentioned firm. However, accused-Som Pal produced the deed of partnership, executed between Dharam Pal and him, before the lower Appellate Court which shows that partnership deed was executed on 01.04.2003 and prior to the same, the business of M/s Bal Krishan Som Pal, Rampura Phool was being carried on by Dharam Pal as a proprietor till 31.03.2003. The lower Appellate Court has rightly held that liability of proprietorship firm cannot be fastened on a partner subsequently entered into the business due to the creation of new partnership deed. Mere issuance of instructions to close the joint account does not show the involvement of accused-Som Pal in the present.

Moreover, I am afraid, while exercising my revisional jurisdiction, I cannot re-appreciate the evidence. The basic object behind Section 401 of the Code of Criminal Procedure is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the Code of Criminal Procedure does not provide for appeal. The power, however, is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to : a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power, where decision upon which the trial court relied has since been reversed or overruled when the revision is being heard. In exercising the power of revision, which is discretionary, the court should always bear in mind the limitation that under the garb of exercising its powers of revision; it cannot exercise the power of appeal in the face of statutory prohibitions. This is not a case where an important piece of evidence has been left out from consideration by the courts below while deciding the case.

In view of above, I do not find any illegality or perversity in the impugned orders.

Dismissed.

31.03.2015 **(Paramjeet Singh)**
parveen kumar **Judge**