IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-2590-SB of 2009
Date of Decision :14.3.2016

Jasbir Singh

.......Appellant

Versus

Arvind Gill

.......Respondent

CORAM:- HON'BLE MR. JUSTICE GURMIT RAM

Argued by: Mr. K.S. Dadwal, Advocate for the appellant.

Mr.Arun Takhi, Advocate for the respondent.

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GURMIT RAM, J.

This appeal is preferred by above-said appellant (complainant) against the judgment dated 18.7.2008 passed by the Court of Judicial Magistrate Ist Class, Hoshiarpur in Act Complaint No.91 of 2004/2007 dated 15.3.2004/26.5.2007 titled as 'Jasbir Singh Versus Arvind Gill' vide which respondent-herein (accused) was acquitted of the accusation (offence) under Section 138 of the Negotiable Instruments Act, 1881 (for short – '*the Act'*).

2. The case of the appellant-herein (complainant) before the learned trial Court was that the complainant, who was running the business of sale purchase of different goods in the area of Hoshiarpur was having good financial position. The respondent-herein (accused), who

was also running his business under the name and style of M/s Hospital Share Engineering Services, Hoshiarpur, was known to complainant. The respondent being friendly to appellant (complainant) borrowed money from him on several occasions in cash as well as through cheques. In all, he borrowed a sum of Rs.1,00,000/- from him out of which he returned the amount of Rs.17,000/- to the appellant – complainant in two installments in the month of November and December, 2003 whereby leaving the balance of Rs.83,000/- outstanding against him. The appellant approached the respondent and demanded from him the remaining amount of Rs.83,000/- in the last week of January, 2004, which he did not pay with the request to grant him time to pay the same. Then ultimately in the first week of February, 2004, on the demand of appellant – complainant, respondent – accused issued the cheque bearing No.003502-146240002/000926 dated 4.2.2004 in the sum of Rs.83,000/- of HDFC Bank in favour of the complainant in order to discharge his liability towards him with the assurance that there were sufficient fund in his account for the honour of this cheque. Accordingly, appellant (complainant) presented this cheque for collection through his banker i.e. Indian Bank near D.A.V. College, Chandigarh Road, Hoshiarpur which was returned unpaid by the bank authorities with the remarks “Account Closed” vide memo dated 9.2.2004 of HDFC Bank, Hoshiarpur. Then appellant (complainant) served a legal notice upon respondent – accused for informing him of dishonouring of the said cheque and also to make payment of the cheque amount through his counsel, but to no effect which resulted into filing of the instant complaint.

3. After recording preliminary evidence of the complainant, respondent herein (accused) was ordered to be summoned under Section 138 of the Act vide order dated 20.4.2004.

After procuring the presence of respondent-herein (accused), he was served with notice of accusation under Section 138 of the Act, to which, he pleaded not guilty and claimed trial.

4. The appellant (complainant) in order to substantiate the accusation against respondent-herein (accused) examined three witnesses.

5. Then respondent-herein (accused) was duly examined as per the provisions of Section 313 of Cr.P.C. Entire incriminating evidence as brought on the file against him was put to him, which was denied by him entirely. Further he took the plea of his innocence and false implication in this case. He never issued the cheque in question nor the same bore his signatures.

Then in defence, he (respondent – accused) also examined two witnesses.

6. Then after hearing the learned counsel for both the parties and going through the record as well, the learned trial Court acquitted the respondent-herein of the notice of accusation served upon him u/S 138 of the Act by granting him the benefit of doubt vide the impugned judgment.

7. Appellant (complainant) being not satisfied with the impugned judgment has come up in the instant appeal before this Court, notice of which was given to the respondent. Trial Court record was also requisitioned.

8. I have heard the learned counsel for both the parties and have

also gone through the record with their able assistance.

9. Learned counsel for the appellant (complainant) has contended that the impugned judgment of learned trial Court is against the law and facts on the file and as such it is not tenable in the eyes of law. The learned trial Court has recorded the acquittal of respondent-herein (accused) by giving him benefit of doubt mainly for the reason that appellant had failed to prove the liability of respondent. The learned trial Court while passing the impugned judgment had failed to take into consideration the ample evidence available on the record which was sufficient to prove the guilt of respondent. The impugned judgment is purely based on conjectures and surmises and on this ground also, it is not sustainable at all.

10. But on the other hand, learned counsel for the respondent has contended that the appellant had failed to bring on the record any kind of evidence to prove his financial position for advancing the alleged cheque amount to the respondent and as such the learned trial Court has rightly passed the judgment of acquittal of respondent in this case. Then the learned trial Court had also taken into consideration the evidence available on the record and passed the impugned judgment after appreciating the same and as such there is nothing worthwhile on the record which could warrant interference of any kind in the impugned judgment.

11. As per the impugned judgment, the learned trial Court acquitted respondent-herein (accused) for the following reasons:

(i) That the appellant (complainant) failed to prove that he had sufficient means to advance the huge amount since he himself had been

borrowing money from the others.

(ii)Then he (complainant) also neither pleaded nor proved on the record any date, month or the year as well as the amount allegedly borrowed from him by the respondent on any specific occasion.

(iii)In the complaint, he (complainant) took the plea that respondent returned to him a sum of Rs.17,000/- in two installments in the month of November, December, 2003 out of the total borrowed amount of Rs.1,00,000/- and whereas while appearing in the witness-box as CW3, he stated that the above-said amount was returned to him in one installment only. This amount may be either of Rs.15,000/- or Rs.13,000/-.

12. Further in order to record the impugned judgment of acquittal, the learned trial Court has relied upon the cross-examination of complainant CW3 as well as the case laws i.e. :

(a) ***M.S. Narayana Menon @ Mani Versus State of Kerala and another, 2006(6) Supreme Court Cases 39***;

(b) ***Kamalammal Versus C.K.Mohanan and another, 2007(2) R.C.R.(Criminal)977***;

(c) ***K. Parkashan Versus P.K.Surenderan, 2007(4)R.C.R. (Criminal) 588***; and

(d) ***G.Veeresham Versus S. Shiva Shankar and another, 2008 (1) Crimes 548***.

In the above referred case law at point (a), there was specific plea of the appellant (accused) that nothing was due against him and the cheque in question was issued by way of security. This defence version was accepted as probable one. It was held that if the defence is acceptable as probable, the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose, the same would not come within the purview of Section 138 of the Act. The appeal was accordingly accepted and the accused was acquitted.

So far as the case law referred at point (b) is concerned, in this case law also there was specific plea on behalf of the accused that two blank cheques in question were handed over by him to the complainant/her attorney as a security. In this case, the accused was acquitted by the learned trial Magistrate and his acquittal was upheld by the Hon'ble High Court.

But in the case in hand, the respondent never took the plea that he issued the cheque in question to appellant (complainant) as a security. His simple plea under Section 313, Cr.P.C., was that he did not issue the cheque in question nor it bore his signatures. So as such, the above-said both the case laws referred at points (a) and (b) cannot be attracted to the case in hand.

So far as the above referred case law at point (c) is concerned, in that case it was the plea of complainant that he advanced a sum of Rs.3,16,000/- to the respondent – accused. It came on the record that he advanced this money to respondent on different dates in different sums as detailed in para No.5 of the judgment. It also came on the record that complainant had himself been taking advances either from his father or brother or third parties without making any attempt to realise the amount already advanced. It was held that complainant was not a man of means which enabled him to advance the above-said huge amount of Rs.3,16,000/- to the respondent. But in the case in hand, the amount of the cheque in question is on the much lower side i.e. Rs.83,000/- as compared the amount in this case law. Then nothing had come on the record in the case in hand to prove the fact that appellant (complainant) had ever borrowed any money either from his father or brother or any other person. So the learned trial Court has wrongly applied this case law to the facts of the case in hand while there is no assimilation of facts of these two cases i.e. this case law and the case in hand.

In the case law referred to above at point (d), the complainant admitted in his cross-examination that he had no proof of lending Rs.40,000/- to accused. He even did not tell the date, month or year of this loan. It was denied by the accused that he had borrowed the alleged sum of Rs.40,000/- as hand loan from the appellant/complainant. Rather his plea was also that the appellant/complainant had obtained certain blank cheques from him in respect of finance business. It was held that the accused was able to rebut the presumptions available to the complainant under Sections 118 and 139 of the Act. Accused was acquitted.

But in the case in hand, there was no plea of respondent (accused) that the alleged cheque was obtained from him by appellant-herein (complainant) regarding any finance business. Rather as above-said, he had been denying that the alleged cheque was issued by him in favour of complainant. So this case law is also having no bearing on the facts of the case in hand.

13. Now I want to discuss cross-examination of CW3 (complainant) in some detail in order to ascertain the fact as to whether the respondent has been able to rebut the presumptions available in favour of the complainant under Sections 118 and 139 of the Act on the basis of

his cross-examination.

In his cross-examination, it had come on the record that he is 10+2 pass. He remained unemployed for about two years after passing his 10+2. Thereafter, he joined as a salesman with Ishwari Traders,120, Civil Line, Hoshiarpur and he worked as such for a period of seven years. He left this job either in the year 1998 or 1999 since he intended to start his own business. He was getting a salary of Rs.2,500/- per month as a salesman from the above-said firm. He opened his saving account in Indian Bank, Branch D.A.V. College, Hoshiarpur about 7/8 years ago when he was employed as salesman in the above-said firm. He also used to help his father from his salary. Approximately he started his own business under the name and style of Badwal Enterprises in the year 1999 at 120, Civil Line, Hoshiarpur by taking some premises on rent and also got issued sale tax number. He employed three persons for this work who were paid by Frito-Lays India Pvt. Ltd., Sangrur. He was working as a distributor of this firm and was paid a margin at the rate of 6% on the sale basis. He opened the bank account of Badwal Enterprises with UBI, Phagwara vide Account No.CC-202. He did not get any financial help from any person at the time of starting of the work of Badwal Enterprises. After closing the work of Badwal Enterprises, he got agency from Oriental Insurance Company, which he is still holding. He was maintaining the account books of Badwal Enterprises, but now the same are not available with him since he had destroyed the same. He was also doing the work of sale-purchase little bit with his brother. At the time of starting business of Badwal Enterprises, he also got issued cash credit limit to the extent of Rs.5,00,000/- from said U.B.I., Phagwara. He might have got deposited in his saving account a sum of Rs.3,00,000/- to the maximum. He used to write down on paper the amounts allegedly advanced to the respondent as well as the dates which he destroyed on receipt of the cheque in question from the respondent.

14. So from the above discussed cross-examination of complainant-Jasbir Singh (CW3), nothing has come on the record to say that he had ever borrowed any amount from any person at any stage either to run his business or for any other purpose. So in the light of this situation, the above-cited case law i.e. ***K. Parkashan Versus P.K.Surenderan*** (supra) could not be attracted to the case in hand. So the finding of the learned trial Court that appellant (complainant) himself had been borrowing money from his father, brother or friends is held to be not tenable being inconsistent with the record.

15. Then CW1 Naranjan Singh, Clerk-cum-Cashier of Indian Bank, Chandigarh Road, Hoshiarpur stated that he had seen the original cheque dated 4.2.2004 of HDFC, Bank in the sum of Rs.83,000/- in the file which was deposited in account No.1627 of the complainant on 9.2.2004. This cheque was received back unpaid from HDFC Bank, Branch Chandigarh Road, Hoshiarpur on the ground that account No.22920/0344 having been closed. Further he proved the receipt Ex.CW1/A regarding depositing of the above-said cheque, memo Ex.CW1/B dated 9.2.2004 made on the back of this cheque and the statement of account of the complainant Ex.CW1/D.

CW2 Gur Trishan Singh of HDFC Bank, Chandigarh Road, Hoshiarpur stated that cheque bearing No.3502 issued by Arvind Gill was pertaining to account No.22920/0344. The cheque was returned by their bank due to closure of account of account holder vide memo Ex.CW1/C. Then he also proved the certified copy of the relevant entry of the cheque return register of their bank as Ex.CW2/A.

16. From the perusal of above-said statement of account Ex.CW1/D of the appellant (complainant), it is found that appellant-complainant was having a sum of Rs.1,55,416.05 in his saving account on dated 3.6.2003. This statement of account was pertaining to the period of about 8-9 months approximately and during this period, he was having amount in his saving account ranging from ₹46,000/- to ₹ 1.50 lacs approximately barring 2-3 entries. So in the light of this statement of account, it cannot be held that the appellant (complainant) was a penniless person and hence unable to advance the alleged amount to respondent.

17. Then respondent (accused) did not step into the witness-box in order to rebut the presumptions which are in favour of complainant under the provisions of Sections 118 and 139 of the Act. Then as above-said, nothing has come out from the above discussed cross-examination of complainant (CW3) in order to hold that he (respondent) had been able to rebut the above-said presumptions.

18. Then as above-said, it came on the record in the statement of CW2 that the cheque Ex.C1 had been pertaining to the account of respondent. There was no explanation on the part of respondent as to how this cheque came into the hands of appellant-complainant. At the time of arguments, learned counsel for the respondent vaguely raised the plea that

complainant was friendly to the respondent (accused) and as such he might have stolen the same from the custody of respondent. But the respondent could not be permitted to raise this plea at this stage because he did not take any such plea at any stage during the trial of the case. Even if this cheque was allegedly stolen by complainant from his custody, then he was bound to lodge report with the police in this regard against him, which he did not do.

19. Then in his statement recorded u/S 313, Cr.P.C., he took specific plea that he did not issue the cheque in question nor it bore his signatures. The signatures of respondent are available on four places including that of cheque in question i.e. under his plea with regard to the serving of notice of accusation under Section 138 of the Act at Page No.25 of the trial Court record, under his statement recorded under Section 313, Cr.P.C., at Page No.59 of the trial Court record and on his bail bonds furnished on 13.9.2004 before the trial Court at Page No.123 of the trial Court record. If the alleged signatures of respondent on these three documents are compared with his alleged signature on cheque Ex.C1, then the same are held to be quite identical as well as similar to each other without any variation. Then three more signatures of the respondent (accused) are also available on the trial Court record i.e. on the order-sheet containing three zimny orders dated 25.3.2008, 15.4.2008 and 1.5.2008. These are also found to be quite matching with the alleged signature of respondent on the cheque in question Ex.C1. The above-said signatures of respondent (accused) were obtained in due course of judicial proceedings of this case and the judicial notice of the same could also be

taken in order to determine the point in issue.

20. Then learned counsel for appellant in support of his contentions has also referred to some case laws which are discussed as under:

(i) ***Goa Plast (P) Ltd. Versus Chico Ursula D'Souza, 2004(1) Criminal Court Cases 693(S.C.)***.

In this case, accused after the issuance of cheque in question gave instructions to his banker to stop payment. It was held that once a cheque is issued by a drawer, a presumption under Section 139 of the Act must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment, it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. It is also to be presumed that the cheque was issued in discharge of a debt or other liability which presumption though rebuttable by adducing evidence. In this regard, burden of proof is on the person who wants to rebut the presumption.

In the case in hand, the respondent (accused) utterly failed to bring on record any sort of evidence to rebut this presumption.

(ii) ***Hemant Pavel Gracias Versus Socorro Santan Fernandes, 2008(1) Criminal Court Cases 977, Bombay High Court***.

In this case, the complainant did not produce any document in support of the amount allegedly advanced by him. It was held that this in itself was not sufficient to displace the presumption available to the complainant. Appeal was accepted. The trial Court judgment of acquittal was set aside and the respondent – accused was convicted.

(iii) ***Pawan Kumar Saini Versus Jogendra Kumar*** along with two other appeals, ***2014(8) R.C.R.(Criminal) 1912***.

In para 17 of this case law, it has been observed as under:

"In view of judgment of Hon'ble Apex Court in the case of Laxmi Dyechem (supra), the amount of money is insufficient to honour the cheque is a genus of which the expression "account being closed" is specie, therefore, complaint is maintainable under Section 138 of the NI Act, even if cheque is dishonoured on the ground "ACCOUNT IS CLOSED"."

(iv) ***Issac K.J. Versus Reghunathan Chettiar, 2015(4) R.C.R. (Criminal) 360***.

In this case, the account was closed by accused after issuance of the cheque. Resultantly, cheque was dishonoured. It was held that it would make out an offence under Section 138 of the Act.

In the case in hand, the alleged cheque Ex.C1 dated 4.2.2004 was returned unpaid by the bank of accused vide memo Ex.CW1/C dated 9.2.2004 with the remarks "Account Closed".

21. There is nothing on the record to say about the innocence of the respondent or that alleged cheque was not issued by him. When it is proved on the file that the alleged cheque Ex.C1 was issued by respondent, then presumptions u/Ss 118 and 139 of the Act in favour of the complainant are that this cheque was issued by respondent in discharge of his liability towards the complainant.

22. In the light of above discussion, there are merits in this appeal and as such it is liable to be accepted. So, accordingly, this appeal stands accepted and consequently the impugned judgment is set aside. Respondent (accused) is held guilty of notice of accusation (offence)

under Section 138 of the Act. The transaction of the cheque in question is related to January, 2004. Since then a period of more than 12 years has already elapsed. So, accordingly, respondent is awarded sentence of rigorous imprisonment for six months along with a fine of Rs.1,20,000/- which is to be treated as a compensation. The respondent (accused) is directed to pay this amount of compensation to the complainant within four months from today, failing which, to further undergo rigorous imprisonment for a period of four months. Accused (respondent) is directed to surrender before the learned trial Court/Chief Judicial Magistrate concerned to undergo the above sentence, within three weeks from today, unless the operation of this judgment is stayed by the Hon'ble Apex Court. In case respondent (accused) does not surrender before the trial Court/Chief Judicial Magistrate concerned as directed above within the above-said stipulated period, then in that eventuality, the Court concerned will be at liberty to proceed against him to procure his presence as per law in order to commit him to jail for undergoing the sentence above mentioned.

A copy of this order be sent to the quarter concerned for strict compliance.

14.3.2016 **(GURMIT RAM)**
Brij **JUDGE**

1. To be referred to the Reporters or not?Yes
2. Whether the judgment should be reported in the Digest? Yes