IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-2713-SB of 2011
Date of Decision :-24.5.2016

Jaivir Singh

.......Appellant

Versus

Satbir Singh

.......Respondent

CORAM:- HON'BLE MR. JUSTICE GURMIT RAM

Present: Mr. K.D.S. Hooda, Advocate for the appellant.

Mr.Lekh Raj Sharma, Advocate for the respondent.

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GURMIT RAM, J.

This appeal is preferred by the appellant – herein (complainant) against the judgment dated 30.1.2009 passed by the Court of learned Additional Sessions Judge, Gurgaon vide which the appeal of the respondent – herein (accused) filed against the judgment of conviction dated 18.9.2007 and order of sentence dated 21.9.2007 passed by the learned Additional Chief Judicial Magistrate, Gurgaon in the complaint case titled 'Jaivir Singh Versus Satbir Singh' under Section 138 of the Negotiable Instruments Act, 1881 (for short – '*the Act'*) was allowed and the above-said judgment of conviction and order of sentence were set aside and the accused was acquitted by accepting the appeal.

2. The case of the appellant - herein (complainant) before the

learned trial Court in nut-shell was that respondent – herein (accused) along-with one Om Singh was the partner of a firm namely Chandna Marbles which was carrying out the business of marbles. They took a loan of Rs.23,82,700/- from the appellant – herein (complainant) for running their above-said business with the promise to return the same with interest. The respondent – herein (accused) along-with his above-said partner - Om Singh gave three cheques, bearing No. 870098 dated 15.9.2003 in the sum of Rs.7,85,000/-, No.870099 dated 15.11.2003 in the sum of Rs.7,50,000/- and No.870100 dated 15.12.2003 in the sum of Rs.6,30,000/- in order to discharge their said liability towards the complainant. They were operating account No.37 of their firm with 'The Delhi State Co-operative Bank Ltd., Palam, New Delhi'. The complainant presented the above-said two cheques bearing No.870098 and 870099 on 13.2.2004 and third cheque bearing No.870100 on 18.2.2004 with his bank i.e. Gurgaon Gramin Bank, Khandsa, Gurgaon for the encashment thereof, but the same were returned with the remarks 'insufficient funds'. Then legal notice dated 3.3.2004 was served upon respondent – herein (accused) and his partner Om Singh. It was the case of the complainant that said Om Singh paid him a sum of Rs.11,90,000/- vide five post dated cheques with the request to grant him some more time to arrange the payment of these cheques. The respondent – herein (accused) refused to pay the amount in question despite the legal notice which resulted into filing of the instant complaint.

3. After recording preliminary evidence of the complainant, respondent - herein (accused) was ordered to be summoned u/S 138 of the

Act vide order dated 29.3.2004.

4. Though it was a summon case but the learned trial Court adopted the procedure for its disposal as that of a warrant case. After procuring the presence of respondent-herein (accused) and recording the pre-charge evidence, he was served with notice of accusation u/S 138 of the Act on 25.1.2005, to which, he pleaded not guilty and claimed trial.

5. Then the appellant – herein (complainant) in order to substantiate the accusation against respondent - herein (accused) examined three witnesses.

6. 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. Neither he nor his firm had ever borrowed any amount from the complainant. This complaint case has been filed by complainant (herein-appellant) in connivance with Om Singh for causing a loss to him.

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

7. Then after hearing the learned counsel for both the parties and going through the record as well, the learned trial Court held the accused guilty u/S 138 of the Act vide judgment dated 18.9.2007 and sentenced him thereunder vide order dated 21.9.2007.

8. The accused being dissatisfied with the judgment and order of sentence passed by the learned trial Court came up in appeal before the learned Sessions Judge, Gurgaon. His appeal was dealt with by learned

Additional Sessions Judge, Gurgaon who vide the impugned judgment dated 30.1.2009 accepted his appeal and acquitted him of the notice of accusation u/S 138 of the Act by setting aside the impugned judgment and order of sentence passed by the learned trial Court.

9. Appellant - herein (complainant) feeling aggrieved from the impugned judgment passed by the learned Additional Sessions Judge, Gurgaon has come up in the instant appeal before this Court, notice of which was given to the respondent herein – accused. Trial Court record was also requisitioned.

10. I have heard the learned counsel for both the parties and have also gone through the record with their able assistance.

11. The appellant – herein (complainant) in order to establish his case before the learned trial Court brought on the file the alleged three cheques Ex.P1 to Ex.P3 and the memos thereof Ex.P4 to Ex.P6 vide which these cheques were returned unpaid on account of 'insufficient funds'. These documents were proved in the statements of PW1 – Virender Kumar Tanwar, Clerk, Delhi State Co-operative Bank, Palam Branch, New Delhi, PW2 – Jai Narain, Clerk, Gurgaon Gramin Bank, Branch Khandsa, Gurgaon, PW3 Jaivir Singh (complainant) and PW4 Pankaj Kumar Pandey, Clerk, Delhi State Co-operative Bank, Branch Palam, New Delhi. Further Ex.PW1/D is the copy of the record of 'cheque return register' which came on record in the statement of PW1 – Virender Kumar Tanwar. Further this witness also produced record of Chandna Marbles Partnership deed and proved its attested copy as Ex.PW1/A. He also proved the account opening form of this firm along with photographs

as Ex.PW1/B. Om Singh in pre-charge (notice) evidence as PW2 tried to corroborate the version of complainant.

12. Complainant – Jaivir Singh also deposed to the effect that when above-said all the three cheques were received back unpaid on account of 'insufficient funds', he served a legal notice Ex.P7 upon the respondent – herein (accused) as well as Om singh through registered post, receipts of which were Ex.P8 and Ex.P9.

13. On the other hand, DW1 – Sidesh Nain @ Kulbir Nain proved one writing Ex.D1 executed between respondent – herein (accused) and one Om Singh, partner qua the firm Chandna Marbles on dated 16.9.2003. Vide this writing, Om Singh had undertaken to pay a sum of Rs.2,47,692/- to Satbir (respondent – herein) on behalf of Chandna Marbles.

DW2 – Sita Ram had produced on record the voter list of village Ahirka falling within the area of Jind Legislative Constituency and proved the same as Ex.DW2/1 and Ex.DW2/2.

14. Learned counsel for the appellant has contended that appellant – herein (complainant) and respondent – herein (accused) were related to each other. The complainant advanced the amount in question to the respondent – herein (accused) as a friendly loan and as such no writing or receipt was taken from the accused in token of receipt of this amount. In support of his contention, he has placed reliance upon the case law as laid down in ***Manoj Jain Versus Surinder Kumar Jain and another, 2015(4) R.C.R.(Criminal) 624***, ***Delhi High Court***. In this case, a friendly loan of Rs.1.50 lakhs was given to accused without any

documentation. The accused issued a cheque to pay this loan which was dishonoured. It was held that complaint could not be dismissed for the reason of non-preparation of any document since the loan in question was given to the accused as a friendly loan.

But in the case in hand, the facts are somehow different. In the case in hand, the complainant had filed the instant complaint qua the 50% of the total amount of the three cheques in question i.e. bearing No. 870098 dated 15.9.2003 in the sum of Rs.7,85,000/-, No.870099 dated 15.11.2003 in the sum of Rs.7,50,000/- and No.870100 dated 15.12.2003 in the sum of Rs.6,30,000/- since these cheques were not encashed on their presentation on account of 'insufficient funds'. So the amount in question in the case in hand is quite on the higher side as compared to the case law cited supra which comes approximately to Rs.11.50 lacs.

15. Then another point relating to above contention of the learned counsel for the appellant is the financial status of the complainant in order to hold as to whether he was in a position to advance such a huge amount on the relevant date. Regarding his financial position, complainant has not led any documentary evidence. Few lines from his cross-examination as PW3 are found to be relevant to adjudicate this controversy. In his cross-examination, he has stated that he is serving with Sona Steering and had been getting salary of Rs.25,000/- per month. When he initially joined this service, then he was getting Rs.2,000/- as the salary per month.

Then it is also found recorded in his cross-examination that the amount which he had advanced to respondent – herein (accused) was borrowed by him from his friends namely Kuldip Singh, Shishpal Singh, Krishan Kumar etc. etc. He is an income tax assessee, but he did not show the amount in his income tax return which he had allegedly borrowed from his friends.

16. For a person who himself is serving at a monthly salary of Rs.25,000/- with some private firm, it is difficult to save such a huge amount. Then he also did not examine any of his above-said friends from whom he had allegedly borrowed the amount for advancing the same to the respondent – herein (accused). Then he also did not show this alleged borrowed amount in his income tax return. So in this situation, there would be nothing wrong to say that appellant – herein (complainant) was not in a financial position to advance the alleged amount to the accused on the relevant date. Herein the principles as laid down by the Hon'ble Apex Court in ***K. Parkashan Versus P.K.Surenderan, 2007(4)R.C.R. (Criminal) 588*** are followed. In this case, complainant failed to show that he had financial capacity to advance huge amount i.e. Rs.3.16 lakhs. In this case also, it was the plea of the complainant that he used to borrow the amount from his father, brothers etc. etc. which he allegedly advanced to the accused. The complaint was quashed.

So for this reason, the plea of friendly loan as raised by the learned counsel for the appellant above is held to be not tenable.

17. Then in this case there is a legal defect for the reason that the evidence led by the complainant on the record is not sufficient to hold that the alleged legal notice Ex.P7 was duly served upon the respondent – herein (accused). It was the case of the complainant that he sent the said

notice to the respondent – herein (accused) and Om Singh, Partner vide registered post. He also placed on record its postal receipts Ex.P8 and Ex.P9. Postal receipt Ex.P9 is found to be relevant for the purpose above mentioned as it pertains to the respondent – herein (accused). From its perusal, it is found that father's name of the addressee namely Satbir Singh was not recorded in it. Then from the perusal of voter lists Ex.DW2/1 and Ex.DW2/2 pertaining to village Ahirka of which the respondent – herein (accused) is shown to be resident, it is found that there were 15/17 persons in the said village by the name of Satbir. Since the father's name of the alleged Satbir Singh is not recorded in his address, so it cannot be said that the alleged notice Ex.P7 was served upon him legally.

Then it also came in the cross-examination of PW3 Jaivir Singh – complainant that he did not know as to who was looking after the business of M/s Chandna Marbles. Satbir Singh is doing business at Jammu. Then in the same breath, he stated that Satbir Singh is doing business at Delhi as well as Jammu. Then he also admitted that Sabir Singh has often been visiting Jammu and used to stay there. So in the light of this cross-examination of complainant Jaivir Singh himself also, it cannot be held that the alleged legal notice Ex.P7 was validly served upon the respondent – herein (accused).

18. Then it was the defence version that since respondent – herein (accused) was earlier running a partnership firm alongwith Om Singh under the name of Chandna Marbles, so some cheques bearing signatures of respondent – herein (accused) were lying in the custody of

Om Singh, Partner. They settled their account of this firm vide writing Ex.D1 dated 16.9.2003. It was also his plea that litigation between him and said Om Singh is going on qua some amount and as such, the said Om Singh had misused his said cheques in connivance with the complainant (appellant – herein). Then it also came on the record that vide this settlement, said Om Singh had undertaken to pay a sum of Rs.2,47,692/- to respondent – herein (accused) – Satbir Singh qua the settlement of accounts of firm Chandna Marbles. Then a copy of an order dated 6.6.2005 Ex.DX was brought on record by the respondent - herein (accused) to show that he had filed a complaint u/S 138 of the Act against said Om Singh in the Court of Chief Judicial Magistrate, Jind.

19. Then cheque Ex.P1 is shown to be dated 15.9.2003 signed by both Om Singh and Satbir Singh for Chandna Marbles. There is a visible overwriting qua the date on this cheque at Mark-A and the same is initialed by Om Singh only and not by Satbir Singh. So the possibility of this overwriting by Om Singh alone in connivance with the complainant Jaivir Singh cannot be ruled out since he had settled his accounts qua Chandna Marbles with respondent – herein (accused) Satbir Singh vide writing Ex.D1 dated 16.9.2003 and for this reason, the same is not bearing the initial of respondent – herein (accused) Satbir Singh. Then it was also established on record that this Om Singh was facing litigation at the hands of respondent – herein (accused) in a complaint case u/S 138 of the Act. Then as such his connivance with the complainant as alleged by respondent – herein (accused) in the filing of present case cannot be ruled out.

20. No doubt when a duly signed cheque is issued by a person in favour of any person then the general presumptions under Sections 118 and 139 of the Act are that the same is issued for consideration and for the discharge either in whole or in part, of any debt or other liability. But these presumptions are always rebuttable if the accused succeeds to lead reliable evidence to make his defence version probable. Herein the principles as laid down by the Hon'ble Apex Court in ***M/s Kumar Exports Versus M/s Sharma Carpets, 2009(1) R.C.R.(Criminal) 478*** are followed. It was held as under:

> *(1)To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial.*
>
> *(2)Bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused – Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.*
>
> *(3)The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.*
>
> *(4)Once rebuttal evidence is adduced and accepted by Court, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.*

In the case in hand, the evidence led by the accused to make his defence version probable is that the alleged signed cheques were already lying in the custody of his partner Om Singh which he had misused in connivance with the complainant after the settlement of accounts of partnership firm namely 'Chandna Marbles' vide writing Ex.D1 dated 16.9.2003 of which initially he and Om Singh were partners. Then financial status of the complainant to advance the alleged huge amount is also discussed above. Then it also proved on the record that relations between Om Singh – Partner and respondent – herein (accused) were not good and the accounts of the said firm Chandna Marbles were settled between them vide writing Ex.D1 dated 16.9.2003. Then the copy of an order Ex.DX dated 6.6.2005 also established the fact that Satbir Singh respondent – herein (accused) had filed a complaint case u/S 138 of the Act against above-said Om Singh, which was pending against him since 25.8.2004. Then the appellant – herein (complainant) did not show the amount which he allegedly borrowed from his friend for advancing the same to the respondent – herein (accused) in his income tax return nor did he examine any of his friends from whom he allegedly borrowed the said amount. So it is held that the respondent – herein (accused) had succeeded to rebut the above-said presumptions as available to the complainant under Sections 118 and 139 of the Act by leading confidence inspiring defence evidence to make his version probable.

21. Then it is also the settled law that when two views are possible, the Appellate Court need not to reverse the judgment of acquittal merely for the reason that other view was possible. When the impugned judgment is neither perverse nor suffered from any legal infirmity or non-consideration/misappropriation of evidence on record, there is no justification to reverse the finding of acquittal recorded vide the impugned judgment. In order to reach at this conclusion, the

principles as laid down by the Hon'ble Apex Court in ***K. Parkashan Versus P.K.Surenderan*** (supra) are followed.

22. In the light of above discussion, there is no merit in this appeal. So as such, the same stands dismissed and disposed of accordingly. Impugned judgment dated 30.1.2009 passed by the Court of learned Additional Sessions Judge, Gurgaon is upheld. Consequently, the complaint under Section 138 of the Act also stands dismissed.

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

24.5.2016 **(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