

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-A No.228-MA of 2013 (O&M)

Date of decision: 28.09.2017

Ashok Kumar

....Applicant/Appellant

Versus

Ambuj Chauhan and another

....Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Ashok Kumar Singla, Advocate
for the applicant/appellant.

Mr. Rajiv Sharma, APP, U.T., Chandigarh
for respondent No.2.

ARVIND SINGH SANGWAN J. (Oral)

Heard.

Leave to appeal granted.

Registry is directed to number the same as main appeal.

Prayer in this appeal is for setting-aside the impugned judgment dated 06.02.2013 passed by the trial Court vide which the respondent/accused was acquitted in the complaint filed under Section 138 of the Negotiable Instruments Act (in short 'the Act').

Brief facts of the case are that the appellant filed a complaint against the respondent/accused on the basis of 03 cheques bearing No.740742 dated 21.10.2009 for an amount of Rs.50,000/-, No.803030 dated 21.12.2010 for an amount of Rs.1,50,000/- and No.803029 dated 14.01.2010 for an amount of Rs.2,00,000/-. It is pleaded in the complaint that the respondent/accused took a friendly

loan of Rs.2,00,000/- in the month of October, 2009 along with interest @ 12% per annum and in discharge of his liability he issued two post dated cheques with the assurance that the same would be encashed on presentation. Later on, the accused took another loan of Rs.2,00,000/- in the month of January, 2010 and in lieu thereof, he issued the 3rd post dated cheque. It is further pleaded that the accused/respondent has also admitted his liability by executing a written note dated 21.12.2009. On presentation of the cheques, the same were dishonoured by the bank and accordingly, the complaint was filed.

In the preliminary evidence, the appellant recorded his statement as CW1 and proved on record the cheques as Exs.CW1/1 to CW1/4, returning memos of the bank as Ex.CW1/5 to Ex.CW1/7 as well as the registered cover. Thereafter, the respondent was summoned and in his statement recorded under Section 313 Cr.P.C., he denied his liability towards the complainant and also pleaded that these cheques were not issued in discharge of any liability.

Thereafter, the trial Court vide its judgment dated 06.02.2013 dismissed the complaint holding that the complainant has failed to prove the guilt of the accused and discharged him.

In pursuance to the notice of motion order, service of respondent/accused was duly effected, however, it was noticed by this Court vide order dated 14.11.2014 that despite due service of respondent, none has put in appearance and, thereafter, the case was fixed for arguments.

Counsel for the petitioner has submitted that the only ground taken against the appellant by the trial Court while discharging

the respondent/accused is that the cheques in question were issued in the name of M/s. Shree Ganesh Jewellers whereas the complaint has been filed by the appellant – Ashok Kumar in his individual capacity without explaining that he is a proprietor of M/s. Shree Ganesh Jewellers. Counsel for the petitioner has further submitted that in his complaint and affidavit, while appearing as a witness as CW1, he has duly explained that the cheques were issued by the respondent/accused in discharge of his liability and the appellant is the sole proprietor of the firm.

The appellant/complainant has also filed an application under Section 391 Cr.P.C. for leading additional evidence i.e. a certificate issued by the State Bank of Patiala dated 09.04.2013 wherein it is certified that the appellant – Ashok Kumar Gupta is the proprietor of M/s. Shree Ganesh Jewellers and challan form regarding VAT-II showing that the appellant has paid the VAT of M/s. Shree Ganesh Jewellers under his signatures. It is, thus, submitted that the application may be allowed and the petitioner be permitted to lead this additional evidence to prove that he is the sole proprietor of M/s. Shree Ganesh Jewellers. In support of his arguments, counsel for the appellant has relied upon the judgment **“V. Srinivasa Reddy vs State of Andhra Pradesh”**, 1998(1) RCR (Criminal) 743 where the Hon'ble Supreme Court has held that the additional evidence under Section 391 Cr.P.C. allowed by the High Court while remanding the case back to the trial Court is well within the powers exercise by the Court under Section 391 Cr.P.C.

Counsel for the appellant has also relied upon **“N.**

Sivalingam and another vs A.V. Chandraiya, 1996 Company Cases

(86) 167 where the Madras High Court has held that there is nothing in the wording of Section 138 to hold that only the payee named in the cheque can maintain an action thereunder. The language of clauses (b) and (c) of the proviso to Section 138 as well as Section 139 would make it clear that either the payee or the holder in due course can maintain the action. It is, thus, submitted that the complaint filed by the appellant in the capacity of a proprietor even though filed in his individual capacity will be maintainable.

Since, there is no representation on behalf of the respondent despite service, the present appeal is allowed and the impugned judgment dated 06.02.2013 passed by the trial Court is set-aside and the matter is remanded back to the trial Court for decision afresh in the light of observations made hereinbefore. The parties are directed to appear before the trial Court on 26.10.2017.

28.09.2017
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(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No