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

CRM-A-1029-MA-2014
Date of decision:-29.11.2017

Sanjeev Setia
...Applicant

Versus

Kashmir Singh
...Respondent

CORAM : HON'BLE MR. JUSTICE H.S. MADAAN

Present : Mr.R.K. Girdhar, Advocate
for the applicant.

Mr.Harpal Singh, Advocate for
Mr.Harpreet Singh, Advocate
for the respondent.

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H.S. MADAAN, J.

Applicant – Sanjeev Setia has filed this application under Section 378(4) Cr.P.C. seeking special leave to appeal.

Briefly stated, facts of the case are that complainant – Sanjeev Setia had brought a criminal complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) against Kashmir Singh alleging that the latter had issued a cheque bearing No.448365 drawn on Bank of Punjab (since merged with HDFC Bank), Branch Abohar dated 26.9.2009 for Rs.70,000/- in order to discharge a financial liability giving assurance to the complainant at the time of issuance of cheque that on presentation the cheque would be encashed but things went otherwise inasmuch as the cheque was dishonoured on 26.9.2009 and the complainant was informed by the banker with memo having endorsement "Funds Insufficient"; that thereafter complainant served a legal notice dated 30.9.2009 upon the accused calling upon him to make payment of cheque amount within 15 days of receipt of notice but to no effect, as such the complainant filed complaint in question against the accused in the Court of Sub Divisional Judicial Magistrate, Abohar on 17.11.2009.

After recording of preliminary evidence, the accused was summoned, who put in appearance and was admitted to bail. Notice of accusation under Section 138 of the Act was served upon him, to which, he pleaded not guilty and claimed trial.

During the course of his evidence, complainant Sanjeev Setia got his statement recorded as CW1 and repeated on oath his case as given in the complaint proving various documents.

With that the evidence of the complainant stood closed.

Statement of accused was recorded under Section 313 Cr.P.C. in which the accused while denying the incriminating circumstances appearing against him submitted that he is innocent and had been falsely involved in the case.

During defence evidence, the accused examined Vikas, Clerk from SDM Court, Fazilka as DW1.

Learned trial Magistrate had formulated following points for determination:

1. Whether complainant has proved to the hilt that accused Kashmir Singh in discharge of his legal liability issued cheque bearing No.448365 dated 26.9.2009 for a sum of Rs.70,000/- drawn on Bank of

Punjab?

2. If so, whether the said cheque was dishonoured as accused had no sufficient funds in his account and despite service of legal notice he has failed to pay the amount within the stipulated time without any cause and thereby committed the offence under the Act?

After hearing arguments, the learned trial Magistrate dismissed the complaint under Section 138 of the Act, which left the complainant aggrieved and he had knocked at the door of this Court by moving an application under Section 378 (4) Cr.P.C. for grant of special leave to appeal against the judgment of acquittal.

Notice of the application was ordered to be given to respondent – accused, who put in appearance through counsel.

I have heard learned counsel for the parties besides going through the records.

A perusal of the judgment passed by learned trial Magistrate goes to show that he has basically dismissed the complaint for following reasons:

(i) The complainant appearing as CW1 admitted during his cross-examination that the accused had appended his signatures on cheque Ex.C1 and had himself filled the cheque in question in his presence, though he was unable to tell as to with which ink the accused had appended his signatures or filled the body of the cheque.

(ii) Refusal of the complainant to answer question with regard to the body writing and signatures on the same in his cross-examination.

(iii)A perusal of cheque Ex.C1 showing that body writing had been filled with black ball point pen, whereas it had been signed with blue ball point pen and that if Ex.C1 had been signed and filled by the accused in presence of the complainant then he would have done so with the same pen instead of filling body of cheque with different pen and using another pen for appending his signatures.

(iv)The complainant stating in his cross-examination that he does not know if the accused had filed an application against the firm of his father before the Court of Assistant Collector Ist Grade, Fazilka in order to redeem his land but then admitting that he had filed reply in the said case which according to him was in his personal capacity and not on behalf of the firm whereas a perusal of the certified copy of application shows that it had been filed by the accused against the complainant through M/s Sohan Lal Sanjeev Kumar, commission agent and the complainant is shown to have filed reply Ex.DW1/B on behalf of the firm though he had denied his dealings with the firm and in case he had no relation with the firm of his father then there was no occasion for him to file reply on behalf of the firm. The failure of the complainant to plead in the reply that he had no connection with the firm.

(v) The complainant stating in his cross-examination that he had made payment of the cheque amount in question to the accused on 22.9.2009 after withdrawing the same from Axis Bank in terms of statement of account Ex.C7 and that the accused required the amount for 2-3 days and on 25.9.2009, the accused approached him and delivered the cheque in question dated 26.9.2009.

(vi) Admission of the complainant that he had filed two cases against the accused since accused was to make payment of approximately Rs.1.5 lacs.

(vii) The complainant stating that he had not claimed interest from the accused due to good relations between them and that he does not look into the business of the firm of his father and denying if accused has not borrowed any amount from him, whereas reply Ex.DW1/B so filed by complainant on behalf of the the firm showing otherwise.

In para No.14 of the judgment, the trial Magistrate has observed as under:

"It is appropriate to mention here that said application Ex.DW1/A has been filed by the accused against the complainant for redemption of land so mortgaged by him

with the complainant for sum of Rs.40,000/- by depositing the mortgage amount of Rs.40,000/-. The said application has been resisted by complainant as per his reply Ex.DW1/B on the objection that he be also directed to make payment of interest on the said amount. He has further pleaded that since the accused has not deposited the amount along with interest, accordingly his land cannot be redeemed. He has further pleaded if the accused deposited sum of Rs.82,426/- i.e. mortgage amount along with interest then he has got no objection for redemption of the mortgage. Consequently as per order Ex.DW1/C the application so filed by accused has been dismissed. It is further appropriate to mention here that said application has been filed by accused on 25.2.2009 and subsequently reply to the same has been filed by the complainant on 7.12.2009. As per averments contained in the application Ex.DW1/A mortgage was executed on 14.2.2006. Meaning thereby as per plea of complainant himself the accused has not repaid the mortgage amount and was also not making the payment of interest as has been claimed by him vide his reply Ex.DW1/B. When the accused has not made the payment of either mortgage amount or interest against the same, then on the basis of alleged relations of the complainant with the accused, it is highly improbable that he further lend sum of Rs.70,000/- to the accused on 22.9.2009. As per the admission of complainant during his *cross examination, he is an agriculturist and has stated that he does not file income tax. Though as per his statement of account Ex.C7 cash amount of Rs.70,000/- is shown ot have been debited from his account on 22.9.2009 but on the same date the said account also bears cash deposit of Rs.50,000/-. In the said back ground, the complainant has failed to convince this Court, if despite heavy amount already due towards the accused as has been claimed by the complaint vide his reply Ex.DW1/B, he has further advanced cash sum of Rs.70,000/- as has been narrated by him through the present complaint. The evasive denial of the complainant to have any relation with the agency of his father is against his own reply Ex.DW1/B and use of different pens for filling the body writing and signature of accused on cheque Ex.C1 support the plea of the accused that the cheque in question was lying with firm of father of the complainant in security to his account or the mortgage as has been executed by the accused with the complainant. For the said reason only, the said cheque has been filed by using a different pen at the time of filling its body as compared to its signatures. Apart from the different pen used for filling the body and signature on the cheque Ex.C1 it is also evident from the impression of ink of the body writing that it seems to be fresh as compared to the impression of the ink of signature which shows that same have been appended quite long time back as it is giving* *faded impression. The said factum further strengthens the plea of accused that blank cheque in question must be lying with the complainant that has been used later on, as against the admission of complainant that cheque in question has been filled and signed by the accused in his presence. When he has been confronted with the original cheque before the Court during his cross examination he has failed to give any answer at that moment and has only opted to say that it has been signed by the accused. In case the cheque in question might have been filled by the accused in presence of complainant, then he would have given the optimum reply for the same when he has been confronted with the cheque. As discussed above, Section 139 of the Act drawn presumption in favour of the holder of the cheque, however, the said presumptions rebuttable by leading probable defence. The standard of proof for doing so is that of preponderance of probability. It has been held if accused is able to raise a probable defence which creates doubt about the existence of legally enforceable debt or liability the prosecution case can fail.* ***Rangappa Versus Mohan, 2010(3) RCR(Crl.) 164*** *relied upon. In view of the reason as has been recorded above, this Court has reached to the conclusion that accused stood successful in rebutting the presumption as has been drawn in favour of the complainant by establishing his probable defence plea that the cheque in question was lying with the complainant in* *security that has been misused by the complainant without the consent/assent of the accused. For the said reasons both the points as have been raised by this Court are decided against the complainant and in favour of the accused.*

Thus I do not find any illegality and irregularity in the judgment passed by the learned trial Court. Rather it is based upon proper appraisal and appreciation of evidence and correct interpretation of law.

Therefore, no ground is made out to grant special leave to appeal in this case. The application is, therefore dismissed accordingly.

(H.S.MADAAN)
JUDGE

29.11.2017
Brij

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No