IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-1889-MA-2014
Date of decision :27.10.2017

Manju

...... Petitioner

Versus

Ashwani Malhotra

...... Respondent

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

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Present : Mr. B.D. Sharma, Advocate for the applicant.

Mr. Arnav Sood, Advocate for the respondent.

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H.S. MADAAN, J.

Complainant Manju had preferred a complaint under Section 138 of the Negotiable Instrument Act, against accused Ashwani Malhotra on the allegations that on account of friendly / family relations between them and at the request of latter, the former advanced a sum of ₹90,000/- to him and that the accused in order to discharge legal and enforceable lability towards the complainant had issued a cheque bearing 623034 dated 28.01.2013 in the sum of ₹90,000/- drawn on ICICI Bank, Jalandhar in favour of complainant, however on presentation the cheque was returned uncashed having memo of the bank with the remarks "Accounts Freeze", therefore, complainant served legal notice dated 01.12.2013 upon the accused calling upon him to make payment of cheque amount within stipulated period but to no effect, as such, the complaint was filed.

After recording preliminary evidence, accused was summoned. Accused put in appearance, notice of accusation for offence under Section 138 of the NI Act was served upon him, to which he pleaded not guilty and claimed.

During the course of evidence of the complainant, complainant recorded her as CW-1, thereafter closed her evidence.

Statement of accused under Section 313 Cr.P.C. was recorded, in which all the incriminating circumstances appearing against the accused were put to him, but he denied assertions contending that he is innocent and has not committed any crime. In addition to that he pleaded that he never received any friendly loan from the complainant; that he had not taken any loan from the complainant even she never met the complainant; that in fact, he took a loan of ₹10,000/- from Santosh, the mother-in-law of the complainant in the year 2010; that at the time of giving loan, the said Santosh mother-in-law of the complainant took a blank cheque drawn on ICICI Bank, G.T. Road, Branch, Jalandhar as security; that he returned back the loan to Santosh in the year 2011 in the presence of Ajay son of Dhana Ram r/o Abadpura, Jalandhar and he demanded the said cheque given by him as security to Santosh, mother-in-law of the complainant but she told him that the cheque was not traceable when she finds the cheque she would return it to him but she did not return the cheque to him. He further stated that the said cheque was misused by the complainant with the help of Santosh; that the cheque Ex.C1 is the same cheuqe, which he gave to

Santosh as security in the year 2010; that lastly he stated that he was residing at H. No.46 Gali No.6, Preet Nagar, Abadpura, Jalandhar from the year 2011 to 2013; that the complainant had wrongly given the name of his father and his address in the complaint as well as in the notice Ex.C3; that he had no liability towards the complainant and further stated that the name of his father is Dharam Chand.

During his defence evidence he examined Ajay Kumar as DW-1 and closed his defence evidence.

After hearing evidence the trial Magistrate dismiss the complaint and convicted the accused of the charges framed against him for the following reasons:-

i. Failure of the accused to prove that the cheque in question had been issued by the accused in her favour on account of discharge of a legal and enforceable debt.

ii. Complainant appearing as CW-1 admitting in her cross-examination that accused was alien to her, although the complainant claimed that she had friendly relations with the accused but she was not having much knowledge about the accused. It being highly improbable that the complainant would advance a substantial amount of ₹90,000/- to accused without getting any document executed or without any witness.

iii. Admission by the complainant in cross-examination that she, her husband and mother-in-law are doing business of finance.

iv. Inability of complainant to bring on record any evidence to show the source of alleged loan amount, failure of complainant to place on record bank passbook despite she being required to do by defence counsel.

v. Non-mentioning in the complaint or in statement of complainant as and when the alleged loan was given to her by the accused.

vi. No evidence on file to show that legal notice sent by complainant had been received by the accused, in the light of plea by the accused that he has never reside at the address given by the complainant.

vii. Complainant appearing as CW-1 admitting in cross-examination that accused is residing at house No.46, Gali No.6, Preet Nagar, Abadpura, Jalandhar, whereas address of the accused mentioned in the complaint as well in the legal notice being of some other place.

viii. Return of the envelope containing notice with the report that there was no such person namely Ashwani Malhotra son of Sardari Lal residing at the address, in that way mandatory legal notice was not dispatched at the correct address of the accused.

ix. Presumption under Section 118 and 139 of the NI Act successfully rebutted by the accused, failure of the complainant to examine her husband and mother-in-law Smt. Santosh.

Feeling dissatisfied with the verdict given by the trial Magistrate, the complainant had approached this Court by moving an application seeking Special Leave to Appeal in terms of Section 378(4) Cr.P.C., when it came up for hearing, notice of motion was issued in view of the restricted statement of learned counsel for the applicant that in case respondent is summoned there is possibility of some settlement before the Mediation Centre, this is so recorded in order dated 19.05.2016, however, parties have failed to reach any amicable settlement.

This application for special leave to appeal is being vehemently opposed by the respondent.

Learned counsel for the the applicant has referred to citation **C.C.**

Alvi Haji vs. Palapetty Muhammed and Another 2007(3) R.C.R. (Criminal) 185 by the Apex Court, wherein it was observed that *entire purpose of requiring a notice is to give an opportunity tot he drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138.* However, this authority had different facts.

The notice had been sent to the accused through registered post with correct address of drawer of the cheque though the same had not been received by him, however, in this case the position is otherwise and it comes out that the mandatory notice was not sent to the accused at his correct residential address and was rather returned unserved with that very report.

The judgment passed by the trial Magistrate is well reasoned one, based upon proper appraisal and correct interpretation of law. I do not find any reason to grant leave to file appeal, therefore, the application in that regard stands dismissed.

(H.S. MADAAN)
JUDGE

27.10.2017
Gaurav Sorot

1. Whether reportable? **No**
2. Whether speaking / reasoned? **Yes**