

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

CRM-A-554-MA of 2017 (O & M)

Date of Decision:-12.07.2017

Malkeet Singh

...Applicant-appellant

Versus

Panna Lal

...Respondent

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

Present:- Mr. M.K. Bhatnagar, Advocate for
Mr. Gurpreet Singh, Advocate
for the applicant-appellant.

HARI PAL VERMA J.

CRM No.8543 of 2017

Applicant has filed the present application under Section 5 of the Limitation Act for condonation of delay of 329 days in seeking leave to appeal.

The complaint filed by the applicant-complainant under Section 138 of the Negotiable Instruments Act, 1881, was dismissed and accordingly, the respondent-accused was acquitted of the offence. The pleaded ground for seeking condonation of delay is that the counsel in the trial Court had handed over the certified copies of the impugned judgment and the documents etc. only a month back and it is, thereafter, the leave to appeal i.e. accompanied application under Section 378(4) Cr.P.C. has been

filed. The delay, if any, is not deliberate or intentional.

I have heard learned counsel for the applicant and gone through the contents of the application filed under Section 5 of the Limitation Act.

The averments made in the application are totally vague. The law provides that when a party approaches the Court and seeks condonation of delay, sufficient cause is required to be established. Therefore, in the absence of any sufficient cause having been shown seeking condonation of delay to file leave to appeal, the present application is dismissed.

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To be fair with the applicant-appellant, learned counsel for the applicant has been heard on merits as well. The judgment passed by the learned Magistrate is perused.

The applicant-appellant has filed the present application under Section 378(4) Cr.P.C. seeking leave to appeal against the judgment dated 27.1.2016 passed by the Judicial Magistrate, Chandigarh, whereby in a complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called 'the Act'), the respondent-accused was acquitted.

Briefly stated the complainant had filed a complaint under Section 138 of the Act on the ground that in October 2013, the respondent-accused had requested him and obtained a friendly loan of Rs.4,00,000/-. He promised to repay the same along with lump sum of Rs.50,000/- and in discharge of his liability, he had issued a cheque No.168091 dated 27.10.2014 for an amount of Rs.4,50,000/- drawn on State Bank of Patiala, Sector 35-C, Chandigarh. When the cheque was presented, it was

dishonoured vide memo dated 5.11.2014 with the remarks “No Such Account”. Accordingly, legal notice dated 5.11.2014 as envisaged under Section 138 of the Act was served upon the accused calling upon him to make the payment within the stipulated period. Since the respondent-accused failed to make the payment despite legal notice, it necessitated the complainant to file the complaint.

In order to prove the averments made in the complaint, the complainant examined himself as CW1, but his deposition could not be looked into as he has failed to appear for cross-examination. The deposition of any witness can be taken into consideration only when such witness has faced the cross-examination. But the complainant has failed to face the cross-examination. Accordingly, the complaint was dismissed and accused was acquitted for the offence under Section 138 of the Act vide judgment dated 27.1.2016 passed by learned Magistrate, Chandigarh.

Impugning the aforesaid judgment dated 27.1.2016, the applicant-appellant has filed the present application seeking leave to appeal pleading therein that the complaint has been dismissed on purely technical ground to the effect that the applicant could not produce himself for his cross-examination. The applicant has duly proved the case by placing on record in preliminary evidence i.e. the dishonoured cheque, returned memo, legal notice and therefore there was sufficient material before the Court below to convict the accused. Section 138 of the Act is attracted in the instant case in as much as (i) there is a legally enforceable debt; (ii) the cheque issued by the accused has been returned unpaid on return of memo

from the bank, there is a presumption that the cheque has been dishonoured, unless this fact is rebutted. Thus, the order passed by the learned Magistrate acquitting the accused is not sustainable in the eyes of law.

In order to prove his case, the complainant was required to lead his evidence. It is settled law that deposition of a witness cannot be looked into in case when such witness fails to appear for cross-examination. It becomes evidence only when he offers himself for his cross-examination. Irrespective of the fact that whether, he is in fact cross-examined or not. But in the case in hand, despite various opportunities granted to the complainant for his cross-examination, he has opted not to face cross-examination. In order to succeed in a complaint under Section 138 of the Act, the complainant is required to prove that the accused had issued a cheque discharging in whole or in part his legally enforceable debt or liability and once the factum of execution of the said cheque is proved by the complainant or admitted by the accused, only such admission on the part of accused is duly accepted by the Court as a proof of the said act i.e. execution of the cheque and then presumption under the Act comes into operation.

Therefore, in order to attract the legal presumption under Section 138 (a) and 139 of the Act, the complainant has to prove the execution of the cheque by the accused and said presumption can only be drawn subsequent to the said rule. The complainant has failed to discharge his initial onus viz a viz execution of the cheque by the accused against his legally enforceable debt or liability. Therefore, once the complainant has

failed to adduce the evidence as required under the Indian Evidence Act, and despite various opportunities, has failed to discharge his initial onus qua execution of the cheque, this Court does not find any illegality in the well reasoned order dated 27.1.2016 passed by the learned Judicial Magistrate, Chandigarh.

Dismissed.

July 12, 2017
Vijay Asija

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No