IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-130-2014
Date of decision : 01.11.2017

M/s S.F. Finance Company (P) Ltd.

...... Petitioner

Versus

Devinder Malhotra and another

...... Respondents

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

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Present : Mr. Rajan Bhargava, Advocate
for the petitioner.

Mr. G.S. Saini, Advocate
for the respondent.

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H.S. MADAAN, J.

M/s S.F. Finance Company (P) Limited, Walia Complex, College Road, Pathankot through Managing Director Ravinder Singh Basra had brought a complaint under Section 138 of the Negotiable Instruments Act read with Section 420 IPC IPC against accused Davinder Malhotra on the allegations that the accused in order to discharge a legally enforceable debt and liabilities the complainant had issued cheque bearing No.152717 dated 10.09.2003 in the sum of ₹6,00,000/- drawn on the Pathankot Hindu

Co-operative Bank Ltd. Branch Model Town Pathankot giving assurance that on presentation the cheque would be encashed, however, things went otherwise when it was so done and the cheque was dishonoured with the remarks "Account Closed". Banker of the accused informed banker of the complainant vide memo having endorsement "Account Closed", intimation was received by the complainant on 07.10.2003, thereafter he served statutory notice dated 29.10.2003 upon the accused calling upon him to make payment of cheque amount within 15 days on receipt of notice, but accused did not do so despite receiving notice, thereafter the complaint was filed.

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

During course of evidence of complainant, he CW-1 Narpal Guleria Cashier of Oriental Bank of Commerce, Dhangu Road, Pathankot, CW-2 Avnish Puri, Clerk of Hindu Co-operative Bank, Pathankot and he himself got recorded his statement as CW-3.

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 the same contending that he is innocent and has been falsely involved in this case. He did not lead any evidence in defence.

After hearing arguments, the trial Magistrate convicted the accused for offence under Section 138 of the NI Act and sentenced him to undergo simple imprisonment for one year and to pay a fine of ₹1,000/-, in default of payment of fine to undergo further simple imprisonment for a period of one month vide judgment and order of sentence dated 09.08.2011.

Feeling aggrieved the accused had preferred an appeal to the Court of Sessions, which was disposed of by Additional Sessions Judge, Pathankot vide judgment dated 17.09.2013 inasmuch as the appeal was accepted, the impugned judgment of conviction and sentence passed by the Judicial Magistrate Ist Class, Pathankot was set aside and he was acquitted of the charge framed against him.

The reasoning given by the Additional Sessions Judge, Pathankot for arriving at this conclusion is as follows:-

i. As per well settled law, once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a resumption is rebuttable. The accused can prove the non-existence of a consideration by raising a probable defence. If the accused is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument.

ii. The burden upon the accused of proving the non-

existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the accused is entitled under law to rely upon all the evidence led in the case including that of the complainant as well. In case, where the accused fails to discharge the initial onus of proof by showing the non-existence of the consideration, the complainant would invariably be held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The Court may not insist upon the accused to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.

iii. Now reverting to the case in hand and as per averments raised in complaint and chief examination of Ravinder Singh Basra CW-3, there is no details of the loan advanced to the appellant. Only it is in chief-examination of Ravinder Singh CW-3 that the appellant approached the respondent asking for loan and the loan was sanctioned by respondent for business purpose after execution of agreement duly signed by the appellant Davinder Malhotra along with other requisite documents.

iv. The cross-examination of Ravinder Singh Basra

CW-3 on this aspect and the relevant part thereof is reproduced below:-

> *"......I have not produced the loan agreement as referred to in my affidavit. Volunteered, I can produce if so demanded. Today I have not brought the same. I have not written date, month and year in my affidavit of such loan agreement. Volunteered, this has been mentioned in account statement....... The payment to appellant was made through cheque but this has not been referred in complaint. Volunteered, this has been referred in account statement. There is no reference of loan agreement and disbursement of loan by cheque, in the complaint. The loan was paid by account payee cheuqe. The total loan amount was of ₹9 lacs which was disbursed by different cheques...."*

v. Having regard of such cross-examination of Ravinder Singh Basra CW-3, the material documents pertaining to advancement of loan have not been brought on record nor the respondent disclosed the detail of such loan transactions. In these circumstances, it can be safely presumed that either these documents are not in existence and if these documents do exist, same have not been produced, since these documents might have gone against the respondent.

vi. When the cross-examination of Ravinder Singh Basra CW-3 was being recorded on 20.05.2010, he deposed that as per memorandum of articles of the respondent company, the account books were being maintained. But these account books have not been produced when the complaint was filed.

vii. After the conclusion of oral evidence, Ravinder Singh Basra being director of respondent company tendered into evidence, account statement Mark X and closed the evidence on behalf of respondent, such material document has not been properly proved and there is no evidence to prove that account books were regularly maintained in due course of business by the respondent company.

viii. Let us presume for the sake of arguments that the account statement Mark X is extract of duly maintained account books of the respondent company and it is evidence from such document Mark X depicting transactions from 1996 till 31.03.2003 that there is no details of disbursement of loan ₹9 lacs to appellant by respondent company. On 10.09.2003, when the cheque Ex.C1 was purported to be issued, an amount of ₹5,14,594/- was shown outstanding in the account of appellant in document Mark X. In other words on that day there was no liability of appellant to pay ₹6 lacs to the respondent company, if one goes through the document Mark

X.

ix. The presumptions envisaged under Section 118(1a) and 139 of the Act 1881 stood rebutted as the respondent failed to prove that cheque Ex.C1 was supported by valid consideration and it was issued to discharge legal liability of the appellant.

The Appellant Court had concluded that respondent – complainant had miserably failed to prove that cheque in question Ex.C1 was issued to appellant – accused to discharge of his legally enforceable debt therefore, conviction and sentence of accused was not maintainable, therefore the judgment of his conviction and order of sentence passed by the trial Magistrate was set aside.

Feeling aggrieved the complainant has approached this Court by way of filing instant revision petition praying that the judgment passed by the Additional Sessions Judge, Pathankot be set aside and one passed by the trial Magistrate convicting and sentencing the accused be restored.

Notice of the revision petition was given to respondent – accused, who put in appearance through his counsel.

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

The scope of revision petition is quite limited. The revisional Court is to interfere only if the order passed by the Court below is patently illegal and perverse which means the error in the order must be apparent on the face of it and the order passed should have been in gross violation of settled principles of criminal jurisprudence. The order in hand does not suffer from any such infirmity. It is well settled principle that revisional Court is not be upset the order passed by the Court below in a light manner simply because of the reason that another view in the matter is possible.

The judgment delivered by Additional Sessions Judge, Pathankot does not come out to be suffering from any legal infirmity or illegality what to talk of such alleged illegal or infirmity being apparent on the face of it or the judgment being preserved. No ground is made out to upset the said judgment passed by Additional Sessions Judge, Pathankot exercising revisional jurisdiction, therefore, the revision petition stands dismissed.

(H.S. MADAAN)
JUDGE

01.11.2017
Gaurav Sorot

1. Whether reportable? **No**

2. Whether speaking / reasoned? **Yes**