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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-1438-2017
Date of Decision:- September18, 2017

Mukesh Kumar .... Petitioner

Versus

Surinder Kumar and another .... Respondents

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

Present: Mr. Ravinder Bangar, Advocate,
for the petitioner.

Mr. Naresh Kumar, Advocate,
for respondent no.1.

Mr. Satish Saini, DAG,
for the respondent State.

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SHEKHER DHAWAN, J.

Present revision petition is against the judgment of conviction dated 23.09.2013 and order of sentence dated 26.09.2013 passed by Judicial Magistrate Ist Class, Karnal whereby the revisionist was convicted under Section 138 of the Negotiable Instruments Act, 1881 (for short, "**the Act**") and sentenced to undergo Rigorous Imprisonment for a period of one year and six months and to pay a fine of ₹500/- and in default of payment of fine to further undergo Simple Imprisonment for a period of 7 days.

2. The appeal filed by the revisionist was dismissed by learned Additional Sessions Judge, Karnal vide judgment dated 28.03.2017.

3. Relevant facts for the purpose of decision of present revision petition; that respondent herein had preferred a complaint under Section 138 of the Act on the ground that Mukesh Kumar, present petitioner borrowed amount of ₹70,000/- and ₹80,000/- from the complainant on 01.10.2008 and 20.10.2008 respectively with the promise to repay the same by 30.12.2008. About one week prior to the said date, the complainant had gone to the accused just to remind him about the payment, but the payment was not made and thereafter, cheque bearing No.548266 dated 18.01.2010 for a sum of ₹1,50,000/- in favour of the complainant. On presentation, the said cheque was returned by the Bank with the remarks "Funds Insufficient". The complainant issued a legal notice which was refused by the present petitioner and subsequently complaint was filed before the Court of Magistrate.

4. Learned Magistrate completed the trial, including framing of charge against the accused, recording of evidence and examining the accused under Section 313 Cr.P.C., and after considering the prosecution evidence and defence evidence held the present revisionist guilty and convicted and sentenced under Section 138 of the Act.

5. Appeal preferred by the revisionist was dismissed by learned Additional Sessions Judge, Karnal vide judgment dated 28.03.2017 and as such the present revision petition before this Court.

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6. Learned counsel for the petitioner contended that the complaint itself was not maintainable as issuance of cheque was not existing liability. First of all the cheque was issued against loan whereas the petitioner had not issued the cheque to the complainant, there was no legal liability of the petitioner to pay the amount and even the complainant had not disclosed legal source of income to advance the loan amount and on that ground the present complaint is not maintainable and judgment of conviction recorded by learned Magistrate and order passed by learned Appellate Authority while ignoring all these aspects are liable to be set aside. In support of his arguments learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court in **K. Subramani vs. K. Damodara Naidu, 2014 (4), R.C.R.(Criminal) 985** wherein Hon'ble Apex Court observed that if the complainant failed to prove his financial capacity to pay the money, the accused is entitled to acquittal. On the same point reliance was also placed upon the judgments from co-ordinate Benches of this Court in **Amit Kumar vs. Yogesh Arora, 2016 (2) R.C.R. (Criminal) 900** and **Mohinder Singh vs. Tarsem Singh and another, 2015 (9) R.C.R. (Criminal) 157.**

7. While arguing on this point, learned counsel for the respondent contended that the fact of issuance of cheque and signatures thereon are not denied by the present petitioner. As per Section 139 of the Act, onus lawfully shifts upon the present petitioner to prove that the issuance of cheque was not for consideration. Another plea was taken by learned

counsel for the respondent that the petitioner cannot raise the plea that no income tax was paid on the income of the complainant because that subject matter comes within the preview of Income Tax Authorities and not to be considered during the trial of a complaint under Section 138 of the Act. Both the Courts below have already scanned the evidence adduced by the parties and all these pleas were rightly negated by both the Courts below and the present revision petition is liable to be dismissed.

8. Having considered all these facts that the petitioner has admitted his signatures on the cheque in question and that way issuance of cheque as well. In such like situation where issuance of cheque is not disputed, presumption is lawfully in favour of the complainant that the said cheque was issued in discharge of legally enforceable debt. As per provisions of Section 139 of the Act, the burden to rebut the presumption lies upon the accused.

9. As regard to the plea taken by the present petitioner that cheque for a sum of ₹1,50,000/- has been misused by Surender Kumar and Sushil Kumar to file the present complaint, the same has rightly been discarded by both the Courts below. There was no occasion for Sushil Kumar to hand over the cheque to the complainant after signing the same. Learned trial Judge has rightly observed that even questions were put to the complainant in his cross-examination with regard to arranging the funds and to make the payment to the accused and the said questions were duly responded to by the complainant.

10. There is no dispute on the legal point that if an accused, in such like case under Section 138 of the Act, is able to raise reasonable defence that accused had no financial capacity to advance the amount to him, such an accused would be entitled to acquittal, but in the present case, there being no such material or evidence before the Courts below to record such a finding, there is no question of acquittal of the accused on this score and the facts of the present case are certainly distinguishable from the facts of **K.Subramani's case (supra)** and the view taken by co-ordinate Benches of this Court in **Amit Kumar's case and Mohinder Singh's case (supra).**

11. The present petitioner was well within his right to lead some positive evidence to establish that the complainant had no source to advance the amount, but there is no such material evidence on record. Merely to mention that the complainant has not made the payment of income tax in itself would be no ground to say that the issuance of cheque was for without any consideration or the complainant was not having sufficient sources to advance the amount and the Courts below have rightly observed that the petitioner failed to rebut the presumption under Section **138-A** of the Act as well. In **Ganga Prashad Vs. Lalit Kumar, 2008(3) R.C.R. (Criminal) 159**, a Co-ordinate Bench of this Court while dealing with the issue held that payment of loan could not be disbelieved on the ground that complainant did not reflect the amount in his income-tax return.

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12. In view of the above, no ground is made out for interference in the well reasoned judgment of conviction and order of sentence passed by the Courts below. The Revision Petition lacks merits and is dismissed.

September 18, 2017 **(SHEKHER DHAWAN)**
som **JUDGE**

Speaking/Reasoned Yes
Reportable Yes