IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-AS-162-2017 (O&M)
Date of decision : 17.4.2018

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Anuja

................Appellant

vs.

Sunil Kumar

.................Respondent

Coram: Hon'ble Mr. Justice H. S. Madaan

Present: Mr. Anurag Jain, Advocate
for the appellant.

Mr. V.P. Sangwan, Advocate for
the respondent

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H. S. Madaan, J.

Complainant Smt. Anuja, feeling aggrieved by the judgment dated 13.10.2014 passed by Judicial Magistrate Ist Class, Hisar, dismissing complaint under Section 138 of the Negotiable Instruments Act, filed by her against accused Sunil Kumar, has approached this Court seeking special leave to appeal, which was accordingly granted to her vide order dated 26.9.2017.

Briefly stated, the facts of the case are that complainant – Anuja had filed a complaint under Section 138 of Negotiable Instruments Act, 1881 against accused Sunil Kumar, which was registered as Complaint No.1535-II of 2012.

Inter alia in the complaint, the complainant had asserted that accused had issued a cheque bearing No.005971 dated 08.09.2012 for a sum of Rs. 5,00,000/- drawn on State Bank of Bikaner and Jaipur, Hisar in favour of the complainant with an assurance that the cheque would be honoured on its presentation. However, things went otherwise inasmuch as when the complainant had presented the cheque with her bank and it was forwarded to bank of accused, the same was received back uncashed due to "Insufficiency of Funds" in the account of accused and complainant was informed in that regard vide bank return memo dated 11.09.2012. On coming to know about it, the complainant had served legal notice dated 27.09.2012 upon the accused to make payment of cheque amount, but to no effect, as such, complaint was filed in the Court.

After recording preliminary evidence accused was summoned, who put in appearance, notice of accusation for offence punishable under Section 138 NI Act was served upon him, he pleaded not guilty and claimed trial. The case was fixed for evidence of the complainant. During such evidence complainant got her statement recorded as PW-1 tendering her affidavit Ex.PW1/A and reiterated the contents mentioned in the complaint by proving various documents. The evidence of the complainant was closed by Court vide order dated 31.05.2014.

Statement of accused under Section 313 Cr.P.C. was recorded, in which all the incriminating circumstances appearing against the accused was put to him, to which he denied contending that he is innocent. He tendered documents Ex.D1 to Ex.D3 in defence vide statement dated 10.10.2014. The accused did not lead any defence evidence and closed the same vide separate statement.

After hearing arguments, the complaint was dismissed mainly for the reason that complainant had failed to prove that accused had issued the cheque on account of discharge of financial lability.

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

Learned counsel for the complainant had contended that it was so done by the trial Magistrate wrongly when presumption under Section 139 was there.

In support of his contention, learned counsel for the petitioner has cited ***T. Vasanthakumar vs. Vijayakumari 2015(2) RCR (Criminal) 894 SC*** by the Apex Court wherein it was observed that when the cheque as well as signature has been accepted by the accused - respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability.

He further referred to authority ***Gurmeet Singh vs. State ofHaryana and another, 2012 (2) RCR (Criminal) 306*** by a Coordinate Bench of this Court wherein it was observed that when the accused had admitted his signatures on the cheque in question. He cannot escape his liability under Section138 of the Act even if the amount, date and other particulars are filled up by some other person with different ink.

He further placed reliance on ***Hemant Pavel Gracias vs.Socorro Santan Fernandes, 2008(1) CCC 743*** by High court of Bombay wherein it was observed that a loan of Rs. 4 lacs had been advanced to the accused without any document being produced in support of loan amount. It was held that this in itself is insufficient to displace the presumption available to the complainant. It was further observed that when a blank cheque theory was put forward by the accused, however, reply to the statutory notice was not given "Stop Instructions" not issued to bank, it is unusual conduct of accused. The failure of accused to rebut the presumption resulted in accused being held guilty under Section 138 of the Act.

Whereas learned counsel representing the accused had defended the impugned judgment submitting that there is no illegality or infirmity therein and no reason is there to upset the same, by allowing the appeal.

After hearing the rival contentions I find that the trial Magistrate has discussed that the complainant has nowhere mentioned that on which date, month and time, loan was advanced by her to the accused and as to what was the outstanding liability for discharge of which the accused had issued the cheque in question and no document evidencing such transaction being there, which created a doubt in the mind of the Court, which is further fortified by the fact that the complainant had not proved her financial capacity to advance such an amount.

However, I find the entire approach of the Court to be misconceived. The Court has admitted that there is presumption in favour of the complainant under Section 139 of the Act but has nowhere explained as to how this presumption has been rebutted by the accused. The trial Court in paragraph 11 of the judgment while answering the question (A) i.e. whether the cheque in question was issued/drawn by the accused and ground of dishonor is covered under Section 138 of the Act, has decided the point in favour of the complainant to the extent that cheque in question was drawn in favour of the complainant and dishonoured on the ground of 'insufficient funds', which is covered under Section 138 of the Negotiable Instruments Act. It being so, the court could not certainly take a different view that ingredients of Section 138 of the Negotiable Instruments Act were not established, more particularly, when point (B) i.e. Whether the conditions provided to proviso a, b and c of Section 138 of the Act read with Section 142 of the Act, have been complied with, has also been decided in favour of the complainant. Coming to the next point (C) i.e. whether the accused issued the cheque in discharge of the legally enforceable debt or liability, the trial Magistrate has observed that presumption under Section 139 is in favour of the holder of the cheque and in the instant case cheque Exhibit P-1 bears the name of the complainant as payee, therefore, the complainant is holder of the cheque and presumption is in his favour, but then drew an inference that presumption under Section 139 of the Act had been rebutted by giving reasoning which does not seem to be convincing. Merely because no document evidencing the loan transaction was prepared, does not nullify the transaction. A perusal of the statement of the complainant goes to show that she had rendered explanation which appears to be cogent and convincing as to how she had arranged the money which had been lent to the accused. Therefore, point No. 3 appears to have been wrongly decided by the trial Court against the complainant. The judgment vide which the complaint was dismissed and accused was acquitted, is not sustainable and is liable to be set aide by way of acceptance of appeal.

Accordingly, the appeal is accepted, the impugned judgment passed by the trial Magistrate is set aside and a direction is issued to the trial magistrate to pass a fresh judgment after hearing both the sides by proper appraisal of evidence and in light of the settled law on the subject.

Parties are accordingly directed to appear before the trial Court on 2.5.2018 and the trial Court would make earnest endeavor to dispose of the case within one month thereof. The trial court record be sent back.

(H.S. Madaan)
17.4.2018 **Judge**
chugh

Whether speaking / reasoned Yes / No

Whether reportable Yes / No