IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A- 457-MA of 2013
DATE OF DECISION :- January 22, 2018

Jai Bhagwan **...Applicant**

Versus

Avtar Singh Saini **...Respondent**

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

Present:- Mr. Munish Gupta, Advocate for the applicant.

Mr. P.S. Khurana, Advocate for the respondent.

***

In the last order, the fixed date was inadvertently mentioned as 21.1.2018 which happen to be Sunday, as such it had been taken up today.

Complainant Jai Bhagwan had filed the complaint under Section 138 of the Negotiable Instruments Act against Avtar Singh Saini on the allegation that there has been a friendly relation between the parties as such accused had borrowed an amount of Rs.8,50,000/- from the complainant in January 2010 and issued a cheque bearing No. 500421 dated 20.4.2010 in a sum of Rs.5 lac and cheque bearing No. 500422 dated 4.5.2010 for Rs.3,50,000/- drawn on ICICI Bank Limited in favour of complainant so as to discharge the said financial liability. However on presentation, the cheques were dishonoured due to insufficiency of funds in the account of the accused. The complainant was informed accordingly vide memo dated 30.6.2010. He issued a legal notice dated 14.7.2010 calling upon the accused to pay the cheque amounts within a period of 15 days on receipt of notice, but to no effect, as such complaint was filed in the Court of competent jurisdiction i.e. of Judicial Magistrate Ist Class, Rohtak.

After recording of preliminary evidence accused was ordered to be summoned. He accordingly put in appearance and was admitted to bail. Notice of accusation for offence under Section 138 of the Negotiable Instruments Act was accordingly served upon him to which he pleaded not guilty and claimed trial. Thereafter complainant led evidence inasmuch as he himself appeared as CW1 and tendered his evidence by way of affidavit Ex.CW-1/A. He perused on record the following documents :-

Ex.C-1 & C-2	Original cheque
Ex.C-3 and C-4	Bank Return Memo
Ex. C-5	Legal notice
Ex.C-6	Postal Receipt
Ex.C-7	UPC Receipt
Ex.C-8	Returned Envelope

The accused further examined Sh. Pritam Saini as CW-2, who submitted his affidavit Ex.CW-2/A stating that complainant Jai Bhagwan is his father-in-law and in January 2010 he had handed over an amount of Rs.2,50,000/- to his father-in-law as the accused wanted to borrow an amount of Rs..8,50,000/-from his father-in-law who had tendered an amount of Rs.Rs.8,50,000/- to the accused on 10.1.2010 at Rohtak on the assurance of the accused that he would repay it within 3-4 months and that his father-in-law told him that accused issued two cheques in his favour so as to clear his liability. The 3rd witness examined by complainant happen to be his daughter Smt. Babita wife of Jagdish as CW-3, who tendered her affidavit Ex.CW-3/A stating therein that in the first week of January,2010 she gave an amount of Rs.2 lacs to her father since accused wanted to borrow amount of Rs.8,50,000/- from her father who had given an amount of Rs.8,50,000/- to accused on 10.1.2010 at Rohtak and that her father had told her that accused issued two cheques in his favour so as to clear the liability. Complainant further tendered sale deed Ex.CW-3/B. With that evidence of complainant got concluded.

Statement of accused was recorded under Section 313 Cr.P.C. in which all the incriminating circumstances appearing against the accused put to him but he pleaded innocence.

The accused laid evidence in defence also by examining,DW1 Desraj and DW2 Jasvinder Singh.

After hearing the arguments, the trial Magistrate dismissed the complaint. The relevant part of observation are as under :-

> "From the testimony of the complainant as well as CW-2 and CW-2 it has come to the notice of the Court that accused is known to the complainant since 2008 as the accused used to visit the complainant shop as a customer which has been categorically admitted by the complainant in his testimony. From the present set of facts, applying the test of prudent citizen, the Court fails to find any gravity in the complainant's story that he has tendered a huge sum of Rs.8,50,000/- to the accused. The above said thought becomes more cogent and convincing when the complainant failed to show any sort of agreement or document reflecting that he has actually paid Rs.8,50,000/- to the accused. Further the testimony of CW-2 and CW-3 also does not sound convincing as CW-2 who

> happens to be the son-in-law of the complainant has not been able to show bank account statement or pass book reflecting that he actually withdrew Rs.2,50,000/- from the bank so as to tender the same to complainant which he has lent to accused, which he has categorically admitted in his cross examination and further that the testimony of CW-3 i.e. Daughter of the complainant also compels to frown over the set of facts which he has narrated as she has sold the plot for Rs.1,62,000/- in October 2009 and she has alleged that she has paid Rs.2,00,000/- to her father so as to tender the same to the accused and she has failed to explain to the Court that from where she has made up the deficiency of Rs.38,000/-. Therefore, story of the complainant is worth not believable."

The trial Magistrate has considered the case law also. Further in the judgment he has observed that :-

> "However, if for the sake of argument I believe the story of the complainant to be gospel truth then also the accused cannot be held liable under Section 138 of the Negotiable Instruments Act as in the absence of proof showing that the amount of Rs.8,50,000/- allegedly tendered by the complainant to the accused has not been properly accounted-for, as no tax return or PAN card or statement of account has been filed by the complainant, having said so, I would like to state that under Section 269SS of the Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- has to be made by way of an account payee cheque only otherwise liable for penalty under Section 271 D of Income Tax Act.
>
> Extending the corollary of the above said argument I feel no hesitation in concluding that 'unaccounted cash' does not fall within the ambit of 'Legally enforceable debt or liability' as enumerated under Section 138 of the Negotiable Instrument Act. Reliance is placed upon case titled ***Dalmia Cement***

(Bharat) Ltd. vs. Galaxy Traders & Agencies Ltd and others (2001) 6 Supreme Court Cases 4631, where Hon'ble Supreme Court has held that the laws relating to the said Act are required to be interpreted in the light of the object intended to be achieved by it despite there being deviation from general law. The Apex Court expressed that the object of Section 138 of the said Act was to ensure that commercial and mercantile activities are conducted in smooth and healthy manner. The explanation to Section 138 of the said Act clearly provides that a debt or other liability referred to in Section means a legally enforceable debt or other liability. The alleged liability to repay an unaccounted cash amount admittedly not disclosed in the Income Tax Return cannot be a legally recoverable liability. If such liability is held to be a legally recoverable debt, it will render the explanation to Section 138 of the said Act of ensuring that the commercial and mercantile activities are conducted in a healthy manner. The provision of Section 138 cannot be resorted to for recovery of an unaccounted amount. A cheque issued in discharge of alleged liability of repaying 'unaccounted' cash amount cannot be said to be a cheque issued in discharge of a legally enforceable debt or liability within the meaning of explanation of Section 138 of the said Act. Such an effort to misuse the provision of Section 138 of the said Act has to be discouraged."

As such, the complaint was dismissed. The complainant has opposed this by way of filing an application under Section 378(4) Cr.P.C. seeking special leave to appeal, notice of which given to the respondent.

I have heard learned counsel for the applicant as well as learned counsel for the respondent.

The judgment passed by the trial Court is well reasoned one, based on proper appraisal and having correct interpretation of law. There is no illegality or infirmity therein.

As regards the authorities referred to by the learned counsel for the applicant in cases of ***Grasim Industries Ltd. And another versus Agarwal Steel 2009(4) Civil Court Cases 0598, S.M.S. Pharmaceuticals Ltd. Versus Neeta Bhalla and another 2005(3) Civil Court Cases 0483, Khushwinder Singh and another versus State of Punjab 2007(1) R.C.R. (Criminal) 531, Himanshu Singh Sabharwal versus State of M.P. and Ors. 2008(2) R.C.R. (Criminal) 267, M/s. Kusum Ingots and Alloys Ltd. Versus M/s. Pennar Peterson Securities Ltd. And others etc. AIR 2000 Supreme Court 954 and Ganga Parshad versus Lalit Kumar 2008(3) R.C.R. (Criminal) 159***, those do not find application to the present case due to different facts and circumstances and the context in which such observation has been made.

I do not see any reason to allow the application and grant of special leave to appeal to the applicant. Therefore, the application is dismissed accordingly.

(H.S. MADAAN)
JUDGE

January 22, 2018
p.singh

Whether speaking/reasoned Yes/No

Whether Reportable Yes/No