

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

CRM-A No.1452-MA of 2015 (O&M)

Decided on: 18.05.2018

M/s. Norang Rai Inder Sain through its proprietor

....Appellant

Versus

Birbal

....Respondent

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. Vishnu Godara, Advocate
for the appellant.

Mr. Amit Singla, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this appeal is for setting-aside the judgment dated 08.06.2015 passed by the trial Court vide which the complaint filed by the appellant under Section 138 of the Negotiable Instruments Act (in short 'the NI Act') was dismissed.

Brief facts of the case are that, the complainant through its proprietor Bishambher Dayal filed the complaint against the respondent with the allegations that the complainant is dealing in the business of commission agency in the grain market and the accused is known to the complainant and had borrowed a sum of Rs.84,900/- and assured that he will sell the crops to the complainant and the borrowed amount will be adjusted towards the sale proceeds of the crops. It is further alleged that instead of selling the crops to the complainant, the accused sold the crops to some other commission agents and, therefore, he is in arrear of the aforesaid amount. It is further stated in the complaint that the

amount was borrowed by the complainant on different dates either by way of cash or by way of cheques. It is further stated that on 19.12.2012, the accused, in discharge of his liability has issued a cheque bearing No.060669 for a sum of Rs.84,900/- as this amount was payable to the complainant. It is further stated that on presentation of the cheque in the bank account of the appellant with HDFC Bank, Hisar Branch, it was dishonoured with the remarks 'funds insufficient' vide memo dated 21.12.2012.

The complainant, thereafter, sent a legal notice to the respondent/accused who failed to make the payment within the stipulated period of 15 days despite having received the legal notice dated 04.01.2013.

Thereafter, the complainant led his preliminary evidence and the trial Court summoned the respondent/accused vide order dated 24.04.2013.

The respondent/accused appeared in the Court and on receiving the notice of accusation, he did not plead guilty and claimed trial.

The complainant, in support of his pre-charge evidence, examined himself as CW1 and tendered his affidavit as Ex.CW1/A in examination-in-chief and also produced the documents Ex.C1 the original cheque, Ex.C2 the bank memo, Ex.C3 legal notice, Ex.C4 postal receipt, Ex.C5 and Ex.C6 the photocopy of entries in the account book. Thereafter, the complainant produced one another witness namely Satya Parkash as CW2, who proved the documents Ex.CW2/A i.e. the statement of account from 26.04.2006 to 08.05.2014 and Ex.CW2/B i.e.

the statement of account from 01.04.2006 to 17.07.2014 and, thereafter, he closed the evidence.

Thereafter, the statement of the accused under Section 313 of the Code of Criminal Procedure (in short 'Cr.P.C.') was recorded and when the evidence on record led by the complainant was put to him, he denied the same and pleaded his false implication. Thereafter, the accused opted to lead his defence evidence and examine one Jaibir Singh as DW1, who placed on record the documents Ex.D1 the copy of account opening form, Ex.D2 the statement of account from 01.04.2006 to 07.02.2015, Exs.D3 and D4 the copy of pay-in-slip and Ex.D5 the copy of cheque.

The trial Court, thereafter, vide impugned judgment dated 08.06.2015 dismissed the complaint and discharge the respondent/accused. The operative part of the judgment passed by the trial Court is reproduced as below:-

“14. Now comes the point that whether the accused issued the cheque in discharge of his legally enforceable debt or liability.

*One of the condition under Section 138 is that the cheque in question must be drawn by the accused to discharge his legal enforceable debt or liability. Presumption under Section 139 is in favour of the holder of the cheque. A perusal of the cheque Ex.C1, shows that it bears the name of the complainant as 'payee' so, as per Section 80 f the Act, the complainant is the holder of the cheque and presumption is in his favour. But presumption under Section 139 of the Act is a rebuttable presumption and in view of the preposition of law laid down in **Vijay vs Laxman and another 2013(10) RCR (Crl.) 1028 and M.S.***

Narayana Menon vs State of Kerala 2006(6) SCC 39.

This presumption can be rebutted by the accused either by leading specific evidence or from the preponderance of probabilities as arisen from the material available on the file and the accused need not step into the witness box for rebutting the same. Now it is to be seen whether by the evidence led by the accused and the material available on the file, the presumption under Section 139 of the Act has been rebutted or not.

15. In case titled as Hiten Dalal vs Brathindranath AIR 2001 Supreme Court 3897, it has been held that:-

“Section 139 provides that it shall be presumed unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 of the discharge, in whole or in part of any debt or other liability the effect of these presumptions is to place the evidential burden on the accused, of proving that the cheque was not received by the complainant towards the discharge of any liability. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheque for the amounts for which the cheque is drawn, as noted in it obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. It introduced as exception to the general rule as to the burden or proof in criminal cases and shifts the onus on the accused. Such a presumption is a presumption of law, as distinguished from a presumptions of fact which describes provisions by which the Court 'may presume' a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumptions of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the

accused beyond reasonable doubt. The obligation on the prosecution may be discharged, with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact, the distinction between the two kinds of presumptions lay not only in the mandate to the Court, but also in the nature of the evidence required to rebut the two. In the case of discretionary presumption, the presumptions if drawn may be rebutted by an explanation which might reasonably be true and which is consistent with the innocence of the accused. On the other hand, in the case of mandatory presumptions, the burden resting on the accused persons in such a case, would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words “unless the contrary is proved” which occur in this provision make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence to be probable that a reasonable man would act on the supposition that it exist. Unless therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.”

16. *In order to rebut the presumption, under Section 139, the accused need not to step in the witness box, however, it is well settled principle of law that the accused can assail the evidence adduced by the complainant to show that the cheque in question has not been issued in discharge of legally enforceable debt or liability.*

17. *It is the case of the complainant that accused*

borrowed a sum of Rs.84,900/- from the complainant and assured that he will sell the crops to the complainant and that said amount shall be adjusted accordingly. But the accused did not fulfill his words and sold his crop to some other person. Therefore, the amount was outstanding and cheque in question was given by the accused against that outstanding liability.

18. In order to prove his complaint, the complainant himself appeared in the witness box as CW1 and placed on record his duly sworn affidavit Ex.CW1/A wherein he has reiterated the version of the complaint and also deposed that the amount in sum of Rs.28,000/- was given by the complainant to the accused, through cheque bearing No.873776 and amount in sum of Rs.5000/- was given to the accused vide cheque bearing No.886225 dated 30.05.2006 but this fact has not been reiterated by the complainant in his complaint. The complainant has placed on record Bahi entries Ex.C5 and Ex.C6 wherein entries regarding Rs.28,000/- and Rs.5000/- have been mentioned but as per the complainant he gave Rs.84,900/- to the complainant. This itself create doubt on the case of the complainant that if he has entered amount in sum of Rs.28,000/- as well as Rs.5000/- why he did not make any entry in his bahi-khata (account books) regarding rest of the amount. Though, there is presumption in favour of the complainant that the cheque in question has been issued by the accused to the complainant against legally enforceable debt or liability but this is also duty of the complainant to prove the transaction regarding borrowing the money from the complainant. The complainant has not put forth any cogent and reliable evidence regarding the transaction in sum of Rs.84,900/- between the complainant and the accused. Therefore, the transaction between the complainant and the accused is not proved. Reliance can

*be made on **Vijay vs Laxman and another 2013(1) RCR (Criminal) 1028 (S.C.) and John K. John vs Tom Varghese and another 2007(4) RCR (Criminal) 807 (S.C.)**.*

19. *Further the complainant has not mentioned on which date accused borrowed Rs.84,900/- from the complainant. The complainant has also not mentioned in his complaint regarding the date of advancement of loan of Rs.84,900/-. Though, he has deposed in the cross-examination that in the bali entries, transaction regarding Rs.28,000/- and Rs.5000/- have been mentioned but he has not mentioned any specific date regarding borrowing the amount in sum of Rs.84,900/- from the complainant. This also create doubt in the mind of the Court. Reliance can be made on **G. Veeresham vs S. Shiva Shanker and another 2007(4) Civil Court Cases 532 (A.P.)**, wherein cheque was issued against loan and loan was denied by the accused. There was no proof of lending money, even month or year of loan not disclosed. It has been held by the Hon'ble Andhra Pradesh High Court, that when complainant does not place on record any material of lending money then it is sufficient to infer that accused is able to rebut the presumption available in favour of the complainant-accused not guilty of offence u/s 138 of the Act.*

20. *In order to prove that the complainant has advanced loan in sum of Rs.84,900/- to the accused, the complainant has also examined Satya Parkash as CW2, who has brought the record Ex.CW2/A and CW2/B, which is bearing the signature of Marketing Manager but examination of Satya Parkash CW2 is not suffice in order to prove transaction between the complainant and the accused.*

21. *Though under Section 138 of the N.I. Act, the presumption under Section 139 of the Act is in favour of*

*the holder of the cheque but this presumption is in favour of the holder of the cheque does not mean that holder of the cheque is relieved from every burden. Meaning thereby, the issuance of the cheque by the accused does not ipso facto proves that there is debt or liability of the accused towards the complainant. If it is so, then it would amount to blindly raising the presumption in favour of the complainant relieving him from every burden and over burdening the accused. Reliance can be made on **K. Parkashan vs P.K. Surenderan 2007(4) RCR (Criminal) 588 S.C.**, wherein Hon'ble Apex Court, pleased to held that while dealing with the cases under Section 138 of the N.I. Act, the prosecution must prove the guilty of the accused beyond reasonable doubt. The stand of proof so as to prove the defence on the part of accused is 'preponderance of probabilities'. So, while laying down the above noted preposition of law, Hon'ble Apex Court certainly held in its golden wisdom the idea that "complainant has to prove his case and he is not relieved from discharging that onus."*

22. *In the cases under Section 138 of the N.I. Act, the legal enforceability of debt/liability is sine qua non and if it is proved that the debt/liability was not legally enforceable debt/liability, the accused/drawer of the cheque cannot be held liable under Section 138 of the Act. As already discussed, in the present case, the debt/liability of the accused/drawer of the cheque was not a legal enforceable debt/liability, so, it is held that one of the most important ingredient of Section 138 of the N.I. Act, has not been fulfilled. Consequently, the present complaint is hereby dismissed. The accused is hereby acquitted of the offence under Section 138 of the Act. His bail bond and surety bond stands discharged. File be consigned to record room after due compliance."*

Counsel for the appellant has submitted that once the trial Court has held that the presumption under Section 138 of the NI Act is proved on record, the onus shifted on the complainant to prove that the cheque was not issued in discharge of his legally enforceable debt or liability and the trial Court has not appreciated this aspect of the case. Counsel for the appellant has further submitted that as per the statement of the accused recorded under Section 313 Cr.P.C., the accused has admitted that he was dealing with the complainant and has issued the cheque as a security as the accused used to sell the crops to him and, therefore, the trial Court has wrongly believed the version given by the accused. It is further submitted that since the issuance of cheque and signature on the cheque are not disputed by the respondent, the acquittal by the trial Court is not justified especially in view of the fact that the appellant has issued a legal notice to the complainant and no evidence in rebuttal thereof was led.

Counsel for the appellant has further argued that there is a statutory presumption in favour of the appellant/complainant under Section 139 of the NI Act and the trial Court has erroneously not drawn the presumption in favour of the appellant. It is, lastly, submitted by counsel for the appellant that the appellant has proved from the statement of the witness as well as the documentary evidence that the accused has borrowed the amount of Rs.84,900/- and despite having made a promise to sell the crop in the shop of the complainant, the accused has sold the same to some other commission agent and, therefore, the advancement of loan stands proved.

In reply, counsel for the respondent has submitted that, in

fact, the cheque in question was given as a security as the accused earlier used to sell the crop with the complainant and had cleared the payment, however, the accused has misused the cheque which was given as a security as subsequently, the accused started selling his agriculture produce to some other commission agent. It is further submitted that from the statement of the complainant who appeared as CW1 and as per the affidavit Ex.CW1/A, it has come on record that the amount was advanced by the complainant on various dates and even the complainant has made the payment by way of issuing a cheque which is not reflected in the ledger/bahi entries Ex.C5 and Ex.C6, therefore, even though, there is a presumption in favour of the complainant under Section 139 of the NI Act, the complainant has failed to put forth any cogent and reliable evidence regarding the transaction in the sum of Rs.84,900/- as the ledger/bahi entries or statement of account produced by the complainant is not reflecting the entire transactions as stated by the complainant in his examination-in-chief Ex.CW1/A.

Counsel for the respondent has also submitted that the dates of advancement of loan to the accused have not been mentioned in the complaint and even as per the statement of CW2 -- Satya Parkash, who produce Ex.CW2/A and Ex.CW2/B, the details of advance to the complainant is not proved and, therefore, the presumption under Section 138 of the NI Act is rebuttable. Counsel for the respondent has relied upon the judgments **"Shiva Murthy vs Amruthraj"**, 2009 Civil Court Cases 160 (Karnataka), **"B. Girish vs S. Ramaia"**, 2011(4) Civil Court Cases 338 (Karnataka) and **"Rosa Maria Fernandes vs Nauso N. Kepkar"**, 2010 Civil Court Cases 288

(Bombay), to contend that since the presumption in this case is rebutted, the trial Court has rightly acquitted the respondent/accused.

Counsel for the respondent has further argued that the entire case of the complainant is based upon the ledger/bahi entry and the complainant being a commission agent and the respondent/accused being a farmer were having the dealings of sale and purchase of agriculture produce and in the ledger/bahi entries, only the outstanding amount is shown and, therefore, the same cannot be treated as in the Negotiable Instruments Act under Section 118 of the NI Act read with Section 34 of the Indian Evidence Act. Counsel for the respondent has further relied upon the judgment of this Court "**Narsi Dass vs Surender**", 2015(1) RCR (Criminal) 104 and prayed for dismissal of the complaint.

After hearing counsel for the parties, I find no merit in the present appeal on the following grounds:-

(a) Though, there is a presumption in favour of the complainant under Sections 138 and 139 of the NI Act as the complainant has not denied issuance of the cheque as well as his signature on the cheque, however, the moot point involved is whether the cheque in question was given as a security or in discharge of any legal debt or liability. A perusal of the affidavit Ex.CW1/A i.e. the examination-in-chief of the complainant show that he has given some details of advancement by way of a cheque in favour of the complainant on a previous date, however, the said detail is not missing in the complaint or the legal notice.

(b) The complainant has produced on record the statement of account (Ex.CW2/A) from 26.04.2006 to 08.05.2014 and the statement of account from 01.04.2006

to 17.07.2014 (Ex.CW2/B) and nothing has come on record that at any stage, the respondent/accused has acknowledged the same. On the other hand, it is the defence set up by the accused person that he had given the cheque as a security at the time when he was selling his agriculture produce with the complainant and, thereafter, when he started selling the crops to the other commission agent, the appellant in a mala fide manner has misused the cheque, though, the same was never issued in discharge of any legally enforceable liability and, therefore, the respondent/accused has led sufficient evidence to rebut the presumption in favour of the complainant.

*(c) The case of the complainant is based upon the ledger/bahi entries and it is held by this Court in **Narsi Dass's case (supra)** that if the complainant has set up a case of advancing loan by making the ledger/bahi entries, such entry cannot be treated as a negotiable instrument under Section 118 of the NI Act read with Section 34 of the Indian Evidence Act and, therefore, the entries alone is not sufficient to charge a person with liability as the entries in the ledger/bahi entries are not per se admissible.*

(d) In order to prove that the complainant has advanced loan in sum of Rs.84,900/- to the accused, the complainant has also examined Satya Parkash as CW2, who has brought the record Ex.CW2/A and CW2/B, which is bearing the signature of Marketing Manager but examination of Satya Parkash CW2 is not suffice in order to prove transaction between the complainant and the accused.

(e) In the present case, the complainant being commission agent was in a dominating position over the respondent/accused who was a farmer and used to sell his crops and, therefore, in the absence of any cogent evidence of advancement of loan, the trial Court has rightly

acquitted the respondent/accused.

(f) Their lordships of the Supreme Court in “Sudha Renukaiah and others vs State of UP”, 2017(2) RCR (Criminal) 693, held that where, in a case, two views are possible, the one which favours the accused, has to be adopted by the Court.

(g) It has been held by a Division Bench of this Court in “Anil Kumar vs State of Punjab and others”, passed in CRA-D-531-DB of 2015, while dealing with an appeal against acquittal, that order of acquittal interfered with only when there are compelling and substantial reasons for doing so i.e. when the order was clearly unreasonable. There were also no compelling and substantial reasons to interfere with the findings recorded by the trial Court and the trial Court has rightly taken into consideration all the material brought on record.

(h) To the same effect is the ratio of the judgments of the Supreme Court in “State of Goa vs Sanjay Thakran”, (2007) 3 SCC 755 and in “Chandrappa vs State of Karnataka”, (2007) 4 SCC 415. In “Mrinal Das and others vs The State of Tripura”, 2011 (9) Supreme Court Cases 479, the Supreme Court, after looking into various judgments, has laid down parameters, in which interference can be made in a judgment of acquittal, by observing as under:

“8. It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be

innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are “compelling and substantial reasons”, for doing so. If the order is “clearly unreasonable”, it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed.”

In the facts and circumstances, the reasons recorded by the trial Court in acquitting the accused are just and proper and there is no merit in the criminal miscellaneous application seeking leave to appeal in terms of Section 378(4) of the Code Criminal Procedure, 1973. Accordingly, the criminal miscellaneous application seeking leave to appeal is dismissed.

(ARVIND SINGH SANGWAN)
JUDGE

18.05.2018
yakub

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No