IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

Criminal Revision No.3541 of 2014
Date of Decision: 14.12.2018

Bhim Singh

...Petitioner(s)

Versus

Pawan Kumar

...Respondent(s)

Criminal Revision No.3895 of 2014

Bhim Singh

...Petitioner(s)

Versus

Pawan Kumar

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

Present:- Mr. Shiv Kumar, Advocate
for the petitioner.

Mr. Sudhir Aggarwal, Advocate
for the respondent.
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HARI PAL VERMA J.

This order shall dispose of two criminal revision petitions i.e. CRR No.3541-2014 *Bhim Singh Vs. Pawan Kumar* and CRR No.3895-2014 *Bhim Singh Vs. Pawan Kumar*. The facts of both the revision petitions and the parties to the dispute are similar. However, for brevity, facts are being taken from CRR No.3541-2014.

Petitioner-complainant has filed the present criminal revision petition impugning the judgment dated 12.09.2014 passed by learned Additional Sessions Judge, Gurgaon, whereby the criminal appeal filed by respondent-accused against the judgment of conviction dated 04.12.2013 and order of sentence dated 09.12.2013 passed by Judicial Magistrate Ist Class, Gurgaon, was allowed.

Briefly stated, the petitioner-complainant had filed a complaint against the respondent-accused under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act") with the averments that he was owner in possession of agricultural land bearing Khasra No.698 Min, 700, 701, 702 situated within the revenue estate of Village Basai, Tehsil and District Gurgaon. One Kulraj Kataria son of Sh. Satgur, resident of 12 Biswa, Village Gurgaon, Tehsil and District Gurgaon approached him, showing his desire to purchase land measuring 2541 square yards. Accordingly, an agreement was entered between the petitioner-complainant and Kulraj Kataria for a total sale consideration of Rs.1.44 crore. Out of this amount, an amount of Rs.7.50 lakhs was agreed to be paid by the respondent-accused to the petitioner-complainant. Accordingly, the petitioner-complainant executed a registered General Power of Attorney dated 03.10.2011 in favour of Kulraj Kataria and on the same date, an agreement to sell was also executed by the petitioner-complainant in favour of Kulraj Kataria. The respondent-accused undertook and assured the petitioner that he will pay Rs.7.50 lakhs to him and issued a cheque No.527469 dated 03.10.2011 drawn on Oriental Bank of Commerce Branch at Mata Sheetla Devi Mandir, Sector 5, Gurgaon for a sum of

Rs.7,50,000/- in favour of the petitioner towards the sale consideration. However, on presentation of the said cheque for encashment, the same was dishonoured with the remarks "payment stopped". On receipt of the said endorsement, the petitioner submitted a legal notice dated 17.11.2011 to the respondent, but since the amount in question was not paid to the petitioner, he filed the complaint in question.

Learned Magistrate after hearing both the sides and considering the evidence, held the respondent guilty for offence under Section 138 of the Act vide judgment dated 04.12.2013 and sentenced him to undergo rigorous imprisonment for a period of six months vide separate order dated 09.12.2013. An amount of Rs.10 lakhs was also ordered to be paid to the petitioner-complainant by the respondent-convict under Section 357(3) CrPC within one month from the date of said judgment, failing which, the respondent was ordered to undergo further simple imprisonment for three months.

Aggrieved against the judgment of conviction dated 04.12.2013 and order of sentence dated 09.12.2013, the respondent filed an appeal before the Court of Session, which was allowed by the learned Additional Sessions Judge, Gurgaon vide judgment dated 12.09.2014, acquitting him of the charges levelled against him. Resultantly, the judgment of conviction dated 04.12.2013 passed by learned Magistrate was set aside in appeal.

It is in these circumstances, the present revision petition has been filed by the petitioner-complainant against the judgment of acquittal dated 12.09.2014 passed by learned Additional Sessions Judge, Gurgaon.

Learned counsel for the petitioner has argued that learned Additional Sessions Judge, Gurgaon has set aside a well reasoned judgment of conviction dated 04.12.2013 and order of sentence dated 09.12.2013 passed by the trial Court. The limited question for the Court below was to ascertain whether the respondent-accused had issued the cheque in question, which has duly been proved on record. In fact the respondent had issued the cheque in question in discharge of a legally enforceable debt. However, on presentation of the same with the bank, the same was dishonoured with the remarks "payment stopped". Despite having been given a notice under Section 138 of the Act, the respondent-accused failed to make the payment of the cheque amount within 15 days from the date of the notice and the ingredients of Section 138 of the Act having been fulfilled, the offence is deemed to have been committed. The agreement to sell was executed between the petitioner and Kulraj Kataria on 03.10.2011 on which the respondent had put his signatures. The respondent has issued the cheque in question which was presented on 11.10.2011 for encashment, however, the same was dishonoured. The observation of learned lower Appellate Court that the land was acquired by the State on 20.04.2012 i.e. much after presentation of the cheque for encashment, is sufficient to establish that on the date on which the cheque was presented, the land had not been acquired. The respondent is a signatory to the agreement and the issue regarding acquisition of the land and possession by the State is of no relevance as regards the claim of the petitioner under Section 138 of the Act is concerned. He has referred to judgments in the cases of ***Rangappa Vs. Mohan 2010 (3) RCR (Criminal) 164 (SC)***, ***I.C.S.D. Ltd. Vs. Beena***

Shabeer and another 2002(4) RCR (Criminal) 74 (SC) and ***Alex P. Oommen Vs. Kerala State Film Development Corporation Ltd. & anr. 2012(8) RCR (Criminal) 2011 (Kerala HC)*** to contend that complaint under Section 138 of the Act is maintainable even against a guarantor who has issued the cheque to discharge the liability of another person.

On the other hand, learned counsel for the respondent has supported the judgment of acquittal passed by learned lower Appellate Court. He has argued that the proceedings regarding acquisition of land were already in process and notifications under Section 4 and 6 of the Land Acquisition Act, 1894 had already been issued regarding the land mentioned in the agreement.

I have heard learned counsel for the parties and perused the record.

There is no dispute that the agreement dated 03.10.2011 was entered between the petitioner-complainant and the Kulraj Kataria. The respondent-accused has merely signed as a witness and therefore, whatever amount was to be paid, was required to be paid by Kulraj Kataria. The respondent had issued cheque No.527469 dated 03.10.2011 for a sum of Rs.7.50,000/- drawn on Oriental Bank of Commerce Branch at Mata Sheetla Devi Mandir, Sector 5, Gurgaon in favour of the petitioner-complainant and on presentation of the said cheque, the same was returned dishonoured with the remarks “payment stopped”. There is no privity of contract between the petitioner-complainant and the respondent-accused. Therefore, he was not required to pay anything to the complainant in discharge of any liability. The Court below was required to ascertain whether the respondent was legally bound to pay the cheque amount, but the trial Court failed to consider this aspect. The petitioner had executed a registered power of attorney on 30.10.2011 in favour of Kulraj Kataria with whom the petitioner-complainant had entered into an agreement to sell. The respondent has merely signed the agreement as a witness to the agreement to sell. Thus, there was no privity of contract between the petitioner and the respondent. Moreover, nothing has come on record which may establish that the cheque amount was ever transferred even in the name of Kulraj Kataria. The land was in fact was acquired by the State Government. The notifications under Sections 4 and 6 of the Land Acquisition Act in respect of the property, which is subject matter of the agreement to sell, were already published prior to the date of agreement to sell dated 03.10.2011. The said land was finally acquired by the State on 20.04.2012. So, the petitioner was not even competent to enter into any such agreement when land is acquired and process started. The petitioner wants to take undue benefit of the signatures of the respondent, who is a signatory as a witness, though he had issued the cheque as a security to the petitioner. The relevant discussion of learned lower Appellate Court while dealing with the aforesaid proposition reads as under:-

> *"16. With above discussed law in mind, this court is required to see whether the cheque in question had created any legally enforceable liability upon the accused viz a viz the complainant.*
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> *At the outset, it is pertinent to mention here that the perusal of complaint indicates that the complainant has no where claimed to have entered into agreement for sale of his land with the accused. Rather, he has claimed to have*

executed agreement to sell with Kulraj Kataria. The contention of the complainant is that the accused had agreed to pay an amount of ₹ 8,35,000/- to the complainant and believing accused, the complainant had executed a registered General Power of Attorney on dated 30.10.2011 in favour of said Kulraj Kataria. It is also the case of the complainant that the accused had signed as witness to agreement to sell executed between the complainant as seller and Kulraj Kataria the purchaser. The claim of the complainant itself proves that there has been no privity of contract between the complainant and the accused qua the purchase of land subject matter of agreement to sell, but to attract the provisions of Section 138 of Negotiable Instruments Act, there is no necessity to have privity of contract between the drawee and the drawer. As per settled law, liability to pay may be owned up by third person but such owning up of third person to pay, must be established by leading evidence to the effect that the third person had agreed to pay the amount for the one who was legally bound to pay. It may be proved by having mention in complaint and the legal notice. It is not out of place to mention here that if the law makers wanted that the cheque must compulsively be issued by a party to the contract (and under a liability) the provision would have stated so. In fact, a liability under Section 138 of Act, would rise even when a third party issued a cheque for the discharge, in whole or in part, of any debt or other liability. Reliance, to this effect is placed on the law laid down in ***ICDS Ltd. Vs. Beena Shabeer, 2002(4) RCR (Criminal) 74 (SC), Anil Sachar Vs. M/s Shree Nath Pvt. Ltd. 2009(1) RCR (Criminal) 750 (P&H), Devender Vs. Ram Gopal 1999 (2) RCR (Criminal) 217 (Allahabad), S.S.Ummal Vs. B.Rajendran 2005 (1) RCR (Criminal) 352 (Madras), 2012 (8) RCR (Criminal) 2011.*** *In*

Alex.P.Oommen Vs. Kerala State Film Development Corporation Ltd., 2012(8) RCR (Criminal) 2011. *Hon'ble Kerala High Court held that there is no such restriction or impediment on one issuing a cheque to discharge the liability of another person. Even if cheque was issued in discharge of the liability of another person, the offence under Section 138 of the Negotiable Instruments Act would be made out in the event the cheque issued is dishonoured for Insufficiency of Funds and despite the notice demanding discharge, the liability is not discharged within the time limit. Plea of petitioner that since there was no transaction between the petitioner and the first respondent; and the petitioner owed no liability to the first respondent, the prosecution under Section 138 of Negotiable Instruments Act, would not lie, is devoid of any merit.*

Since, in the instant case, there are specific averments in the complaint and legal notice and complainant's evidence that the complaint had issued GPA in favour of Kulraj on the assurance of accused to pay for Kulraj if latter fails and there are suggestions also put to the complainant that the cheque issued was for security to be returned when Kulraj make the payment to the complainant qua sale transactions, there remains no doubt that the accused had agreed to pay in case Kulraj fails. It is not out of place to mention here that within the meaning of Sections 141 and 142 of the Indian Evidence Act, a party is permitted to suggest an answer to a witness in cross-examination, which it desires on record. It means, the suggestive fact is the case of opponent put in the form of leading question, so, such party becomes bound with fact put through leading question. So, here also the accused can't say now that cheque was not issued as security for payment to be made *by Kulraj. In other words, the accused expressly as well as impliedly had agreed to own up the liability of Kulraj. So, the accused cannot escape his liability to pay, provided such liability is found to be legal.*

17. This court is of the opinion that though, the accused was liable to pay the amount mentioned in the cheque as there is no evidence Kulraj having paid the said amount to the complainant, but because of the reasons given below as the cheque amount is not proved to be legally enforceable debt, accused is absolved from making payment.

It has duly been proved on record by the accused that notification under Sections of 4 and 6 of Land Acquisition Act, in respect of property subject matter of agreement to sell, were published much prior ***to*** *the date of agreement to sell dated 3.10.2011, in the year 1989 & 1990 respectively. It has also come on record through DW-2 Surender Singh and DW-4 Karambir Singh that the award in respect of the land subject matter of agreement to sell, was passed on dated 20.04.2012 and possession was taken on behalf of the Government on 20.04.2012. Even the contents of jamabandi for the year 2001-02 Ex.DW/3 indicate that there is a remark of the land having been notified under Sections 4 & 6 of the Land Acquisition Act.*

If this be the factual position, the agreement to sell pertaining to land in question executed between the complainant Bhim Singh and Kulraj Kataria, was void ab initio in view of the law laid down in ***Mahavir's case (supra). In the*** *quoted case, the notification under Section 4 (1) of the Land Acquisition Act, was published on 29th January, 1957 and thereafter owner sold the properties to the petitioners on 11th June, 1957 and 2nd August, 1958. Declaration under Section 6 was published on 14th August, 1958. In the given circumstances, Hon'ble apex*

Court held that the sales made after the publication of notification under Section 4 (1) are void sales and the State it not bound to such a sale effected by the owner. Similarly, in the ***Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao AIR 2007 (SC), 2439,*** *Hon'ble apex Court held that where an agreement for sale with forfeiture clause, was entered into wherein purchaser made the advance payment but the acquisition notification qua the property was issued thereafter, such agreement had become unenforceable and forfeiture of advance paid in such circumstances, was held to be improper.*

In view of the law discussed above, the agreement to sell in question is held to be void abinitio. So, even if, it is accepted that the accused had issued the cheque on behalf of Kulraj Kataria, the cheque can not be said to have been issued for a liability which was legal because the agreement to sell in respect of a property subject of acquisition, is not legally enforceable, in the eyes of law. In simple words, any liability accrue under such void agreement automatically becomes unenforceable in a civil court as well as in a criminal case u/s 138 of Negotiable Instruments Act. Thus, even if the cheque of the accused was dishonored because of 'stop payment' and the cheque in question bears the signatures and hand writing of the accused and that it was issued by accused owning up liability of Kulraj, still it could safely be held that the cheque amount was not an amount legally recoverable by the complainant from the accused.

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19. Here this court also would like to observe that the evidence on record, neither proves the suggestion of the accused that Kulraj had paid the amount for payment of which he issued the cheque in question as security and has also not been able to explain, how the complainant

> *came in possession of his duly filled in and signed cheque but despite this weakness on the part of defence, the complainant cannot escape from onus upon him to prove that the amount mentioned in the cheque was legally enforceable debt, which the complainant has failed to prove as observed in preceding paragraph No.1 of this judgment."*

Admittedly, the petitioner had not handed over the possession of land in question to the respondent or even to Kulraj Kataria, which was already subject matter of acquisition. In fact the said land stands acquired and the possession thereof has already been taken by the State Government on 12.04.2012. The petitioner must have enjoyed the compensation as well. Thus, this Court finds that the petitioner just wants to take the benefit of undue enrichment, on account of issuance of the cheque by the respondent. The judgments so cited in the case are not disputed, but the same are not attracted to the facts of the case, for the reason that the petitioner has not handed over the land even to Kulraj Kataria with whom he entered into the agreement.

Therefore, no ground is made out to interfere with the judgment of acquittal passed by learned lower Appellate Court.

Accordingly, both the revision petitions are hereby dismissed.

A photocopy of this order be placed on the file of other connected case.

December 14, 2018 **(HARI PAL VERMA)**
AK **JUDGE**

Whether speaking / reasoned? Yes / No
Whether reportable? Yes / No