

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

CRM-A-79-MA-2018 (O&M)

Date of decision : 22.08.2019

Pawan Kumar

...Applicant/appellant

Versus

Sunil Kumar

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Rakesh Gupta, Advocate for the applicant/appellant.

ANIL KSHETARPAL, J. (ORAL)

Leave to appeal has been sought against the judgment of acquittal passed by the Judicial Magistrate, Ist Class, Rajpura dated 30.10.2017 while deciding criminal complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred as “the Act of 1881”).

Criminal prosecution was launched by the appellant alleging that the cheque dated 15.02.2016 issued in discharge of legal liability by the accused for a sum of ₹2,90,000/- drawn on Oriental Bank of Commerce, SSI Branch, Rajpura, has been dishonoured with the remarks “Funds Insufficient” and in spite of notice demanding the amount, payment has not been made.

Learned Judicial Magistrate has found that no doubt holder of cheque has a statutory presumption in terms of Sections 118 and 139 of the

Act of 1881, however, there is a doubt in the case set up by the prosecution for following reasons:-

- 1). Complainant-victim is a Property Dealer by profession. He claimed that he is also having rental income but account books have not been produced. Complainant also admits that he was a Municipal Councilor and now his wife is a Municipal Councilor whereas accused is worker in the same political party i.e. Congress.
- 2). Although complainant, the alleged victim is paying income tax, however, record thereof has not been produced. Complainant also admits that the alleged loan transaction is not reflected in income tax.

This Court has heard learned counsel for the appellant at length and with his able assistance gone through the judgment passed by the learned Judicial Magistrate, Ist Class, as well as photocopy of the record produced by the learned counsel for the appellant.

It is apparent from the reading of the complaint that the complainant while filing the complaint did not make any assertions or averments to the effect that how the cheque in question was issued in discharge of legal and enforceable liability. Even in examination-in-chief, appellant did not lead evidence to that effect. In cross-examination, appellant failed to disclose when and how the amount was due and payable. Thus, appellant has not even stated a word as to whether the amount was due and payable on account of loan or due to commercial dealings or on account of other liability. In this regard, appellant in cross-examination has stated as under:-

“It is correct that there is no specific and particular entry

regarding the withdrawal of Rs.2,90,000/- from my bank account. Vol. I withdraw some amount from bank and some amount was lying in my house. I do not remember how much amount was withdrawn from my bank.”

It has also come in evidence that the appellant has filed two similar complaints, one against Depesh Kumar and another against Mohinder Singh but he does not remember what was the exact amount in the aforesaid complaints. He admitted that 5-7 years back, he was in the business of financing.

Learned counsel for the applicant/appellant, while referring to the judgment passed by Hon'ble the Supreme Court in **Rohitbhai Jivanlal Patel Vs. State of Gujarat & Anr., Criminal Appeal No.508 of 2019, decided on 15.03.2019**, has submitted that under Section 139 of the Act of 1881, there is a statutory presumption and it is for the accused who has to rebut the presumption. Hence, he submitted that once issuance of cheque is proved, conviction has to follow unless the accused rebuts the presumption. This Court has carefully reads the judgment passed by Hon'ble the Supreme Court in the case of Rohitbhai Jivanlal Patel (Supra).

In the aforesaid judgment, Hon'ble the Supreme Court has dealt with the statutory presumption under Section 139 of the Act of 1881 in favour of the holder of the cheque. However, the presumption can be proved to have been rebutted even from the evidence led by the prosecution. It is nowhere laid down that the defence must lead evidence to rebut the presumption. No doubt, initial presumption is in favour of prosecution but it is rebuttable. This aspect has been examined by Hon'ble the Supreme Court in the case of **Basalingappa Vs. Mudibasappa, Criminal Appeal No.636 of**

2019, decided on 09.04.2019. Once it is proved that accused has raised a probable defence and the accused has failed to prove his financial capacity, then it would not be appropriate to order conviction. In the present case, as discussed above from the evidence of the complainant-victim-prosecution itself, accused has raised a probable defence and hence, the judgment passed by the Judicial Magistrate which has taken plausible view, needs no interference. Hence, leave to appeal is declined.

This issue with reference to judgment passed by the Three Judge Bench of the Hon'ble Supreme Court, has already been examined in detail by this Court in **CRM-A-622-2019 titled as Harish Kumar Vs. Mukesh Kumar.**

Dismissed.

22.08.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No