IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-6361 of 2017

DATE OF DECISION: OCTOBER 18, 2019

RAKESH KUMAR GUPTA ...PETITIONER

VERSUS

STATE OF PUNJAB AND ANOTHER ...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ.

PRESENT: MR. ARSHIT GOEL, ADVOCATE
FOR MR. MANUJ NAGRATH, ADVOCATE
FOR THE PETITIONER.

MR. HITTAN NEHRA, ADDL.A.G., PUNJAB.

MR. B.S.ICHHEWAL, ADVOCATE
FOR RESPONDENT NO.2.

MANOJ BAJAJ, J.

Petitioner Rakesh Kumar Gupta has filed this petition under Section 482 Cr.P.C. for quashing the revisional Court order dated 15.10.2006 (Annexure P-10), whereby the order framing of charge by the trial Court dated 27.8.2013 (Annexure P-8) in case FIR No.198 dated 5.8.2011 under Section 381 IPC, Police Station Division No.5, Ludhiana (Annexure P-1) was upheld.

The facts in brief leading to the petition are as under:-

The subject FIR No.198 dated 5.8.2011 under Section 381 IPC, Police Station Division No.5, Ludhiana was registered upon an application given by respondent No.2, namely, Tejinder Pal Singh, wherein it was alleged that the accused (petitioner) worked till the year 2000 in his Hotel, namely, Shivaz Private Limited as a part-time Accountant. On 20.9.2010, the accused visited the Hotel to see the documents as tax return for the last 5 years was required to be filed with Registrar of Companies. During that visit, a signed cheque of the complainant bearing No.220784 issued from Account No.2642, Indian Overseas Bank was found missing. An information in this regard was given to the police which was recorded as DDR No.36 dated 22.9.2010. Simultaneously, on 25.10.2010, the complainant had intimated the bank regarding the missing of cheque and issued instructions for stopping the payment. On 16.12.2010, Advocate Vikas Gupta sent a registered notice of demand of ₹5 lakhs, as the cheque for a sum of ₹5 lakhs presented by Rakesh Kumar Gupta stood dishonoured. According to the complainant, the said cheque was stolen and misused on 19.11.2010 by Rakesh Kumar Gupta thereby causing wrongful loss, and the bank officials were hand-in-glove with the accused. On these broad allegations, the FIR was registered under Section 381 IPC.

After registration of the case, investigation was carried out and thereafter a final report unde Section 173 Cr.P.C. was filed before the Court. Upon presentation of the challan, the accused (petitioner) filed an application under Section 239/245 Cr.P.C. for discharge. It was pleaded that after dishonour of the cheque, a complaint under Section 138 Negotiable Instruments Act, 1881 was filed against Tejinder Pal Singh (complainant) wherein cognizance was taken by the Court and the trial is at the fag end. It was pleaded that the FIR is nothing, but a concocted defence set up against the said complaint. A reference is made to the reply filed to the legal notice by respondent No.2-Tejinder Pal Singh, wherein it was clearly mentioned by him that the petitioner-Rakesh Kumar Gupta was working as an Accountant with M/s Shivaz Private Limited till the year 2000 and after that he had no concern with the said person. In the light of this categoric response, there was no occasion for the complainant to get Return filed with the Registrar of Companies in the year 2010 through Rakesh Kumar Gupta. In the end, it was prayed that the accused be discharged in case FIR No.198 dated 5.8.2011.

The trial Court vide its order dated 27.8.2013 dismissed the application and proceeded to frame charges against the accused for the offence punishable under Section 381 IPC.

Aggrieved against the said order, a revision was carried before the Court of Addl. Sessions Judge, Ludhiana and the revisonal Court also proceeded to dismiss the application and upheld the order of framing of charges against the petitioner.

Hence, the present petition.

Learned counsel for the petitioner has contended that the cheque in question was dated 21.9.2010 and was dishonoured on 23.9.2010. It was pointed out that after dishonour, respondent No.2 asked the petitioner to present the cheque again in the third week of November, 2010 with the assurance that the said cheque will be honored positively. However, upon presentation in the third week, the same was again dishonoured and the memo dated 19.11.2010 revealed the cause as “Opening Balance Insufficient”. Learned counsel has argued that on dishonour of this cheque, and after completion of the statutory requirements of issuing notice upon the account holder, the complaint under Section 138 Negotiable Instruments Act, 1881 was filed and the trial in the said case is about to conclude, however, the FIR has been registered belatedly on false grounds. Learned counsel has submitted that admittedly there was no communication between the parties after leaving the job in the year 2000 and therefore, there was no occasion for the petitioner to visit the office of the complainant for any reason. In the end, it was prayed that the FIR being an abuse of process of law and the Courts below have ignored the material facts before framing the charges against the petitioner, who deserves to be discharged.

On the other hand, the prayer is opposed by learned counsel for the complainant. It was argued that at the stage of framing of charges, only suspicion is enough and in the present case, the final report clearly indicates that signed cheque was missing and was stolen by accused Rakesh Kumar Gupta. It was submitted that the Courts have passed the said order relying upon the law on the subject and the application for discharge filed by the petitioner was rightly dismissed. According to him, whether the cheque was given deliberately by the complainant to the petitioner, would be a matter of evidence. He prayed that no interference is called for by this Court.

A perusal of the order dated 27.8.2013 passed by the trial Court reveals that the Court proceeded to frame the charge only on the ground that challan has been filed by the police. The trial Court has not even noticed the facts completely and proceeded to frame the charge only on the ground that as the final report has been submitted under Section 173 Cr.P.C., therefore, *prima facie*, offence was made out against the accused. The revisional Court affirmed the said order of the trial Court on the ground that at the stage of framing of charges, strong suspicion is to be seen and reliance was placed on various other pronouncements passed by the Hon'ble Supreme Court.

After hearing learned counsel for the parties, this Court finds that the cheque in question carries date of 21.9.2010, whereas initially the DDR was got recorded by the complainant on 22.9.2010. The cheque was first time dishonoured on 23.9.2010, as per memo issued by the Bank. The complainant (respondent No.2) has relied upon DDR No.36 dated 22.9.2010 to contend that the information was given timely to the police regarding missing of the cheque. It is the case set up by respondent No.2 that he had given instructions to the Bank also regarding stoppage of payment on 25.10.2010 and requested them not to honour the cheque in question. This version is not substantiated, particularly when the cheque was dishonoured second time on 19.11.2010 with the remarks "Opening Balance Insufficient". Had it been a case of stoppage of payment, the cheque would have been dishonoured with the remarks "Payment Stopped". Not only this, the FIR dated 5.8.2011 came to be registered after second inquiry upon the complaint given by respondent No.2. It is also clear from the FIR that firstly on 22.12.2010, the subject complaint by respondent No.2 was inquired by the SHO, Police Station Division No.5, Ludhiana, who had not indicted the petitioner for commission of the alleged offence. It needs to be mentioned here that from the very beginning the complainant alleged involvement of the bank officials who had also connived with the accused, however, none of the bank official was arrayed as accused either in the FIR or in the Final report. On 21.7.2011, the report by the SHO was approved by the ADCP-3, Ludhiana, whereupon the District Attorney, Ludhiana opined that the case be registered against the petitioner and in case any evidence is found regarding forgery, the offence for the same be added. Therefore, it is clear that the FIR registered on the opinion of District Attorney, not only differed from the conclusion of SHO, but the said opinion of the District Attorney was lacking certainty regarding commission of offence(s).

Further, a perusal of the final report reveals that the only material collected during investigation is the cheque in question bearing No.220784 dated 21.9.2010 issued from Account No.2642; DDR No.36 dated 22.9.2010 and photocopy of request letter to Indian Overseas Bank for stoppage of payment of the cheque. On the strength of these documents, a final report was submitted only for the offence under Section 381 IPC.

The facts and circumstances of this case makes it absolutely clear that through the impugned FIR, complainant has set-up a defence to the complaint brought by the petitioner under Section 138 Negotiable Instruments Act, 1881. It has already been noticed that none of the bank officials is an accused with the petitioner, particularly when the cheque in question was not returned with the remarks that 'Payment was stopped'. Admittedly, the cheque was presented twice which was dishonoured for lack of sufficient funds, which gave a valid cause of action to file a complaint under Section 138 of the Negotiable Instruments Act, 1881. The sequence of events does not make out commission of offence of theft regarding the cheque in question, particularly when the petitioner has already placed the said cheque before the Court on the ground that the same was delivered voluntarily by respondent No.2.

In view of the above, this Court finds that the material on record is not enough for framing of the charges and it will be useful to rely upon the judgement of the Hon'ble Supreme Court in ***Central Bureau of Investigation, Hyderabad Vs. K.Narayana Rao" 2012(4) R.C.R.(Criminal)***, wherein it has been held as under:-

> *11) 11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."*
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> ***Exercise of jurisdiction under Sections 227 and 228 Criminal Procedure Code***
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> *21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:*
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> *(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.*

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

Resultantly, the petition is allowed and the impugned orders dated 15.10.2016 (Anenxure P-10) passed by the Addl. Sessions Judge, Ludhiana and order dated 27.8.2013 (Annexure P-8) passed by the Judicial Magistrate 1st Class, Ludhiana are set aside and the petitioner (accused) is discharged for the offence under Section 381 IPC in case FIR No.198 dated 5.8.2011 registered at Police Station Division No.5, Ludhiana.

October 18, 2019 **(MANOJ BAJAJ)**
Gulati **JUDGE**

Whether Reportable : Yes

Whether Speaking/Reasoned : Yes