

In the High Court of Punjab and Haryana at Chandigarh

Crl. Revision No. 911 of 2015 (O&M)
Date of Decision: 3.12.2019

Kulwant Singh

.....Petitioner

Versus

Balwant Singh

.....Respondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. H.P.S.Ghuman, Advocate
for the petitioner.

Mr. K.B.Raheja, Advocate
for the respondent.

HARNARESH SINGH GILL, J.

The petitioner was tried for committing the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act'). Vide judgment and order dated 30.10.2013, learned Sub Divisional Judicial Magistrate, Nabha held the petitioner guilty under Section 138 of the Act and sentenced him to undergo rigorous imprisonment for a period of one year and six months and to pay a fine of Rs. 3,000/- and, in default of payment thereof, to further undergo rigorous imprisonment for one month.

Aggrieved there-against, the petitioner filed an appeal before the learned Sessions Judge, Patiala. Vide judgment dated 5.2.2015, the learned Additional Sessions Judge, Fast Track Court, Patiala, dismissed the appeal filed by the petitioner, thereby affirming the judgment and order passed by the learned trial Magistrate. Still aggrieved, the petitioner has

preferred the present revision petition.

The complaint in question was filed against firm M/s Ekam Onkar Trader (Commission Agents) and its partners, as one of the partner of the firm Kulwant Singh-petitioner in order to discharge his liability of debt, had issued a cheque No. 000952 dated 15.11.2008 for a sum of Rs. 9,24,500/- and the accused also received a writing on the letter pad from the respondent-complainant. The said cheque was presented for encashment but the same was returned unpaid with the remarks “insufficient funds” vide memo dated 29.12.2008. Thereafter, a legal notice dated 24.1.2009 was issued to the petitioner to make the payment within the stipulated period but to no effect.

After preliminary evidence, petitioner Kulwant Singh was only summoned under Section 138 of the Act being signatory of the cheque.

Accused No. 1 M/s Ekam Onkar Traders and accused No. 4 Narinder Singh were discharged as they were never summoned by the trial Court.

Notice of accusation was served upon the petitioner to which he pleaded not guilty and claimed trial.

The complainant had examined three witnesses including himself.

Statement of accused under Section 313 Cr.P.C. was recorded. All the incriminating material was put to the accused, which he denied and pleaded innocence.

Learned trial Court after taking into consideration that the respondent-complainant had filed the complaint against accused No. 1 i.e. firm and accused No. 2 to 4, who are partners of the accused firm, alleging

that the accused firm took loan of Rs. 8.00 lacs on interest from the respondent-complainant and to discharge its liability, Kulwant Singh issued the cheque in question (Ex. C-1) which was dishonoured vide memo Ex. C2, convicted and sentenced the petitioner under Section 138 of the Act. In appeal conviction and sentence of the petitioner was upheld.

I have heard learned counsel for the parties and with their able assistance have gone through the record of the case.

Learned counsel for the petitioner has argued that the petitioner-accused was in jail with regard to some other case. Thus, the notice dated 29.1.2009 (Ex. C-4) was not served upon him. It is further argued that the legal notice was not served upon the firm. Thus, the firm was not party in the eyes of law and there were four accused before the trial Court i.e. firm and three partners but the trial Court discharged the firm and accused/partner Narinder Singh whereas the other accused/partner had died during trial and proceedings qua him were abated.

Moreover, the complainant has failed to prove that there was any existing debt. Learned counsel for the petitioner has relied on the judgment of the Apex Court in case of ***Jitendra Vora versus Bhavana Y. Shah and others (2015) 4 RCR (Criminal) 398*** wherein it has been held that the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or body corporate or even firm, prosecution proceedings can be initiated against the said drawer.

Learned counsel for the petitioner has further pointed out that the trial Court had discharged the firm and accused Narinder Singh as they were never summoned by the Court even though the firm was arraigned as an accused and only after summoning the firm it can thus be brought in the

dragnet on the touchstone of vicarious liability and relies on ***Aneeta Hada versus M/s Godfather Travels and Tours Pvt. Ltd. 2012(2) R.C.R. (Criminal) 854*** and ***Anil Gupta versus Star India Pvt. Ltd. and another 2014(3) R.C.R. (Criminal) 587.***

On the other hand, learned counsel for the respondent-complainant has argued that legal notices were sent to all the partners and the firm as well as notice which is Ex. C-4 and postal receipts are Ex. C-5 to Ex. C-7 were sent through registered post on correct address and the notices were served upon. Learned counsel has further argued that the petitioner and firm had an opportunity to make the payment within 15 days from receipt of summons from the Court to escape prosecution.

Learned counsel for the respondent-complainant has relied on the judgment of this Court in ***Subash Chander and others versus Ramesh Khanna 2019 (3) R.C.R. (Criminal) 992*** wherein it has been held that a legal notice to the partner automatically means notice to the partnership firm and is valid notice to the firm whereas in this case, the petitioner has approached High Court for the dismissal of the complaint on the ground that he could not have been summoned without impleading partnership firm as party. So this judgment will be of no help to the respondent.

Further reliance has been placed on the judgment of ***M/s S. K. G. Construction Company versus M/s Electromech Engineer and another 2012 (14) R.C.R. (Criminal) 942*** which deals with releasing the accused on probation which again is of no help to the respondent-complainant.

Learned counsel for the respondent has also relied upon another judgment of this Court in the case of ***Gian Chand versus M/s Malwa Traders 1995(2) R.C.R. (Criminal) 383*** which is also dealing with the

probation of the accused.

Taking into consideration that in the present case, though the firm was arraigned as accused No. 1 and Narinder Singh partner as accused No. 4 but were not served by the trial Court by giving notice of accusation, to my mind, the firm is the principal offender as per Section 141 of the Act and even after impleading the firm one of the accused in the complaint, finding cannot be recorded unless firm is tried and prosecuted with other partners and that apart, the liability of the individual as per the provision is vicarious and such culpability arises, *ipso facto* and *ipso jure*, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the firm, the principal entity, is prosecuted as accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the firm the principal offender whereas neither the firm nor another partner have been tried or prosecuted by the trial Court.

Moreover, no notice has been issued to the firm for giving an opportunity to make the payment so as to escape penal consequences, as the ingredients of Section 138 of the Act shows that despite service of notice, neither any payment was made nor other obligations, if any, were complied with within 15 days from the receipt of the notice.

No specific allegations are made against each and every partner as well as against the firm in the complaint.

Even to fix any partner for vicarious liability, it is to be pointed out in the complaint and to prove that the said partner is involved in the day-to-day function of the firm as it is a juristic person.

Resultantly, the revision is allowed. The impugned judgments/order of the Courts below, are set aside. Consequently, the petitioner is acquitted of the charge framed against him.

(HARNARESH SINGH GILL)
JUDGE

December 3rd, 2019
Gurpreet

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes