IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-2319-SB-2012(O&M)
Date of decision:-4.2.2020

Ravinder Paul

...Appellant

Versus

Ashwani Kumar

...Respondent

CORAM : HON'BLE MR. JUSTICE H.S. MADAAN

Present : Mr.Sandeep Jasuja, Advocate
for the appellant.

None for respondent.

****

H.S. MADAAN, J.

Briefly stated, facts of the case are that complainant Ravinder Paul son of Sh.Avinash Chander, resident of Dashmesh Nagari, Jalalabad (West), District Ferozepur had brought a complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) read with Section 420 IPC against accused Ashwani Kumar son of Babu Ram, resident of Juneja Street near old Telephone Exchange, Jalalabad(West), District Ferozepur. *Inter alia* in the complaint, the complainant contended that on account of friendly relations between him and the accused, the latter raised a friendly loan of Rs.20,000/- from the former for his domestic needs and promised to repay the loan within short period; that in order to discharge his liability towards aforesaid debts, the accused issued cheque No.074744 dated 26.5.2007 in the sum of Rs.20,000/- drawn from his account with State Bank of India, Branch Jalalabad in favour of the complainant giving an assurance at that time that on presentation, the cheque would be encashed; the complainant accordingly presented the cheque with Oriental Bank of Commerce, Branch Jalalabad on 26.5.2007 but the cheque was dishonoured due to insufficiency of funds in account of the accused; the complainant was informed accordingly vide memo dated 26.5.2007 from the banker of accused and banker of the complainant informed him on 29.5.2007; thereafter the complainant approached the accused with a request to make the payment of the cheque amount but he did not do so; the complainant accordingly served a legal notice upon the accused calling upon him to make the payment of the cheque amount within 15 days of receipt of notice but to no effect; ultimately the complainant brought the complaint in question against the accused in the Court of law.

After recording of preliminary evidence, accused was summoned to face trial and he accordingly put in appearance. Notice of accusation was served upon and the case was fixed for evidence of the complainant. The complainant led oral as well as documentary evidence. Thereafter, the statement of accused under Section 313 Cr.P.C. was recorded wherein all the incriminating material brought on file put to him but he denied the same stating that he had been falsely involved in this case. During his defence evidence, learned defence counsel had tendered in evidence the information dated 8.7.2010 regarding the complaints instituted by the complainant under Section 138 of the Act as Ex.D1.

After hearing arguments, the trial Magistrate dismissed the complaint and in the process acquitted the accused vide judgment dated 26.8.2010.

The main reason for dismissal of the complaint was that the complainant is a money lender and the alleged advance stated to have been made by him to the accused could not be considered to be out of the purview of the money lending business of the complainant. Ultimately learned trial Magistrate referring to judgment ***Anil Baburao Kataria Versus Purshottam Prabhakar Kawane, 2010(2) RCR 843*** by Bombay High Court concluded that upon strength of evidence on the parties, it is to be stated that there is a grave doubt on record regarding the requisite registration of the complainant under the Punjab Registration of Money Lender's Act, 1938, therefore benefit thereof is to be afforded to the accused. Accordingly, dishonouring of the cheque said to have been issued by the accused in favour of the complainant was not covered under the mischief contemplated by Section 138 of the Act as the debt/liability in the discharge of which the cheque is stated to have been issued, could not be stated to be a legally enforceable debt or liability as required for the attraction of provisions of Section 138 of the Act and the complainant was proved to be a money lender and the case of the complainant fell short of the requisite standard of proof on account of the fact that there is no evidence regarding the registration of the complainant under the Punjab Registration of Money-Lender's Act, 1938. Therefore, the case was not proved beyond reasonable doubt.

The complainant felt aggrieved by the said judgment and has approached this Court by way of filing of application seeking leave to appeal, which was allowed. Notice of the appeal was issued to the accused but he did not appear.

I have heard learned counsel for the appellant/complainant besides going through the record.

Learned counsel for the appellant/complainant has contended that the trial Magistrate clearly fell in error in drawing an inference that the complainant was a money lender practicing money lending without licence and the complaint of the complainant has mainly dismissed for the said reason. According to him, firstly the complainant is not a money lender, therefore, there was no question of his requiring any licence to practice money lending. Secondly, even it is taken that complainant had been engaged in avocation of money lending, then it may be a relevant factor in a civil suit but not in a complaint under Section 138 of the Act. In support of his that contention, he has referred to authorities. The first being ***Jupiter Brokerage Services Ltd. Versus Ektara Exports Pvt. Ltd. & Ors.2015(37) RCR(Criminal)775***, wherein it was observed that money lending without licence is not totally barred on prohibited by the Bengal Money-Lender's Act, 1940 and as per presumption under Section 139 of Negotiable Instruments Act unless contrary is proved holder of cheque has received cheque for discharge in whole or in part of a debt or liability, though such presumption is rebuttable.

He has further referred to judgment ***Dhanjit Singh Nanda Versus State and Anr., 2009(5)RCR(Criminal) 462*** by Delhi High Court wherein dealing with a complaint case under Section 138 of the Act where the complainant had lend a sum of Rs.10 lakhs to the accused, who had issued cheque by way of repayment but cheque was dishonoured, in criminal complaint filed by complainant and summoning order issued, the accused had sought quashment of summoning on the ground that complainant was not a registered money lender and not legally entitled to recover the loan amount, that objection was brushed aside and not accepted, rather the accused was imposed with cost of Rs.50,000/-.

In ***Samarendra Nath Das Versus Supriyo Maitra, 2006(4)AICLR 337***, a Single Bench of Calcutta High Court had observed that when in a complaint under Sections 138 and 139 of the Negotiable Instruments Act, 1881, an application for discharge of accused was moved for alleged violation of provisions of 138 of the Act, therein it was observed that the alleged violation of provisions of Income Tax Act and Contract Act and Money Lenders Act does not bar continuation of proceedings under Section 138 of the said Act.

In ***V.Satyanarayana Versus M/s Sandeep Enterprises, 2005(1)RCR(Criminal) 441*** by a Division Bench of Karnataka High Court while dealing with interpretation of money lender, it was observed that money lending must be carrying on as profession and if the money lending was not with profit motive or not carried on as profession, he or she does not become a money lender; a stray instance of lending money does not show carrying on the business of money lending as profession or with profit motive.

The trial Court had dismissed the complaint mainly for the reason that the complainant was a money lender, lending money without licence. The Magistrate had not gone into the merits of the case as to whether the necessary ingredients of Section 138 of the Act were established or not. Therefore, the impugned judgment dismissing the complaint for the reason of complainant having been found to be a professional money lender practicing money lending without licence is not sustainable, in view of the judgments referred to learned counsel for the appellant/complainant. The judgment is accordingly set aside by way of acceptance of the appeal and the matter is remanded to learned Magistrate for giving a fresh decision on merits after hearing learned counsel for the parties.

Since the accused had not turned up despite service, learned trial Magistrate shall issue notice to such accused, whereas the appellant/complainant is directed to appear before the trial Magistrate on 19.2.2020.

(H.S.MADAAN)
JUDGE

4.2.2020
Brij

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No