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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-2075- MA-2018(O&M)
Date of Decision: 09.11.2022

DIDAR SINGH

..... Petitioner

Versus

BHAJAN SINGH

..... Respondent

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present : Mr. B.R. Gupta, Advocate for the appellant.

JAGMOHAN BANSAL, J. (Oral)
CRM-34382-2018

Application is for condonation of delay of 43 days in filing the appeal.

Keeping in view the averments made in the application and in view of the fact that there is nominal delay of 43 days in filing, the application is allowed and delay is condoned.

CRM stands disposed of.

CRM-A-2075- MA-2018

1. The appellant through instant appeal alongwith an application under Section 378 (4) of Cr.P.C. is seeking leave to appeal and setting aside of judgment dated 16.05.2018 passed by JMIC, Nabha whereby complaint filed under Section 138 of Negotiable Instruments Act, 1881 has been dismissed on the ground that the complainant/appellant is unable to show his financial capacity to lend a sum of Rs.10 lakhs especially when complainant is a tailor and he has admitted that his monthly income is Rs.5,000/- per month.

2. The fact emerging from record and arguments of learned counsel for the appellant which are necessary for the adjudication of present appeal are that the appellant filed a complaint under Section 138 of Negotiable Instruments Act, 1881 against Bhajan Singh son of Ramji Das alleging that respondent has borrowed a sum of Rs.10 lakhs from appellant and in discharge of his liability respondent has issued a cheque dated 03.06.2016 which was dishonored on the ground of 'insufficient funds' on being presented by the appellant. The cheque was again presented on 16.06.2016 which also came to be dishonored on the ground of 'insufficient funds'.

3. Learned Trial Court has dismissed complaint of the appellant on the ground that appellant is a tailor and he is not an income tax assessee and his monthly income is Rs.5,000/- per month, thus, it cannot be believed that he had capacity to lend a sum of Rs.10 lakhs to the respondent. Learned Trial Court has rejected evidence led by appellant whereby appellant attempted to show that on account of family partition, he has received a sum of Rs.8,75,000/- from his family members. Learned Trial Court has held that the appellant has failed to lead evidence of his mother and brothers to being on record that there was family partition and a sum of Rs.8,75,000/- was received by the appellant in the said partition/settlement.

4. Learned counsel for the appellant vehemently contended that respondent/complainant has not disputed the fact of signature on the cheque in question and he has not further led any evidence to indicate that money was not borrowed by him. In the absence of any evidence on the part of the respondent that signatures on the cheque are forged and

fabricated, the burden was upon the respondent to disclose that he has not borrowed money and there was no legally enforceable liability. There was presumption in favour of appellant/complainant, thus, Trial Court has wrongly dismissed complaint of the appellant. The question of financial capability of complainant could not be looked into and learned Trial Court going beyond the issues framed has passed impugned order.

5. Learned counsel in support of his contention relied upon judgment of Hon'ble Supreme Court in **Criminal Appeal No.1497 of 2022** titled as **'Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel and another'** whereby Hon'ble Supreme Court has upheld the judgment passed by Himachal Pradesh High Court. The relevant extracts of the judgment read as under:

“9. The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to

him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

10. We have gone through the nature of the evidence in this case. We also bear in mind the fact that three Courts have held in favour of the respondent. In this regard we bear in mind that though it is true that reply notice was sent by the appellant, therein he admits the case of the respondent that the parties were having a cordial relationship. In the reply notice the appellant has not set up any case that the respondent did not have the financial capacity to advance the loan. In fact even we notice that there is no reference to the loss of the cheque book or signed cheque leaf. No complaint was given of the loss of the cheque book or the signed cheque leaf either to the police or to the bank. In the evidence of DW5, the son of the appellant, the version given is that on 5.10.2011, PW5 had left home with the cheque book of the appellant which had a cheque signed by the appellant for withdrawing money, if needed in the absence of the appellant. He set up the version that he drove away an unowned cow. in the field. Thereafter, while sitting in the bus he saw the cheque book was not with him. He further deposed that since his father was not at home he could not tell him about the incident and got engrossed in his study and forgot the

incident. In his statement under Section 313 Cr.PC given on 10.01.2013, appellant has taken the stand that he informed the Bank. It is relevant to notice that DW5 has further deposed that when the appellant received the notice he asked him about the cheque book and then he told him about the incident of the loss of cheque book. Still, at the time when the reply notice was sent, the case is not set up about the loss of cheque book and about the cheque relied upon by the respondent being one which is brought into existence using the lost signed cheque leaf. We have already noticed that there is no evidence to establish that the appellant had informed the Bank about the loss of the cheque book containing blank cheque. In fact, In the statement under Section 313 Cr.PC. appellant had stated that this cheque book containing a blank cheque was lost. Appellant has no case that the signature on the cheque in question was not put by him.”

6. This Court has scrutinized the record and heard arguments of learned counsel for the appellant. This Court is of the considered opinion that appeal is bereft of merit and deserves to be dismissed.

7. From the perusal of record and argument of learned counsel for the appellant, the conceded position emerging from record is that appellant is a tailor, his monthly income is not more than Rs.5,000/- per month, he is not an income tax assessee, he is a married person having two school going children, the alleged money was lend in cash and in one go. It is not case of the appellant that a sum of Rs.10 lakhs which is not a small amount was given in different installments whereas case of appellant is that the entire amount was handed over on 02.05.2016.

8. Section 138 of Negotiable Instruments Act, creates criminal liability in case of dishonored of cheque. Section 138 categorically provides that cheque in question must be issued in discharge of, whole or in part, of any debt or other liability. Relevant extracts of Section 118, 138 and 139 of Negotiable Instruments Act read as:

***“118. Presumptions as to negotiable instruments.**—Until the contrary is proved, the following presumptions shall be made:*

(a)of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b)as to date: that every negotiable instrument bearing a date was made or drawn on such date;

(c)as to time of acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d)as to time of transfer: that every transfer of negotiable instrument was made before its maturity;

(e)as to order of indorsement: that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f)as to stamp: that a lost promissory note, bill of exchange or cheque was duly stamped;

(g)that holder is a holder in due course: that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden

of proving that the holder is a holder in due course lies upon him.

”138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

- (a) the cheque has been presented to the bank within a period of six months*from the date on which it is drawn or within the period of its validity, whichever is earlier;*
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque,[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.*

Explanation.—For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.

The period of “six months” mentioned in S. 138 proviso (a) remains unchanged as there has been no amendment in this regard. However, RBI vide Circular RBI/2011-12/251 DBOD AML BC No. 47/14.01.001/2011-12, dated 4-11-2011, in exercise of the power under S. 35-A of the Banking Regulation Act, 1949 has changed the default period within which a cheque may be presented for payment, from a period of six months from the date of the instrument, to a period of only three months from such date, w.e.f. 1-4-2012. The operative part of the said Circular reads:

“Accordingly, in exercise of the powers conferred by Section 35-A of the Banking Regulation Act, 1949, Reserve Bank hereby directs that w.e.f. April 1, 2012, banks should not make payment of cheques/drafts/pay orders/banker's cheques bearing that date or any subsequent date, if they are presented beyond the period of three months from the date of such instrument.”

The result is that the impact of the above RBI Circular is covered by the latter part of proviso (a), namely, “or within the period of its validity, whichever is earlier;”. The complete RBI circular dt. 4-11-2011 is given below at p. 42.

139. Presumption in favour of holder.—*It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.*

9. Section 269 SS of Income Tax Act, 1961 proscribes acceptance of loan and deposits above Rs.20,000/- in cash. Section 269 SS of Income Tax Act reads as:

“269-SS. Mode of taking or accepting certain loans,

deposits and specified sum.—No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, if,—

- (a) the amount of such loan or deposit or specified sum or the aggregate amount of such loan, deposit and specified sum; or
 - (b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or
 - (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b),
- is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by,—

- (a) the Government;
- (b) any banking company, post office savings bank or co-operative bank;
- (c) any corporation established by a Central, State or Provincial Act;
- (d) any Government company as defined in clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013);
- (e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

Provided further that the provisions of this section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or

specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act.

Explanation.— For the purposes of this section,—

- (i) “banking company” means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in Section 51 of that Act;*
- (ii) “co-operative bank” shall have the same meaning as assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);*
- (iii) “loan or deposit” means loan or deposit of money;*
- (iv) “specified sum” means any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place.”*

10. The parties in the present case are neither agriculturists nor fall in any exclusive category, thus, mandate of Section 269 SS of Income Tax Act is squarely applicable to case in hand. Section 271 D of Income Tax Act further creates penal liability, in case of violation of Section 269 SS of Income Tax Act.

11. In ***John K. Abraham Vs. Simon C. Abraham And Another (2014) 2 SCC 236***, the Hon'ble Supreme Court observed that in order to draw presumption under Section 118 read with Section 139 of the Negotiable Instruments Act, burden lies on the complainant to show:

- (i) that he had the requisite funds for advancing the sum of money/loan in question to the accused;
- (ii) that the issuance of cheque by accused in support of repayment of money advanced was true and ;

(iii) that the accused was bound to make payment as had been agreed while issuing cheque in favour of the complainant. The judgment convicting the accused was set aside by holding the same to be perverse.

The relevant extracts of the judgment read as under:-

'6. When we examine the case of the respondent-complainant as projected before the learned Chief Judicial Magistrate and the material evidence placed before the trial Court, we find that the trial Court had noted certain vital defects in the case of the respondent-complainant. Such defects noted by the learned Chief Judicial Magistrate were as under:

6.1 Though the respondent as PW-1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs.1,50,000/- was paid to him.

6.2 As regards the source for advancing the sum of Rs.1,50,000/-, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs.50,000/-, which he availed by way of loan from the co-operative society of the college where he was employed. Though the respondent stated before the Court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the Court below.

6.3 In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs.1,50,000/-.

6.4 According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque

was not in the handwriting of the appellant and that he (complainant) wrote the same.

6.5 The respondent also stated that the amount in words was written by him.

6.6 The trial Court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the accused appellant.

9. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.

10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent-complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross- examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him.

11. We find that the various defects in the evidence of respondent, as noted by the trial Court, which we have set out in paragraph 7 of the judgment, were simply brushed aside by the High Court without assigning any valid reason. Such a serious lacuna in the evidence of the complainant, which strikes at the root of a complaint under Section 138, having been noted by the learned trial Judge, which factor was failed to be examined by the High Court while reversing the judgment of the trial Court, in our considered opinion would vitiate the ultimate conclusion reached by it. In effect, the conclusion of the learned Judge of the High Court would amount to a perverse one and, therefore, the said judgment of the High Court cannot be sustained.'

12. A two Judge Bench of Hon'ble Supreme Court in **Criminal Appeal No.1497 of 2022** titled as **'Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel and another'** vide judgment dated 11.10.2022 while relying upon its earlier judgment in **'Indus Airways Private Limited Vs. Magnum Aviation Private Limited' and 'Sunil Todi Vs. State of Gujarat'** has held that rigor of Section 138 can be invoked if there is legally enforceable debt or liability and cheque must be issued in discharge of whole or part legally enforceable liability.

13. Hon'ble Supreme Court in a catena of judgments while dealing with scope and powers of the appellate court in dealing with an appeal against an order of acquittal has elucidated:

(i) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion,

both on questions of fact and of law.

(iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(iv) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

14. The appellant is seeking special leave to appeal against judgment and order whereby trial court has acquitted the respondent. It is settled law that granting of special leave to appeal against acquittal is a discretionary power. However, such power has to be exercised judiciously and the Courts are not permitted to exercise the same at whims or fancies and arbitrarily. Arbitrariness has always been held

anathema to exercise of any power.

15. In the case in hand, the appellant has concededly and allegedly handed over a substantial amount of Rs.10 lakhs in cash. The appellant is a tailor and his income is Rs.5,000/- per month, thus, there is always presumption that he could not be having such a huge amount in cash. The appellant to support his contention that he has got aforesaid amount in the family settlement stands nullified as soon as the date of alleged settlement is considered which is 23.12.2015.

16. From the perusal of alleged family settlement which was shown during the course of arguments, it is quite evident that a sum of Rs.8,75,000/- was received by appellant on the date of settlement i.e. 23.12.2015. The appellant is earning Rs.5,000/- per month and he is having two school going children, thus, there is no scope of saving. Even if it is believed that appellant was having Rs.8,75,000/- on 23.12.2015, there is no possibility of depositing Rs.1,25,000/- in 6 months. The appellant has contended that he has handed over a sum of Rs.10 lakhs to respondent on 02.05.2016. It is hard to believe that appellant was holding aforesaid amount in cash at residence for such a long period i.e. about 6 months.

17. Learned Trial Court has considered a plethora of judgments of Hon'ble Supreme Court as well as this Court while considering that complainant has failed to prove his capacity to advance loan to the accused. Learned Trial Court has also concluded that family settlement appears to be prepared after filing of complaint and just to vindicate financial ability of the appellant.

18. In view of the above narrated facts, having regard to the

findings recorded by trial court including accepted legal position, this Court is of the considered opinion that in the case at hand there is no infirmity or irregularity in the impugned order whereby trial Court has acquitted the respondent. Accordingly, this Court fully agrees with the finding recorded by trial Court. The impugned judgment and order being speaking, based upon correct appreciation of facts, applicable law & judicial precedents and well-reasoned needs no interference of this Court. Therefore, request of the applicant seeking permission special leave to appeal is hereby rejected. In the result, application seeking special leave to appeal and consequently, appeal is dismissed.

(JAGMOHAN BANSAL)

JUDGE

09.11.2022

Ali

Whether speaking/reasoned	Yes/No
<i>Whether Reportable</i>	<i>Yes/No</i>