IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-AS-46-2022

Reserved on : 04.04.2022

Pronounced on :20.04.2022

H.C. Kalra .....Appellant

Versus

Subhash Chander and another .....Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Manoj Pundir, Advocate,
for the appellant.
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<u>VINOD S. BHARDWAJ , J.</u>

The instant appeal has been directed against the judgment dated 01.03.2017 passed by the Judicial Magistrate 1st Class, Yamuna Nagar at Jagadhri, whereby the complaint filed by the complainant-appellant against respondent No.1-accused for the offence under Section 138 of the Negotiable Instruments Act, 1881(for short the N.I. Act") has been dismissed and respondent No.1-accused has been acquitted of the notice of accusation served upon him.

Briefly, the facts of the case as emanate from the record are that the appellant-complainant claimed to be having visiting terms/relations with respondent No.1-accused and his family, who was doing the work as a tailor and that wife of the appellant-complainant used to get her clothes stitched from the accused. On account of such relations, respondent No.1-accused started seeking financial assistance from the appellant-complainant as well as his wife who was working as a Principal in Janki Ji College of Education. The appellant-complainant is presently practicing as an Advocate and he has three sons who are doctors and thus he is having good reputation and financial resources. It is alleged that respondent No.1-accused had issued cheque bearing No.593210 dated 25.07.2006 for a sum of Rs.30,000/- to the appellant-complainant in discharge of an existing liability. The said cheque was taken back after respondent No.1-accused had repaid the entire amount. Thereafter, respondent No.1-accused borrowed some more money and issued cheque bearing No.593211 dated 15.09.2009 amounting to Rs.60,000/-. Even the said amount was returned after three months and the original cheque was taken back. Respondent No.1-accused thereafter further borrowed some money for performing the marriage of his sister and issued cheque bearing No.597891 dated 02.09.2012 for a sum of Rs.1,00,000/-. He availed a further financial assistance of Rs.40,000/- on 13.12.2012 and issued cheque bearing No.593211 dated 31.03.2013 for a sum of Rs.40,000/- and also borrowed some more money for the extension of his business. In this view, till March 2013, respondent No.1-accused was under an obligation to repay a sum of Rs.2,00,000/-. Accordingly, a cheque bearing No.564007 dated 20.06.2013 for the sum of Rs.2,00,000/- drawn on ICICI Bank, Branch Yamuna Nagar was issued by respondent No.1-accused in discharge of his legally enforceable liability. Respondent No.1-accused, however, requested the appellant-complainant not to present the said cheque as having spent money on the marriage of his sister, he required some more time to repay the same. Accordingly, cheque bearing No.564008 dated 20.09.2015 for a sum of Rs.2,00,000/- drawn at ICICI Bank, Branch Yamuna Nagar was issued in favour of the appellant-complainant. The said cheque on presentation was dishonoured by the bank with the remarks "**funds insufficient and account dormant".** Thereafter, legal notice dated 06.10.2015 was served upon respondent No.1-accused and upon failure on the part of respondent No.1-accused to make the payment, complaint under Section 138 of the N.I. Act was instituted.

The appellant-complainant himself appeared in support of his case and exhibited various documents in support of his case including the earlier cheques. He also examined the Head Cashier of the State Bank of Patiala as CW2 to prove the statement of account of his wife. He also examined Sanjay Choudhary, Branch Manager of the Punjab National Bank, Yamuna Nagar as CW3; Rajinder Singh from YES Bank, Yamuna Nagar as CW4 and one Harsh from ICICI Bank, Yamuna Nagar as CW5 to prove the copy of cheque book maintenance record.

Upon consideration of the evidence and rival submissions advance by the respective parties, Judicial Magistrate 1st Class, Yamuna Nagar held that the appellant-complainant could not prove legally enforceable liability and that the appellant-complainant despite having stated in his cross-examination that an affidavit in writing was executed by respondent No.1-accused admitting his total outstanding liability of Rs.2,00,000/-, however, the said document was not produced in evidence. It was also noticed that a copy of the stamp paper dated 13.12.2012 which was produced as Ex.C9 showed that the recital of the amount of Rs.2,00,000/- has been typed over and above the admitted signatures of respondent No.1-accused. The same established that the affidavit/receipt in question was typed on an already signed blank stamp paper. The probable defence advanced by respondent No.1-accused was accepted by Judicial Magistrate 1st Class, Yamuna Nagar.

Learned counsel appearing on behalf of the appellant-complainant has assailed the judgment and has vehemently argued that the judgment passed by the trial Court suffers from infirmity and it fails to appreciate the overwhelming evidence establishing a history of money transactions between the appellant-complainant and respondent No.1-accused. It is further submitted that the execution of the cheque and signatures of respondent No.1-accused on the said cheque were not in dispute and as such presumption under Section 118 read with Section 139 of the N.I. Act thereafter would come into play. The burden would thus fall on respondent No.1-accused to establish that he was not guilty of the offence punishable under Section 138 of the N.I. Act. Learned counsel has also argued that the cheque in question was issued in discharge of pre-existing liability.

I have heard learned counsel for the appellant-complainant and gone through the impugned judgment passed by Judicial Magistrate 1st Class, Yamuna Nagar with his able assistance.

The trial Court has noticed that respondent No.1-accused has got recorded in his statement under Section 313 Cr.P.C., wherein the respondent No.1-accused admitted to the fact of borrowing an amount of Rs.50,000/- from the appellant-complainant on interest @ 5% per month and stated that at the said time, he had given two blank signed cheques and blank signed stamp papers to the appellant-complainant as a security. He further submits that he was regularly paying interest to the appellant-complainant and that he had never borrowed an amount of Rs.2,00,000/- from the appellant-complainant. There was thus no occasion or reason for respondent No.1-accused to have issued any cheque in discharge of any liability. It was stated that the appellant-complainant has misused the blank signed security cheque. It was also noticed by the Judicial Magistrate that the appellant-complainant claimed to have given financial assistance of Rs.30,000/-, which was repaid by respondent No.1-accused after two months. It is also contended that the financial assistance of Rs.60,000/- availed by respondent No.1-accused in the year 2009 was also repaid. The dispute pertains to an amount of Rs.1,00,000/- purportedly advanced in the month of September 2012 and a sum of Rs.40,000/- borrowed in December 2012. In discharge of liability thereof, cheque to the tune of Rs.2,00,000/- was claimed to have been issued by respondent No.1-accused. The said claim of the appellant-complainant was denied by respondent No.1-accused. It is noticed that the claim of the appellant-complainant was that the said cheque was never presented for encashment at the request of the appellant-complainant and finally cheque bearing No.564008 dated 20.09.2015, Ex.C3 drawn on the said bank was issued. Even though the appellant-complainant had stated in his cross-examination that respondent No.1-accused had executed a writing admitting his total outstanding borrowings of Rs.2,00,000/- on a stamp paper, however, the stamp papers/affidavit in original were not produced by the appellant-complainant during his cross-examination. Subsequently, a copy of the stamp paper dated 13.12.2012 was tendered as Ex.C9 without producing the original thereof. From examination of the said copy of the affidavit/stamp paper, Ex.C9, it was evident that the receipt of amount of Rs.2,00,000/- had been typed over and above the signatures of respondent No.1-accused which supplemented the defence of respondent No.1-accused that his blank signed stamp paper has been misused to forge acknowledgment and liability against the amount of cheque. It was thus held by the trial Court that the suspicious circumstances surrounded the primary document that would have established existence of a legally enforceable liability. This rather supports the case of respondent No.1-accused probablising the defence of respondent No.1-accused that the appellant-complainant had taken blank signed cheques and blank signed stamp papers and has misused the same. There is no evidence insofar as payment of Rs.2,00,000/- to the respondent No.1-accused is concerned and there is a specific denial by respondent No.1-accused of having borrowed the said amount in question.

The presumption under Section 118 read with Section 139 of the N.I. Act is a rebuttal presumption. An accused is only required to create existence of a circumstance as is likely to probablise his defence and is not mandated to bring evidence in his own defence what to speak of appearing as a defence witness himself. Upon creation of such suspicion and bringing on record such a probability, the burden of establishing legally enforceable debt and pre-existing liability shall fall upon the appellant-complainant. It would thus be necessary for the appellant-complainant to establish that he had actually advanced the amount in question and was entitled to claim the same and that the cheque in question had been actually issued towards discharge of the said liability.

Even though, the financial capacity of the appellant-complainant is duly established, however, he has failed to establish having advanced an amount of Rs.2,00,000/- as claimed by him. An inference is sought to be drawn against the respondent No.1-accused by the appellant-complainant on the strength of the prior commercial transactions between the parties although only one transaction is admitted by respondent No.1-accused. The appellant-complainant admits that the amounts in question were repaid in cash. Otherwise as well, existence of old transaction is merely a circumstantial evidence to support a claim; provided there is some evidence also to show existence of the transactions in question, a mere old transaction does not *ipso facto* discharge the appellant-complainant with an obligation to prove the existence of the transaction in relation whereto proceedings have been initiated. The same being a question of fact, has to be proved by bringing on record positive and affirmative evidence and not merely on the basis of surrounding circumstances to invoke the statutory presumption under Section 118 read with Section 139 of the N.I. Act, 1881. Such circumstances are only most likely to probablise the existence of such a relationship, however, the burden on the prosecution is to prove its case beyond reasonable doubt and not to just establish probabilities about existence of a liability. Pre-existing liability has, however, not been proved by any cogent, convincing and reliable evidence. It is well-settled that suspicion, however, would not substitute the requirement of proof.

The following discrepancies and deficiencies in the case of appellant-complainant are thus noticed on consideration of the evidence of the prosecution:-

(a) The appellant-complainant has not been able to establish advancing of the amount of Rs.2,00,000/- as claimed by him.

(b) There is no written document got executed by the appellant-complainant in support of the transactions claimed to have been entered between the appellant-complainant and respondent No.1-accused.

(c) The conduct of the appellant-complainant in the present case is not supporting prudence of an ordinary person while advancing such huge amount and does not inspire enough confidence considering the fact that the appellant-complainant is a practicing Advocate, his wife is an educated woman serving as a Principal in a College and he has three sons who are doctors.

(d) That the original of the affidavit/writing claimed to have been executed by respondent No.1-accused was not proved by the appellant-complainant.

(e) That it was also noticed that the amount of Rs.2,00,000/- as mentioned in the purported writing executed by the respondent No.1-accused is a poor writing above the signatures of the respondent No.1-accused, thus leading to an inference that the undertaking/affidavit acknowledging the liability of Rs.2,00,000/- was written on a pre-signed blank paper.

(f) Even though the financial transactions are stated to have taken place at different times over a prolonged stretch of time, however, none of the transactions had any witnesses to it.

(g) The respondent No.1-accused denied having borrowed the amount as claimed and specifically stated that his blank signed documents and cheques have been misused.

(h) There is no valid explanation as to why a person with such academic background would prefer transaction in cash instead of preferring a transaction through a legally admissible mode.

(i) That the appellant-complainant submits that the respondent No.1-accused had issued cheque bearing No.593210 dated

25.07.2006 drawn on Punjab National Bank for a sum of Rs.30,000/- and further issued cheque bearing No.593211 drawn on Punjab National Bank on 15.09.2009 for a sum of Rs.60,000/-. Both the said cheques are in quick succession, however, the same are stated to have been issued over a gap of more three years in the said two transactions. It appears highly improbable that the respondent No.1-accused would not have used any cheque for a period of more than three years between these transactions.

(j) That insofar as the transaction of Rs.2,00,000/- which is a subject matter of dispute in the present complaint is concerned, cheque bearing No.564007 drawn on ICICI Bank is stated to have been issued on 20.06.2013 and the 2nd cheque in lieu thereof bearing No.564008 drawn on ICICI Bank is issued on 20.09.2015 which is again after a gap of more than two years and three months. It would be highly improbable that the cheques in question would be in immediate succession and that respondent No.1-accused did not use any cheque leaf in the said cheque-book during the interregnum period of more than two years. It rather supports the probability of the respondent No.1-accused that the blank cheque had been handed over to the appellant-complainant and that such blank cheque has been misused by the appellant-complainant.

Taking note of the discrepancies and deficiencies noticed above, I find that there is no illegality or infirmity in the impugned judgment dated 01.03.2017 passed by Judicial Magistrate 1st Class, Yamuna Nagar at Jagadhri. It also does not suffer from any bias, mis-appreciation of any evidence or that the conclusion drawn by the trial Court is unsustainable. The appellate Court would normally not interfere with a conclusion drawn by the Court below unless such conclusions are based upon unreasonable and improbable appreciation of evidence brought on record and are perverse or suffer from legal or jurisdictional infirmity.

The instant appeal is accordingly dismissed, being devoid of any merit.

April 20, 2022 **(VINOD S. BHARDWAJ)**
seema **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No