IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-4886-2016
Date of decision : 31.10.2022

Narender Kumar ...... Petitioner

versus

Gulshan Kumar ...... Respondent

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Parveen Kumar, Advocate for
Mr. Abhimanyu Singh, Advocate
for the petitioner.

Mr. Ankur Lal, Advocate
for the respondent.

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PANKAJ JAIN, J. (Oral)

Complainant is in revision aggrieved of the judgment passed by the Additional Sessions Judge, Gurgaon dated 22.08.2016, whereby the respondent has been acquitted in proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I. Act').

2. In the complaint filed by the petitioner, it was claimed that owing to family relations, respondent-accused took friendly loan from the complainant on different dates arranging from August 2012 to October 2012. In total, the amount lent by the complainant was Rs.14 lakhs. Despite repeated requests, the accused failed to repay the loan and consequently a meeting was conveyed wherein common friend and relatives participated. In such meeting, respondent admitted his liability and in discharge thereof, he issued a cheque in dispute for an amount of Rs.14 lakhs. On presentation, cheque was dishonoured for the reason 'funds insufficient' vide written memo dated 15.10.2013. The complainant served statutory demand notice upon the respondent dated

08.11.2013 through registered A.D. After respondent-accused failed to respond to the same and did not meet the demand raised by the complainant, the complaint in question was preferred.

3. Trial Court after analysing the evidence found that the complainant had successfully discharged the initial burden. The signatures of the accused on cheque leaf were not disputed and thus it held respondent-accused guilty of offence punishable under Section 138 of the N.I. Act. Pertinent it is to note here that the only defence discernible from the cross-examination of the complainant raised by the accused at the stage of trial is that the cheque was handed over to the complainant as a security while availaing loan of Rs.1 lakh. Accused tried to prove that the said loan of Rs.1 lakh was paid back, however somehow the cheque in question remained in possession of the complainant. The same is being now misused to falsely implicate him in the present proceedings. Trial Court dealt with such defence raised by the accused held as under:-

> "xx xx xx
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> 17. Perusal of the file as well as cross-examination shown that the complainant has discharged the initial burden by placing on record the documents necessary for proceedings under section 138 NI Act. The parties are not stranger to each other, rather accused is admittedly tenant of complainant since 2003. The execution of the cheque in question is admitted. The cheque has been proved to be that of the accused. The dishonour of the cheque is proved. Accused in his statement under section 313 C.P.C has stated that he had taken a loan of Rs 1 lakh from complainant, which he has retuned. The defence of accused is that the complainant has misused his earlier cheque which was handed over to complainant security of earlier loan. Thus,

the complainant is in wrongful possession of the cheque in question. If the complainant is in wrongful possession of the cheque in question, the accused could have lodged any kind of protest regarding the same. Perusal of the file shows that no such protest has ever been lodged, till date. Also, if the earlier loan was paid the accused should have taken steps to demand his cheque back, or lodged any kind of protest or at least stopped payment of the cheque through his bankers, which accused has vehemently failed to do. It is specially pleaded by complainant that accused gave the cheque in question in presence of common friends (Panchayat). But the accused has failed to rebut the said fact also. Not even a question or suggestion has been put to complainant regarding the factum of handing over the cheque by accused to complainant before the said Panchayat. Moreover, the accused failed to raise any defence during the recording of statement under section 313 Cr.P.C. the presumption under section 139 does not stand rebutted by merely saying that cheque was not given for a liability, the onus is on the accused. Denial by the accused is not sufficient to shift the burden. The accused has to prove by leading cogent evidence. Complainant is not obliged to establish the liability as in a suit claiming recovery of money. The complainant had stood in the witness box, but nothing concrete could be culled out in the cross examination of complainant.

18. If the accused is victim of fraud, then he must have filed any complaint before court of law or before the police but that has not been done which shows that this plea has been taken just to avoid the liability arising out of this case. It is also settled preposition of law that fraud is required to be proved like any other guilt in a criminal case and mere allegations of fraud does not discharge the onus having placed upon such a person who alleges so. Such a law was

> laid down by our own Hon'ble High Court in Satwinder Singh Va. Swaran Singh another 2008 (4) RCR (Civil) 434 (P&H). Perusal of the file shows that no such protest has ever been lodged till date. If that was the case the accused could have got the payment of the cheque in question stopped by his bankers, which has not been done in the present case. Hence, these arguments of defence counsel are not acceptable.
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> 19. The argument that the complainant had no source of funds to advance the amount of Rs.14 Lacs is also not convincing as the complainant in his cross-examination has clearly stated that the source of funds were compensation of land acquisition. Complainant has specifically stated that he had withdrawn the said amount from his bank accounts with Allahabad Bank and Gurgaon Gramin Bank. He has even given the account numbers of that accounts. He had also brought the pass books of the accounts, although the same has been not placed on record. CW2 who is a bank officer of Allahabad Bank has stated that during the said period an amount of Rs.3.66 Lacs were withdrawn from the said account. Perusal of account statement of complainant which is Ex. CW2/A also shown that complainant is having huge credit balance much more than the loan amount, which the accused has vehemently failed to do so. Thus, the arguments of learned counsel for accused are not convincing on this point also."

4. On conviction, the judgment was assailed by the respondent-accused before the Appellate Court. Appellate Court vide impugned judgment has set aside the judgment of order of sentence passed by the trial Court and acquitted the respondent. While upsetting the judgment passed by the trial Court, Appellate Court has held that:-

> "xx xx xx

The appellant is not the relative of the complainant and as per the case of the complainant he is a tenant on his shop. The complainant further says that the said loan was interest free and the appellant was to pay it back by March, 2013. It is difficult to digest the story of the complainant that he would grant interest free loan (friendly loan) of huge amount of ₹14 lacs to the appellant who is only a tenant on his premises and that too without any loan document or promissory note. No person with ordinary prudence would do that. Moreover under Section 269 SS of Income Tax Act 1961 ordinarily any advance beyond ₹20,000/- is given by way of Account Payee Cheque. Still further, the complainant has not even produced his Income Tax Returns to show that he had disclosed the said fact of advancing of loan of huge amount of ₹14 lacs to the accused. In <u>Krishna Janardhan Bhat Versus Dattatrayat G.Hegde 2008(4) SCC 54</u> the Hon'ble Supreme Court held that ordinarily in terms of section 269 SS of the Income Tax Act, any advance taken by way of any loan of more than ₹20,000 was to be made by way of an account payee cheque only. In B. Girish Versus S.Ramaiah 2011(4) CCC 310 (Karnataka), it was held as under:-

> "When a substantial amount of ₹ 50,000/- was lent, it is reasonable to expect that the creditor would insist on the debtor to execute some document evidencing such transaction. Absence of any such documentary evidence would create great amount of doubt about the genuineness of the transaction. Section 269 SS of the Income Tax Act, 1961 insists that all transactions involving ₹ 20,000 and above, should be through 'account payee cheques'. It is not the case of the complainant that the loan amount was paid by way of account payee cheque and thus there is a violation of Section 269-SS of the Income Tax Act. There is no

material on record to show that there was any agreement for payment of interest. If the complainant had lent ₹ 50,000/- by borrowing the same from other sources, under normal circumstances, there would have been certainly an agreement for payment of interest between the accused and the complainant. There is absolutely no evidence on record in this regard. Absence of any such agreement for payment of interest between them also would create great amount of doubt about the transaction. All these circumstances, as rightly pointed out by the learned Magistrate are sufficient to hold that the defence of the accused is highly probable and that the accused has rebutted the presumption under Section 139 of the N.I. Act."

In John K. John Versus Tom Varghese & Anr. 2007(4) Criminal Court Cases 974 (SC) the Hon'ble Supreme Court held as under:-

"It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has

> arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken."

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

6. Trite it is that once the signatures on the cheque leaf are admitted, presumption under Section 139 of the Act does pitch in. However, the said presumption is rebuttable. At the same time in order to rebut the said presumption, accused is required to raise probable defence. Though in order to substantiate the same, he can either lead evidence in defence or can well rely upon the evidence adduced by the complainant. Reference can be made to three Judge's Bench in ***Rangappa Vs. Sri Mohan, (2010) 11 SCC 441***, wherein it has been held that :-

> "27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.
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> 28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a

> persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

7. Thus in order to rebut the statutory presumption accused is required to raise a defence though only probable.

8. When analysed in the light of the settled proposition of law, this Court is of the considered opinion that the accused failed to raise any defence during trial and thus it cannot be held that the presumption enumerated under Section 139 of the Act was validly rebutted by the accused.

9. Appellate Court pittedly erred in relying upon '***Krishna Janardhan Bhat vs. Dattatraya G. Hedge 2008(4) SCC 54'*** to hold that in absence of resources to advance loan, the liability qua the cheque in question can be held to be not illegally enforceable. Complainant was explicit in proving source of fund i.e. the compensation received on account of loan acquisition. Admittedly, such compensation is not amenable to the provisions of Income Tax Act, 1961 and thus there was no occassion for the complainant to prove said source by producing his income tax returns.

10. Apart from that the Appellate Court has failed to meet with the reasoning adopted by the trial Court while convicting the respondent-accused and has set aside the judgment of conviction without upsetting the findings

recorded by the trial Court. No cogent reasoning has been afforded by the Appellate Court for acquitting the respondent-accused. Consequently, the impugned judgment dated 22.08.2016 cannot be sustained and is, thus, set aside.

11. In view of the aforesaid discussion, the present petition is allowed. The impugned order passed by the Lower Appellate Court acquitting the respondent is set aside. The matter is remanded back to the the Appellate Court to decide the matter afresh in accordance with law, after hearing both the parties.

12. The parties are ordered to appear before the Lower Appellate Court on 30.11.2022.

12. Ordered accordingly.

(PANKAJ JAIN)
JUDGE

31.10.2022
Dinesh

Whether speaking/reasoned Yes

Whether Reportable : No