

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

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**CRA-AS-132-2022 (O&M)
Date of decision: 12.07.2022**

KULWINDER SINGH

....Appellant(s)

Versus

AJAY KAMBOJ

...Respondent(s)

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

Present : Mr. G.B.S. Gill, Advocate
for the appellant.

VINOD S. BHARDWAJ. J. (ORAL)

The present appeal has been preferred against the judgment dated 11.09.2018 passed by the Chief Judicial Magistrate, Sirsa in case titled as 'Kulwinder Singh Vs Ajay Kamboj' instituted under Section 138 of the Negotiable Instruments Act, 1881.

Briefly the case of the complainant is to the effect that the complainant had entered into an agreement in the year 2012 and that the terms and conditions of such an agreement had been incorporated in the agreement dated 03.09.2012. Five pairs of Emu birds had been provided to the complainant and an amount of Rs.2,25,000/- was paid to the accused as costs of the aforesaid birds. As per the terms and conditions of the agreement, the accused was to purchase the eggs of Emu birds from the complainant at the rate of Rs.1200/- per egg. The complainant had supplied eggs to the accused, however, no payment had been made by the accused in breach of the terms and conditions of the same. Accordingly, the appellant-complainant was entitled to claim Rs.3.50 lakhs from the respondent-accused and a cheque bearing No.056549 dated 01.12.2013 was issued by the respondent-accused for the aforesaid amount of Rs.3.50 lakhs towards discharge of the said liability. Upon the cheque being presented to the

bank, the same was dishonoured with remarks 'funds insufficient', whereupon legal notice was sent to the respondent-accused upon failure of the respondent to remit the payment and the complaint in question was instituted.

Respondent-accused was summoned to face prosecution. Notice of accusation was served, whereupon the following witnesses were examined by the appellant

PW1 Shri Sudesh Bhoriya, Branch Manager

PW2 Shri Ankit Verma, Clerk

PW3 Shri Kulwinder Singh (complainant)

PW4 Shri Khem Chand

Besides this the complainant also tendered following documents:-

Ex.P1 Agreement

Ex.P2 Original cheque

Ex. PW1/A Cheque return memo

Ex.PW2/A Cheque return memo

Ex.PW2/B to

Ex. PW2/F Copies of account statement

Ex.PW4/A Copy of legal notice

Ex.PW4/B Postal receipt

Ex.PW4/C Registered envelope

Mark-A Receipt of Happy Emu Farm, Dabwali

Thereafter, complainant closed his evidence vide a statement recorded separately. Statement of the accused under Section 313 of the Code of Criminal Procedure was recorded, in which all the incriminatory evidence brought on record against him was put to him, to which he denied in toto and claimed false implication.

Upon consideration of the evidence adduced by the respective parties, the Chief Judicial Magistrate, Sirsa recorded as under:-

9. The case of complainant is that he entered into an agreement with the accused to supply the Emu by the accused to him and in that transaction, an amount of Rs.3,50,000/- was due against the accused. It is alleged that in discharge of said liability, accused issued cheque Ex.CI/Ex.P2. which was dishonoured and accused failed to pay the amount in spite of legal notice served upon him. In this regard, it is pertinent to mention that in order to be successful for the complaint under Section 138 of Negotiable Instrument Act, it is to be proved by complainant that cheque was issued by the accused in discharge of the legal liability to pay. In this regard, complainant Kulwinder Singh has examined himself as PW3. however, he failed to prove that in the business transaction between him and accused, some amount was due and cheque was issued in discharge of that liability. In his cross-examination, he has stated that he has entered into Emu farm business in September, 2016 and that business was continue for the next one year, whereas. alleged transaction is of year 2012. He has not mentioned, neither in the complaint nor in his affidavit Ex.PW3/A how many eggs of Emu have been supplied to the accused. He has produced two documents i.e. Mark-A and Ex.PI (agreement) dated 03.09.2012 and signatures. over both differ. He has not produced any document which proves that any transaction of supplying Emu taken place between complainant and accused in which the cheque amount was due against the accused. By way of the agreement Ex.Pl. the liability of accused to pay cheque amount is not proved on record. In agreement Ex.Pl. it has been mentioned that complainant has paid the amount of Rs.2.25.000/- to accused, however, there is no receipt of the same. It is not proved on record that said amount was ever paid to the accused. In agreement Ex.P1 the liability of accused

to pay the above said amount is not mentioned nor the liability to pay the cheque amount has been mentioned. A careful perusal of Ex.P1 agreement dated 03.09.2012 revealed that it has been witnessed by witnesses Trilok son of Shri Sukhdev Raj and Naib Singh son of Shri Jamir ingh, however, said witnesses have not been examined by the complainant to prove the legal liability of accused to pay the cheque amount. Further, PW1 Shri Sudesh Bhoria, Branc Manager and Shri Ankit Verma, Clerk have deposed about issuing of cheque return memos Ex.PW1/A and Ex.PW2/A.

10. In such circumstances it cannot be ruled out that accused issued the cheque Ex.P2 as cheque and handed over the a security same to complainant. Hon'ble Supreme Court of India in authority titled M/s Kumar Experts Vs. M/s Sharma Carpets. 2009(1) BCR 624. has held that complainant did not produce any books of account or stock register maintained by him in the course of his regular business or any acknowledgement for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him. Complainant thus failed to establish his case under Section 138. Conviction set aside.

It was further held in the case that to rebut the statutory presumptions, accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. Something which is probable has to be brought on record forgetting the burden of proof shifted to the complainant.

A pointed query was raised to the learned counsel for the appellant-complainant as to whether any document establishing the existence of liability in the form of supply of eggs as claimed by the petitioner has been produced on record and the reply is the negative. It is thus evident that the appellant-complainant has not been able to lead any evidence to show that the cheque in

question had been issued towards the discharge of a pre-existence liability and is solely placing reliance on the agreement dated 03.09.2012. The said agreement can at best be a corroborative evidence to establish a legal relationship amongst the parties, however, the same would not establish that the supply pursuant to the said agreement had in fact been made. Once the entire case of the appellant-complainant is based upon an approval of the liability towards supply of the eggs, the relevant evidence which was required to be produced ought to have substantiated and established that the eggs had been actually supplied.

In the absence of any such evidence, there can be no presumption of existence of that liability and legally enforceable debt and the conclusion so drawn by the Chief Judicial Magistrate, Sirsa is a possible view. The same cannot be said to be perverse or based upon misreading of the evidence adduced on record.

In view of the above, I do not find any infirmity in the judgment passed by the Chief Judicial Magistrate, Sirsa. The present appeal is dismissed as being without any merit.

(VINOD S. BHARDWAJ)
JUDGE

July 12, 2022

S.Sharma(syr)

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>