IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No.220 CRR-3103-2018 (O&M)
Date of decision : 9.12.2022

Naresh Kumar
.....Petitioner

VERSUS

Hari Chand Sharma
..... Respondent

CRR-3105-2018 (O&M)

Naresh Kumar
.....Petitioner

VERSUS

Hari Chand Sharma
..... Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Vivek Singla, Advocate for the petitioner

Mr.Vaibhav Narang, Advocate for the respondent

AMAN CHAUDHARY, J.

This order will dispose of the petitions bearing CRR-3103-2018 and CRR-3105-2018, wherein a common challenge is to the order dated 23.07.2018 passed by the learned Additional Sessions Judge, Amritsar, dismissing the appeal of the petitioner filed against the judgment of the trial Court, whereby the petitioner has been convicted and sentenced to undergo RI for one year and to pay fine of compensation to the tune of Rs.2 lakh, in default of payment of compensation to further undergo RI for a period of one month for the offence punishable under Section 138 of the Negotiable

Instruments Act, 1881 (for short 'NI Act'). For the purpose of deciding the present cases, the facts are being extracted from CRR-3103-2018.

Briefly put, complainant being on friendly terms with accused-petitioner had advanced a loan of Rs.4 lakh on different occasions with a promise to return the same, as and when demanded by the complainant-respondent. On having raised the said demand in the month of August, 2014, the accused–petitioner in order to discharge his enforceable debt, issued a cheque in favour of the complainant- respondent, which on presentation dishonoured by the bank with the remarks “insufficient funds” vide memo dated 11.08.2014. Thereafter, a legal notice dated 19.8.2014 was sent to the petitioner, but he failed to make good the payment. On the basis of the said allegations, the complaint was filed against the accused-petitioner.

Finding prima facie evidence, the petitioners were summoned to face the trial. They were served with a notice of accusation, to which they pleaded not guilty and claimed trial.

To prove its complaint, the complainant has examined himself as CW1, MK Kak, Senior Manager, PNB as CW2 and Pawan Maini, Clerk, Bank of India as CW3.

On closing of the complainant's evidence, statement of the accused was recorded under Section 313 Cr.P.C. All the incriminating material appearing in the complaint was put to the accused. However, he denied the allegations and claimed innocence but closed his defence without leading any evidence.

After hearing the learned counsel for the parties and going through the evidence brought on record, the learned trial Court came to the conclusion that the complainant has successfully proved the case, bringing home guilt against the accused. Accordingly, the accused- petitioner was convicted and sentenced as mentioned in para no.1 above.

Aggrieved, convict-petitioner filed appeals, which were dismissed by the learned Additional Sessions Judge, Amritsar vide impugned judgment dated 23.07.2018.

Hence, the present revision petitions.

Learned counsel for the petitioner would submit that the Courts below have erroneously allowed the complaint. The cheque in question was obtained by him on the pretext that he wanted to take a loan from the bank and as per the Rules and Regulations of the bank one cheque of a person who is already operating an account there was required for the purpose of guarantee. The main thrust of his argument is regarding the fact that the complainant-respondent was earning a meager amount to Rs.4,000 to 4500/- per month, as is evident from order dated 18.12.2012, passed in an application filed by his wife under Section 125 Cr.P.C., thus, it was not plausible that such a person could loan a huge amount of Rs. 8,00,000/- to the accused-petitioner. It is also his submission that it was a pre-planned conspiracy of the complainant-respondent against the petitioner, on account of which, the complaint was filed by him. The trial Court erred to consider the contradictory statements of the respondent-complainant, inasmuch as he himself in the evidence adduced by him in proceedings under Section 125 Cr.P.C. taken out at the hands of his wife had stated that the land in the village was in the ownership of his father, from which he had no income, whereas at the time of filing of the complaint in question he had stated that he had got approximately Rs.3,50,000/-, from the land of his father.

Learned counsel for the respondent on the other hand would submit that the petitioner had admitted his signatures on chqeue, thus, as per Section 118 (A) and Section 139 of NI Act, a presumption of the cheque having been issued in discharge of legally enforceable debt has arisen, which the petitioner was unable to rebut. Therefore, the Courts below had rightly concluded on the basis of the evidence led by the complainant-respondent and the documents produced by him in evidence that the loan was advanced by him to the petitioner, as his cross examination the complainant-respondent had rightly given his version that his father was the owner of a small piece of land in village Barida, Mathura (UP) and by way of a family settlement between complainant-respondent and his brother, after the death of their father, an amount of Rs.3.5 lakh to Rs.3.75 lakh was received by him, which formed part of the loan amount, to which no questions or suggestions were put by the accused-petitioner. Thus, from the above it could be presumed that his version remained uncontroverted. It is his further submission that had the allegation of the accused-petitioner with regard to the cheque in question having been misused, been correct, a copy of FIR/DRR, if any, lodged by him against the complainant-respondent would have been placed on record, which was not so been done. In fact, the accused- petitioner could have even got the 'payment stopped' by intimating his bank to not to honour the cheque, on the ground of it having been misued by the complainant-respondent but the cheque in question was dishonoured on the ground of 'insufficiency of funds'. Thus, the accused petitioner had failed to rebut the presumption of issuance of cheque, in question in discharge of legally enforceable debt or liability, but on the other hand, as he remained silent with regard to the same. It was prayed that the present petition be dismissed having no merit.

Heard.

Trial Court vide judgment dated 9.5.2016 having found the version of accused petitioner regarding misuse of cheque by the complainant not to be probable and the accused having failed to rebut the presumption under Section 139 of NI Act allowed the complaint and convicted the petitioner to undergo RI of one year alongwith compensation of Rs.2 lakh to the complainant –respondent, which came to be unsuccessfully challenged by him before the Appellate Court, which vide judgment dated 23.07.2018 affirmed the same finding, on the ground that the defence as raised by the petitioner was not probable.

The Appellate Court also recorded that the fact that the accused-petitioner, was declared proclaimed offender and the trial was concluded on 09.05.2016, after he had surrendered on 19.03.2015, but still he did not bother to pay the cheque amount to the complainant-respondent.

The petitioner had at the initial stage of the proceedings though expressed his willingness to pay an amount of Rs.1.25 lakh to the complainant-respondent in order to show his bona fide, which was thus made the basis by this Court to grant interim bail to him vide order dated 16.11.2018, to enable him to arrange the funds, as is apparent from the said order, yet, as is conceded by the learned counsel for the petitioner that till date the petitioner has not complied with his undertaking given on his own volition.

It is axiomatic that the signatures on the cheque have not been disputed by the petitioner. The only defence taken by him was that the earning of complainant-respondent being less, it was not believable that he had the financial capacity to lend the amount to the petitioner.

Apropos, it would be apposite to refer to the findings of the trial Court on the said issue, which read thus:-

> "As once the signatures on the cheque are admitted by the accused, there is a presumption as envisaged u/s.139 of N.I.Act that the cheque has been issued in due discharge of legal debt and liability. Before going into the rival contentions of both the counsel, it is pertinent to mention here that when the complainant was cross-examined by the ld.counsel for accused on 2.9.2015 the complainant had stated that he is working in M/s.Shivam Embroidery at Putlighar and drawing a salary of Rs.4000/- to Rs.5000/- per month from the said concern. However, the complainant during his evidence has placed on record copies of his account statements as Ex.CW2/1 and Ex.CW2/2. Perusal of both the account statements reveals that complainant was maintaining heavy account balance in both the accounts. Further it is also the version of the complainant that payment to the accused was made through self cheque which has been duly corroborated by him by examining CW2 M.K.Kak, Senior Manager, Punjab National Bank, Batala Road,Amritsar and CW3 Pawan Maini, Clerk, Bank of India, Kashmir Avenue, Amritsar. Thus, from the perusal of documents on record and testimony of accused, it is clear that though the complainant has admitted during his cross-examination that he is drawing Rs.4000/- to Rs.5000/- per month. But he has duly proved that the payment has been received by the accused through self cheques and the remaining amount was paid by him in cash, it cannot be said that the complainant is not financially capable of advancing the loan amount. Moreover, the complainant during his cross- examination had stated that he has received an amount of Rs.3.5 Lakh to Rs.3.75 Lakh in family settlement between him and his brother after the death of his father. It was also the version of the complainant that his father was owner of a small piece of land in village Bardia, Mathura (U.P.). No question or suggestions were put by the ld.counsel for accused from which it can be presumed that the accused has controverted the said version of the complainant. Further perusal of the documents Ex.D1 to Ex.D7 relied upon by the ld.counsel for accused reveals that it has come on record that father of the complainant was owner of small land in village Bardia, Mathura in U.P. Further the judgments relied upon by the ld.counsel for accused are not applicable to the facts of the present case as the complainant has successfully proved his financial capacity to advance loan to the accused."

The said finding has been affirmed by the Appellate Court holding as under:-

> "19. So far as contention of learned counsel for the appellant that the complainant has no financial capacity to advance such heavy loan as he was earning only Rs.4,000/- / Rs.5000/- per month is concerned, the same has no merit. The complainant has proved certified copies of statement of accounts Ex.CW.2/1 and Ex.CW.2/2 which shows that complainant was having sufficient amount in his bank accounts to advance such a loan amount covered by cheque in question. The accused in his defence has tendered the documents Ex.D1 to Ex.D8, perusal of which shows that Harish Kumar Sharma filed a petition under Section 25 of the Guardian and Ward Act against his wife Seema Sharma, for custody of his minor son which was dismissed by the Court of Sh.Yukti Goyal, Additional Civil Judge (Senior Division)-cum-Guaridan Judge, Amritsar, vide judgment dated 16.7.2014. His wife Seema Sharma for herself and on behalf of her minor son filed a petition under Section 125 Cr.P.C against Harish Kumar, which was allowed by the Court of Sh.Amardeep Singh, the then Judicial Magistrate Ist Class, Amritsar vide order dated 18.12.2012, but the production of the said documents does not at all prove the defence version put forth by the accused. The learned trial Court while relying upon the citation "Mohanan Versus Bibhukumar 2003 (4) RCR (Criminal) 6" has rightly observed that contention of learned defence counsel that complainant has not been able to prove his financial capacity to give loan is without merits."

Pertinently, a reference to the dictum of Hon'ble The Supreme Court of India, in the cases of **Rangappa vs. Sri Mohan (**2010) 11 SCC 441, **K.Bhaskaran vs. Sankaran Vaidhyan Balan and another** (1999) 7 SCC 510 and **Triyambak S.Hegde vs Sripad** 2021 SCC OnLine SC 788, is made, wherein it has been held that once issuance of a cheque and signature hereon are admitted, presumption as envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption.

It may be accentuated that indubitably the signatures on the cheque in question in the present case, have not been denied by the petitioner, which as per the law enunciated by Hon'ble The Supreme Court of India leads to presumption that the said cheque has been issued in discharge of legally enforceable debt, by virtue of Sections 118(A) and 139 of NI Act.

Hon'ble The Supreme Court of India in the case of **Basalingappa vs. Mudibasappa** (2019) 5 SCC 418 has summarised the principles pertaining to the presumptions and the onus of proof which read thus:-

> "25. We having noticed the ratio laid down by this Court in the above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in the following manner: 25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
> 25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.
> 25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
> 25.4. That it is not necessary for the accused to come in the witness box in support of his defence. Section 139 imposed an evidentiary burden and not a persuasive burden.
> 25.5. It is not necessary for the accused to come in the witness box to support his defence."

It can be adduced from the foregoing, that the presumptions raised under Section 118(b) and Section 139 of the Act are rebuttable. A reverse onus is cast on the accused, who has to establish a probable defence on the standard of preponderance of probabilities to prove that either there was no legally enforceable debtor other liability.

Kerala High Court in the case of **Mohanan vs. Bibhukumar** 2003(4) RCR (Crl.) 6, had held that the crucial question is whether the cheque has been issued for the discharge of a legally enforceable debt/ liability. In a prosecution under Section 138 of the Negotiable Instruments Act the complainant is not obliged to establish the liability as in a suit claiming recovery of money. That is why the presumption under section 139 has been incorporated. Otherwise every criminal Court will have to first do the work of a Civil Court to identify the liability and the quantum. Admission of signature in a document goes a long way in the proof of the document. Once the document is proved the innocuous incongruities in details will not persuade a Court to reject the complainant's version nor shall it persuade the Court to hold that the burden under section 139 has been discharged.

The solitary defence as raised by the petitioner is with regard to the complainant-respondent not having the financial capacity to advance loan, which cannot be the basis to dismiss the complaint, the crucial question in proceedings under Section 138 NI Act being whether the cheque had been issued to discharge the legally enforceable debt/ liability, a presumption in favour of the complainant, though rebuttable at the hands of the accused, which in the present case, the petitioner has lamentably failed to rebut.

In the case of **Smt. Uma vs. Sri M Mahendra Kumar**, Criminal Revision Petition No.1175 of 2009, decided on 11.06.2012, Karnataka High Court had held that the lower appellate Court had embarked on an inquiry as to the financial capacity of the petitioner, which was not warranted and the judgment of acquittal was set aside.

In view of the aforesaid exposition of law, this Court finds no illegality or perversity in the judgments impugned, warranting any intervention. Accordingly, these revision petitions sans merit and are hereby dismissed.

A photocopy of the judgment be placed on the file of the connected case.

9.12.2022 **(AMAN CHAUDHARY)**
gsv **JUDGE**

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No