IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

230 **CRM-A-527-2020 (O&M)**
Judgment reserved on: 16.05.2023
Judgment Pronounced on: 21.07.2023

M/S HIMANSHU ENTERPRISES
… Petitioner

VERSUS

MURLI KUMAR
... Respondents

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL.

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Present: Mr. Sangram Singh Saron, Advocate and
Mr. Shoryaveer Vashist, Advocate
for the applicant-appellant.

Mr. B.K. Majoka, Advocate
for the respondent.

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SANDEEP MOUDGIL. J.

CRMs-10144 and 10146-2020

Allowed as prayed for.

MAIN CASE

By virtue of instant application under Section 378(4) of the Cr.P.C., the applicant-appellant has sought leave to prefer an appeal against the judgment dated 28.11.2019 passed by the Judicial Magistrate Ist Class, Gurugram, whereby the respondent-accused has been acquitted of the notice of accusation served upon him under Section 138 of the N.I. Act, 1881.

Brief facts of the present case are that the complainant i.e. applicant-appellant is alleged to have granted a friendly loan of

Rs.5,00,000/- to the respondent-accused in the month of February, 2017, which he promised to repay within a period of one month. In order to discharge his liability, the respondent-accused issued a cheque bearing No.85635 dated 20.03.2017 for an amount of Rs.5,00,000/- in favour of the of the applicant-appellant. Upon presentation of the same before the banker of the applicant-appellant, the same was dishonoured due to the reason "Funds Insufficient" vide return memo dated 17.04.2017. Thereupon, the applicant-appellant served a legal notice dated 09.05.2023 sent on 11.05.2023 to the respondent-accused, however, the respondent-accused chose not to pay the amount in question. Hence the complaint was filed by the applicant-appellant against the respondent-accused for commission of offence under Section 138 of the N.I. Act. Respondent-accused was summoned and trial conducted. Upon consideration of the evidence led by both sides, finally, the respondent-accused was acquitted by the trial Court vide the impugned judgment.

Learned counsel for the applicant-appellant submits that the impugned judgment is based upon surmises and conjectures and has been passed without appreciating the cogent and convincing evidence brought on record by the applicant-appellant. It is further submitted that the learned trial Court has wrongly held that the complainant i.e. applicant-appellant had no financial capacity to lend an amount of Rs.5,00,000/-; whereas the applicant-appellant has specifically proved on record that he is running a business shop under the name and style of M/s Himanshu enterprises. As such, the finding of the trial Court in this regard is totally baseless and is not sustainable in the eyes of law. The complainant has specifically examined himself as CW-1 and his uncle Suresh Kumar as

CW-2. It is specific stand of the complainant that he himself had Rs.3,20,000/- and he arranged the remaining amount of Rs.1,80,000/- from his uncle Suresh Kumar (CW-2). His uncle has also corroborated the version of the complainant CW-1 i.e. the applicant-appellant herein. As such, the financial capacity of the complainant is very much proved on record and hence, the impugned judgment dated 28.11.2019 deserves to be set aside and the respondent-accused is liable tobe punished accordingly.

Learned counsel for the respondent, on the other hand, vehemently argued that the impugned judgment does not suffer from any illegality, impropriety or any error or law. The respondent-accused has been rightly acquitted by the learned trial Court and the impugned judgment is liable to be upheld and the present application serves to be dismissed.

I have heard the learned counsel for the respective parties and have gone through the documents and record available on case file with their able assistance.

The only basis of acquittal of the respondent-accused is the financial capacity of the applicant-appellant which the complainant is stated to have not been able to prove on record. Perusal of the impugned judgment shows that the applicant-appellant has admitted in his evidence that he had given the amount form the account of his shop, which is under the proprietorship of his father. It is further mentioned in the said judgment that the uncle of the applicant-appellant (CW-2) has also been examined, who deposed that he had given the amount of Rs.1,80,000/- to applicant-appellant to be further given to the respondent-accused. Now the counsel for applicant-appellant submits that the trial Court has wrongly observed that the shop in question is under the proprietorship of father of applicant-appellant; whereas the same is under the sole proprietorship of the applicant-appellant being named as M/s Himanshu Enterprises. However, surprisingly, apart from the oral submission, no documentary proof with regard to the proprietorship of the said shop has been brought on record. It is well settled law that mere bald statements do not take the place of proof. Hence, the finding of the learned trial Court in his regard cannot be stated to be illegal. Further, as far as the testimony of CW-2 Suresh Kumar (so called uncle of the complainant) is concerned, that too is not based on any documentary evidence. Merely stating that he had given the amount of Rs.1,80,000/- to the complainant does prove the actual capacity of the said Suresh Kumar. Furthermore, it is stand of the applicant-appellant that the alleged transaction of Rs.5,00,000/- was in cash but again to the dismay of this Court, there is no written proof or receipt in this regard. How can a person give such a huge amount without any writing work/written proof. It is quite improbable to assume especially, when it is the stand of the applicant-appellant that the amount was given from the account of his shop. No account books or ledger accounts have been produced before the Court, which could proof his financial capacity. Hence, the complainant has utterly failed to prove his as well as his uncle's financial capacity.

On the other, it is the specific stand of the respondent-accused that during a fight between him and the applicant-appellant which took place on 12.04.2017, the applicant-appellant snatched certain items from his including then cheque in question. It is the further stand of the respondent-accused that he never took any amount from the applicant-appellant and never issued any cheque to discharge any liability. In view of the facts and circumstance mentioned above, especially in the light of the fact that complainant has failed to proof his financial capacity, the defence so taken by the respondent-accused appears to be probable and justified. Hence, it can be said that the respondent-accused has been sufficiently able to rebut the presumption drawn against him under Section 139 of the N.I. Act.

The application in hand, being devoid of any merit, is hereby dismissed.

(SANDEEP MOUDGIL)
JUDGE

21st July, 2023
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Whether speaking/reasoned *:Yes/No*
Whether reportable *: Yes/No*