

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

226

CRM-A-1004-MA-2016 (O&M)
Date of decision: 24.05.2023

Sudhir Yadav

....Applicant/Appellant

Versus

Deepanshu Gogia

...Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Kunal Dawar, Advocate for the applicant

AMAN CHAUDHARY. J.

1. The present application for leave to appeal has been filed against the impugned judgment dated 07.04.2016 passed by learned Judicial Magistrate 1st Class, Gurgaon, whereby the accused-respondent has been acquitted under Section 138 of the Negotiable Instruments Act, 1881.

2. The facts of the case are that in the month of April, 2013, the respondent took a friendly loan of Rs. 10 lakh from the appellant for a period of eighteen months. On completion of the said period, he made a part payment of Rs. 4 lakh, handed over one cheque bearing no. 238825 dated 31.01.2015, amounting to Rs. 4 lakh and assured payment of remaining amount, i.e., Rs. 2 lakh in cash. When the said cheque was presented to the bank, it was got dishonoured with an endorsement "Insufficient Funds" vide return memo dated 03.02.2015. Thereafter, a legal notice was issued on 25.02.2015 through a registered post, since the respondent had committed an offence punishable under Section 138 of NI Act.

3. Notice of accusation was served upon the respondent, to which he pleaded not guilty and claimed trial. To prove his case, the complainant, himself appeared as CWI, also tendered his affidavit Ex. CW1/A and thereby reiterated all the facts as mentioned in the complaint. In documentary evidence, he relied upon the documents i.e. dishonoured cheque, return memo and postal receipts.

4. The statement of the accused was recorded under section 313 Cr.P.C., wherein he denied all the incriminating evidence appeared against him and pleaded false implication. In defence, he did not examine any witness.

5. After scrutinising the evidence led by the parties, the learned trial Court acquitted the accused-respondent, as the complainant-applicant could not establish his guilt.

6. Hence, the present application seeking leave to appeal.

7. Learned counsel for the applicant submits that the learned trial Court has failed to appreciate the fact that the cheque in question was duly signed by the accused-respondent, who was the signatory to the same. He further contends that undue importance has been given by the trial Court to the fact that the complainant had in his cross-examination admitted the receipt of Rs. 4 lakh and on the other hand not properly appreciated that the execution of the cheque was not even in dispute.

8. Heard.

9. It would be profitable to refer to the judgment in the case of **Basalingappa vs. Mudibasappa** (2019) 5 SCC 418, wherein Hon'ble The Supreme Court had laid down the following principles governing Sections 118(a)

and 139 of NI Act:

“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 the 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.”

10. Invoking the provisions of Section 138 of NI Act, pertaining to the dishonour of cheques, the onerous burden of substantiating a legal liability and establishing that the cheque was issued in discharge thereof lies on the complainant. Once this obligation is acknowledged, the onus shifts on to the accused to counter the case of the complainant with compelling evidence. If the same is successfully rebutted by casting doubt on the existence of consideration, the burden reverts to the complainant, who must substantiate it as an irrefutable fact. Failure to discharge this burden shall render him ineligible for any redress.

11. The trial Court, while acquitting the accused-respondent, had observed that, “Hence now the burden to rebut this presumption lies upon the accused, though the burden to rebut the presumption is that of preponderance of probabilities. Further it is also pertinent to mention here that to rebut the

presumption arose in favour of the complainant, the accused can rely upon the evidence produced by the complainant also. As far as the case in hand is concerned, as per complainant he himself borrowed an amount of Rs. 6 lacs from his cousin Sushant and Sushant got that money by sale of some property but to the contrary neither Sushant got examined by the complainant nor any such sale deed has been produced upon the case file and hence the source of the amount to the tune of Rs. 6 lacs remain unproved upon the case file. Further the complainant CW1 in his cross-examination himself admitted the receiving of Rs. 4 lacs from the accused. Further he also admitted the fact that the date as well as the amount has been filled in by him in the cheque in dispute. This fact corroborates the defence of the accused to the effect that the accused handed over the blank signed cheque to the complainant. Further while an amount of Rs. 6 lacs was remained left to be paid by the accused, It is quite un-understandable that as to why the complainant filled in the amount of Rs. 4 lacs in place of 6 lacs. It also corroborates the defence of the accused to the effect that he has only borrowed an amount of Rs. 4 lacs from the complainant and the repayment of the same has been admitted by the complainant himself. Moreover the accused has also sent reply to the legal notice Ex. D1 which is also inconsonance with the defence taken by the accused upon the case file and hence it shows that since very beginning the defence of the accused is very much consistent and as well as has also been corroborated by the evidence as has come upon the case file. Hence in view of the discussion made above, to my mind the accused has been able to rebut the presumption arose in favour of the cheque holder i.e. the complainant in due

course. To my mind the non proving of the source of advancing the amount to the tune of Rs. 6 lacs as well as omission to get examined Sushant from whom the complainant allegedly borrowed the amount and the alleged only eye witness Pardeep who was the friend of the complainant himself, is sufficient to rebut the presumption arose in favour of the complainant.”

12. It is apposite to refer to the judgment of Hon’ble The Supreme Court in **N. Vijayakumar v. State of Tamil Nadu** (2021) 3 SCC 687, wherein it was held thus;

“20.....Under [Section 378](#) CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in [Chandrappa v. State of Karnataka](#), (2007) 4 SCC 415 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) _xx xx xx

(3) xx xx xx

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by

the trial court.”

13. Learned counsel for the applicant has not been able to point out any glaring defect in the procedure or that a patent error has been committed in ignorance of law by the trial Court, which has resulted in flagrant miscarriage of justice. There was not even an iota of evidence present against the respondent, which could lead to his conviction. From a close reading of the impugned judgment, no other view is possible.

14. In light of the above discussion, this Court finds no illegality or perversity in the impugned judgment passed by the trial Court warranting any interference. As such, the present application for leave to appeal is hereby dismissed being devoid of merit.

(AMAN CHAUDHARY)
JUDGE

24.05.2023
Mehak

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