

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**226.****CRM-A No.1631-MA of 2016 (O&M)****Date of Decision:17.11.2023**

Surender

... Applicant/Appellant

Versus

Jaibir Singh

... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRARPresent: Mr. Ashok Arora, Advocate
for the applicant.

HARPREET SINGH BRAR, J. (ORAL)

1. The present application has been preferred by the applicant-complainant under Section 378 (4) of the Criminal Procedure Code, 1973 against the judgment dated 12.07.2016 passed by the learned Judicial Magistrate 1st Class, Hisar whereby the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act) was dismissed and respondent- accused was acquitted.

2. In brief, the facts are that the respondent-accused borrowed an amount of ₹1,25,000/- from the applicant-complainant and in discharge of his debt liability, issued cheque bearing No.000005 dated 20.08.2013 drawn on Bank of Baroda, Hisar in favour of the applicant-complainant with assurance of encashment of the same on presentation. However, on presentation of the cheque, the same was dishonoured with remarks 'insufficient funds' vide memo dated 28.08.2013. A legal notice dated 19.09.2013 was issued to the respondent-accused for payment of amount due within a period of 15 days, which was not done by him and therefore, having left with no other option, complaint in question was filed.

3. The applicant-complainant adduced preliminary evidence on the basis of which the respondent-accused was summoned to face trial for an offence

punishable under Section 138 of the NI Act and on his appearance, he was served with the notice of accusation under the aforesaid Section, to which he pleaded not guilty and claimed trial. Statement of the respondent accused was recorded under Section 313 Cr.P.C. and all incriminating evidence was put to him to which he pleaded false implication and claimed innocence. After appreciating the entire evidence on record, the learned trial Court acquitted the respondent-accused.

4. Learned counsel for the applicant-complainant contends that the judgment passed by the trial Court is based on conjectures and surmises. The trial Court has gravely erred in acquitting respondent-accused when he himself had issued the cheque in question in admission to his legal liability. It is further contended that the presumption as laid down under Sections 118 and 139 of the NI Act is in favour of the holder of the cheque and in the absence of any rebuttal evidence, the accused is liable to be convicted. Moreover, the respondent-accused did not step into the witness box to rebut the presumption. It is also contended that since the issuance of cheque and signatures on it were not disputed by the respondent-accused, non-mentioning of date, month and year qua advancement of friendly loan in the complaint or affidavit of the applicant-complainant has no relevance. Further, the learned trial Court has wrongly concluded that the actual debt liability was of ₹59,000/- and the cheque in question was given by the respondent-accused as security for the same.

5. Having heard the counsel appearing for the applicant-complainant and after perusing the record of the case with his able assistance, this Court finds no merit in the arguments raised by him.

6. The NI Act creates a presumption in favour of the prosecution in terms of Section 118 and 139. The same are reproduced as under:

“Section 118: Presumptions as to negotiable instruments.

Until the contrary is proved, the following presumptions shall be made:--

(a) of consideration:-- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

Section 139: Presumption in favour of holder.

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

7. It is no longer *res integra* that these presumptions are of a rebuttable nature.

While, the onus to prove the guilt of the accused rests on the prosecution, once the facts required to form the basis of these presumptions in law exist, the Court is duty bound to draw the conclusion as stipulated by the statute. However, the accused is not barred from presenting evidence in his defence. The accused is only required to raise a probable defence casting a doubt on the existence of consideration which he can do by adducing direct evidence, circumstantial evidence or even on the basis of presumptions of law or fact. Furthermore, if he can explain the circumstances that would indicate his innocence, it is not mandatory for the accused to adduce evidence as the material available on record itself can be looked at from a new perspective. Thereafter, the burden shifts back to the prosecution to reply to and negate the rebuttal made by the accused. The standard of proof in an offence under the NI Act is that of civil proceedings i.e. preponderance of probabilities. Since the burden of proof on the accused is not as heavy as the prosecution, he is not required to disprove the entire prosecution case.

8. A two Judge bench of the Hon’ble Supreme Court in ***M.S. Narayana Menon alial Mani v. State of Kerala and Anr 2006(6) SCC 39***, speaking through Justice S.B. Sinha, observed as follows:

“45. In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 Supreme Court 1316], Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is

withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating :

"...Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

9. The applicant-complainant in his cross-examination admitted that his earning capacity was ₹12,000/- per month and therefore, he was unable to do any saving. The applicant-complainant failed to disclose the source from where he advanced friendly loan of ₹1,25,000/- nor brought on record income tax returns filed by him to prove his financial capability. In fact, a specific defence was taken by the respondent-accused while recording his statement under Section 313 Cr.P.C. that the actual loan amount was ₹59,000/- which he had already paid and the cheque in question was given as security for the same, which was misused by the applicant-complainant. The applicant-complainant had placed on record documents Mark A and Mark B, according to which, the applicant-complainant had received Rs.50,000/- on 02.03.2013 and Rs.4,000/- on 13.08.2013 respectively from the respondent-accused. Another sum of Rs.5000/- was received on 05.04.2014. The applicant-complainant had denied his signatures on documents Mark A and Mark B but the respondent-accused had examined Shamsheer Singh handwriting expert as DW1, who submitted his report as Ex.DW1/B, according to which, said documents bore signatures of the applicant-complainant. In view of the aforesaid facts and circumstances, the respondent-accused has been able to rebut the presumption that the alleged cheque was not issued by him for discharge of any debt liability towards the respondent-complainant.

10. The power of the Appellate Court to unsettle the order of acquittal on the basis of re-appreciation of the evidence is subject to the settled law that where two

views are possible and out of the two, one points towards the innocence of the accused, the view which favours the accused should prevail over the other pointing towards his guilt. Furthermore, the trial Court has the additional advantage of closely observing the prosecution witnesses and their demeanour, while deciding about the reliability of the version of prosecution witnesses. (See *H.D. Sundara and others Vs. State of Karnataka, Criminal Appeal No.247 of 2011 decided on 26.09.2023*; *Kali Ram v. State of H.P., 1973 (2) SCC 808* and *Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415*). A Division Bench of this Court in the judgment passed in *State of Haryana Vs. Ankit and others* passed in CRM-A No.3 of 2022 decided on 06.07.2023 has held that presumption of innocence further gets entrenched and fortified in favour of the accused after earning acquittal from the trial Court.

11. In view of the facts and circumstances of the case, this Court finds that learned counsel for the petitioner has failed to point out any perversity or illegality in the findings recorded by the learned trial Court, which warrants interference by this Court. As such, there is no merit in the present application and the leave to appeal is declined. Resultantly, the instant application stands dismissed.

(HARPREET SINGH BRAR)
JUDGE

November 17, 2023
Pankaj*

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