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

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CRM-A-2637-2019 (O&M)
Date of decision: 24.05.2023

Rakesh Kumar

....Applicant/Appellant

Versus

Yog Raj

...Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Vineet Kumar Jakhar, Advocate
for the applicant-appellant

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AMAN CHAUDHARY. J.

CRM-34541-2019

For the reasons stated in the application, the same is allowed. Delay of 98 days is hereby condoned.

CRM-A-2637-2019

1. The present application for leave to appeal has been preferred against the impugned judgment dated 19.04.2019, whereby the respondent was acquitted of the charge framed under Section 138 of the Negotiable Instruments Act (for short NI Act), 1881.

2. The facts of the case are that a complaint had been filed by complainant-appellant therein that the accused-respondent alongwith one Baljit Singh was running a business of Chit Fund, under which they proposed 4% interest in addition to the principal amount. In the year 2015, the accused took an amount of Rs.15 lakh from the complainant as investment and assured to return it

along with the usual interest. Thereafter, to honour his liability, the accused issued a cheque, which on presentation to the bank was dishonoured vide memo dated 21.01.2017, due to insufficient funds.

3. On notice of accusation under Section 138 of the Act, he appeared and pleaded not guilty. To prove his case, the complainant, himself got examined alongwith another witness namely Jasdeep Singh, Senior Manager, State Bank of India. Thereafter, statement of the petitioner under Section 313 of Cr.P.C. was recorded, where all incriminating evidence was put to him, which he denied and pleaded innocence and claimed false implication. In defence, the accused himself appeared as DW1 and closed his evidence.

4. On meticulous examination of the evidence and hearing the counsel for both the parties, the trial Court acquitted the accused-respondent, as the complainant-applicant could not establish his guilt.

5. Hence, the present application for leave to appeal.

6. Learned counsel for the applicant submits that the learned trial Court had erred in acquitting the accused-respondent only on the ground that he had issued the cheque in advance. The burden of proof was discharged by the appellant as it was shown that the cheque belonged to accused-respondent, as also his signatures were appended thereon, thus he could not deny his legal obligation to honour the same. Moreover, the finding that at the time of receiving the amount, there was no witness cannot be considered as it was given on friendly terms.

7. Heard and perused the file.

8. 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 reversed the finding of the High Court and upheld the acquittal granted by the trial Court, holding that, "High Court without discarding the evidence, which was led by defence could not have held that finding of trial court regarding financial capacity of the complainant is perverse. We are, thus, satisfied that accused has raised a probable defence and the findings of the trial court that complainant failed to prove his financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the trial court are perverse are unsustainable." The following principles were laid down which read thus:

> "(i) 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.
> (ii) 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.
> (iii) 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.
> (iv) 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.
> (v) It is not necessary for the accused to come in the witness box to support his defence."

9. 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.

10. The trial Court, while acquitting the accused-respondent, had observed that, "as per the version of the complainant in the year 2015, the accused took Rs.15 Lakh for investment in Chit Fund and promised to return the same alongwith 4% interest to the complainant. Meaning thereby the amount was given by the complainant to invest in the Chit Fund and arguments advanced by the Ld counsel for the accused are supported with case laws titled as Thiraviyam versus Thangamariyappan, 2017 (4) RCR (Criminal), 76 and M/s Arpit Finance versus Bir Davinder Singh and another, 2015 (4) RCR (Criminal), 956 in which it is held that if cheque is issued on account of chit fund transaction then no offence under-section 138 of Negotiable Instrument Act is made out. To counter this argument advanced by the Ld counsel for the accused, no argument is advanced by the complainant counsel. The investment made in chit fund is not a legally recoverable debt. The accused is not a licensed person to run the business of chit fund company. At this stage the cross-examination of the complainant is also necessary to be discussed. The complainant in cross-examination stated that he paid the accused in cash on one day. This amount is not shown by him in income tax return. He paid this amount from his house. No separate writing was done regarding giving the cash. No one was present there when he handed over the cash to him. So I am of the considered view that the complainant has miserably failed to prove that on 31.12.2016 the day of issuance of cheque he was under the liability to pay Rs.15 lakh to the complainant. Moreover, as already discussed it is

not legally enforceable debt. My view is fortified with the case referred supra. So the accused is not held guilty under-section 138 of Negotiable Instrument Act."

11. In **Rajaram S/o Sriramulu Naidu(since deceased) vs. Maruthalacham (since deceased) through L.R.s**, AIR 2023 SC 471, Hon'ble The Supreme Court held that the scope for interference in an appeal against acquittal is limited. Unless the High Court found that the appreciation of the evidence is perverse, it could not have interfered with the finding of acquittal recorded by the learned Trial Court.

12. 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.

13. 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.

14. 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