

227

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

CRM-A-208-2019

Reserved on: 09.01.2024

Pronounced on: 18.01.2024

Erfan Timber

.....Applicant-Appellant

Versus

Balwinder Singh

....Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: - Mr. Alok Mittal, Advocate
for the applicant-appellant

Harpreet Singh Brar, J.

1. The present application under Section 378(4) of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') is preferred against the impugned judgment of acquittal dated 16.11.2018 passed by learned Judicial Magistrate Ist Class, Yamunanagar at Jagdhri in complaint under Section 138 of the Negotiable Instruments Act (hereinafter 'NI Act').

FACTUAL BACKGROUND

2. Briefly, the facts are that the applicant-complainant engaged in business of timber with the respondent-accused. In July 2016, the respondent placed an order for fuel wood with the applicant amounting to Rs. 1,60,925/- against credit memo/bill no. 05 dated 16.07.2016, no. 06 dated 18.07.2016, no. 07 dated 20.07.2016, no. 08 dated 22.07.2016 and no. 09 dated 25.07.2016. To discharge his liability, the respondent issued a cheque bearing no. 353065 dated 17.08.2016 for a sum of Rs. 1,60,000/-. On presentation, the cheque was dishonoured vide memo dated 18.08.2016 with the remarks- 'Exceeds Arrangement.' Thereafter, a legal notice dated 26.08.2016 was issued to the respondent. Since the respondent failed to make the requisite payment, the present complaint was filed on 15.09.2016.

3. On finding a *prima facie* case against the respondent, the learned trial Court summoned him for having committed an offence punishable under Section 138 of the NI Act. The respondent appeared, secured his bail after which a notice of accusation was served upon him vide order dated 29.09.2017, to which he pleaded not guilty and claimed trial.

4. The complainant examined 2 witnesses to establish its case. Statement of the accused under Section 313 of Cr.P.C was recorded wherein he denied all the incriminating evidence put to him and pleaded false implication. Subsequently, the respondent-accused was acquitted vide the impugned judgment dated 07.07.2023 as he could successfully rebut the presumption under Section 139 of the NI Act.

CONTENTIONS

5. Learned counsel for the applicant assails the impugned judgment on the ground that the learned trial Court has failed to consider that the signature on the disputed cheque was admitted and presumption under Section 139 of the NI Act has not been rebutted by the respondent-accused. The learned trial Court was erroneously swayed by the fact that no memo/forms were produced on record as the applicant had duly proved the bills showing purchase of the said goods by the respondent. Further, the respondent has not led any evidence to justify the stand taken by him in his statement recorded under Section 313 of the Cr.P.C. thereby failing to rebut the presumptions under Sections 118 and 139 of the NI Act. No explanation is forthcoming on behalf of the respondent regarding the purpose for which the disputed cheque was issued. As such, the learned trial Court has fallen into error by passing the judgment of acquittal in favour of the respondent as the conduct of the respondent satisfies all the ingredients for the offence defined under Section 138 of the NI Act. Reliance in this regard is placed on **Sumeet Vij v. M/s Paramount Tech Fab Industries 2021 AIR SC 1281, Uttam Ram v. Devinder**

Singh Hudan and Another 2020(1) R.C.R(Criminal) 110 and K.S. Ranganatha v. Vittal Shetty 2022(1) R.C.R(Criminal) 445.

OBSERVATION AND ANALYSIS

6. This Court has heard the learned counsel for the applicant and perused the record with his able assistance.

7. A three Judge bench of the Hon'ble Supreme Court in **M/s Gimpex Private Limited v. Manoj Goel 2021(4) R.C.R.(Criminal) 404** has laid down the ingredients of the offence as defined under Section 138 of the NI Act. Speaking through Justice Dr. D.Y. Chandrachud, the following was observed:

“25. The ingredients of the offence under Section 138 are:

- (i) The drawing of a cheque by person on an account maintained by him with the banker for the payment of any amount of money to another from that account;*
- (ii) The cheque being drawn for the discharge in whole or in part of any debt or other liability;*
- (iii) Presentation of the cheque to the bank;*
- (iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account;*
- (v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and*
- (vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.”*

8. It is pertinent to discuss the presumptions created in favour of the complainant under the NI Act in terms of Sections 118 and 139 for just and proper adjudication of the instant case. 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.

9. Section 139 of the NI Act uses the words “*shall presume*” which makes it obligatory on the Courts to presume that the disputed cheque, once executed, was issued in discharge of a legal liability. However, it is no longer *res integra* that these presumptions are of a rebuttable nature. The accused is only required to raise a probable defence casting a doubt on the existence of the liability to the extent that a prudent man, in similar circumstances, is caused to believe that such a debt or liability does not exist. The standard of proof here is required to discharge the evidential burden is of preponderance of probabilities, as such, the accused is not required to prove the negative as the same is neither possible nor envisaged under the NI Act. The accused can rebut the presumptions by adducing direct evidence on the record or by referring to the circumstances which includes the contents of the complaint, legal notice, complainant’s evidence before the trial Court as well as his own statement under Section 313 of the Cr.P.C. and reply to the legal notice. It must be noted that mere denial of the incriminating circumstances cannot be considered as rebuttal, the accused must 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. Once a satisfactory explanation has been presented by the accused, the evidential burden shifts back to the complainant. However, at this stage, the complainant cannot take shelter of the presumption under Section 139 of the NI Act. Now, it is on the Court to assess the material available on record to determine existence of guilt. Reliance in this regard can also be placed on the judgments rendered by the Hon’ble Supreme Court in **Basalingappa v.**

Mudibasappa (2019) 5 SCC 418 and Rohitbhai Jivanlal Patel v. State of Gujrat and Another (2019) 18 SCC 106.

10. A two Judge bench of the Hon'ble Supreme Court in **M.S. Narayana Menon alias 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."

A two Judge bench of the Hon'ble Supreme Court in **Rajesh Jain v. Ajay Singh 2023(4) R.C.R(Criminal) 800**, opined as follows:

"55. ...Once the presumption under Section 139 was given effect to, the Courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the Court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The Court would then take an overall view based on the evidence on record and decide accordingly."

11. The reasoned analysis of the factual matrix of the case indicates that in April, 2016, the respondent had bought timber worth Rs. 50,000/- from Himalyan Timber run by one Brij Bhushan. It is alleged that the blank signed cheque issued by the respondent to Brij Bhushan has been misused to lodge the present complaint. The applicant-complainant had deposed that the original bills were

given to the accused while yellow coloured counter foil was kept by him for record

in the bill book. Curiously, in spite of such deposition, the complainant himself placed the original bills on record as Ex. C6 to Ex. C10. A perusal of the same would indicate that none of the bills or the counter foils bear the signature of the respondent-accused.

12. Admittedly, the applicant-complainant is a commission agent in the timber business for over a decade. However, he could neither produce the I-form, issued to the contactor from whom firewood is purchased by the commission agent, or the M-form, which is deposited with the marketing committee in the name of the contractor and the buyer, regarding the sale of fuel wood to the respondent. Further, even if the transaction was made before the implementation of Goods and Service Tax, the applicant-complainant still ought to bring something on record to prove sale of fuel wood to the respondent. While the signatures on the cheque are not disputed, the respondent-accused has denied existence of any legally enforceable debt towards the petitioner. For the presumptions under Section 118 and 139 of the NI Act to be put in action, the execution of the disputed cheque needs to be proved, which necessarily requires for the complainant's case to have legs of its own. If the complainant fails to do so, presumption under Section 139 of the NI Act is not attracted. As such, the respondent has successfully rebutted the presumption and explained the circumstances to point towards his innocence by the standard of preponderance of probabilities in view of judgement rendered by this Court in **Varinder Singh v. Sandeep Kumar Chawla 2016(4) Law Herald 3197**.

13. 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** and **Kali Ram v. State of H.P., 1973 (2) SCC 808**). A Division bench of this Court in the judgment passed in **State of Haryana Vs. Ankit and others** passed **CRM-A No.3 of 2022** decided on 06.07.2023 has held that presumption of innocence further gets entrenched on the acquittal of accused by the trial Court.

14. A two Judge Bench of Hon'ble Supreme Court in **Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415** has laid down the parameters with regard to the power of appellate Court while dealing with an appeal against an order of acquittal. Speaking through Justice C.K. Thakker, the following was held:

"42. From the above decisions, in our considered view, the following general principles regarding powers of 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) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(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 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."

CONCLUSION

15. In view of the facts and circumstances of the case, this Court finds that learned counsel for the applicant-appellant has failed to point out any perversity or illegality in findings recorded by the learned trial Court which warrants interference by this Court. As such, there is no merit in the present application and hence, the leave to appeal is denied.

16. Pending miscellaneous application(s), if any, shall also stand disposed of.

18.01.2024
manisha

(HARPREET SINGH BRAR)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>