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

114

CRM-A-7-MA-2015
Date of Decision: 23.09.2024

Rajesh Sharma ... Applicant

Versus

Rakesh Sharma ... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Parveen Sharma, Advocate,
for the applicant.

Mr. Rajesh Bansal, Advocate,
for the respondent.

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MANISHA BATRA, J. (Oral)

1. This order shall dispose of an application for grant of leave to file appeal against the judgment dated 12.11.2014 passed by the Court of Judicial Magistrate, 1st Class, Panipat in Criminal Complaint bearing CIS No.NACT/1000/2014 titled as *Rajesh Sharma v. Rakesh Sharma*, whereby the complaint filed by the applicant was dismissed and respondent-accused was acquitted of charge under Section 138 of Negotiable Instruments Act, 1881 (For short "NI Act").

2. For the sake of continuity and coherence, parties shall be referred to hereinafter as per the same nomenclature as given before the

trial Magistrate.

3. Brief facts of the case relevant for the purpose of disposal of this application are that the aforementioned complaint had been filed by the complainant Rajesh Sharma on the allegations that on 15.12.2008, he had lent an amount of Rs.3,75,000/- to the accused with whom he was having friendly relations. The accused had agreed to return the said amount within a period of 8-9 months. After expiry of the said period, the complainant approached the accused and told him to repay the amount so borrowed but he did not do so and after putting of the matter for sometime, he expressed inability to pay the amount so borrowed and to discharge his liability, issued a post dated account payee cheque bearing No.582185 dated 01.09.2009 for a sum of Rs.3,75,000/-. The complainant presented the said cheque with his bank for realization of the same. However, this cheque was received back dishonoured with the remarks "funds insufficient". The complainant contacted the accused who assured to pay the amount of cheque in cash but did not do so thereby compelling the complainant to serve a legal notice dated 22.03.2010 upon the accused. Since the accused still did not make payment or respond to the notice, therefore he filed the aforementioned complaint.

4. On considering the preliminary evidence produced on record and on finding a prima facie case, the accused was ordered to be summoned for commission of offence punishable under Section 138 of NI Act. He appeared in response to the summons. Notice of accusation was served upon him. He pleaded not guilty to the same and claimed trial.

5. To substantiate his claim, the complainant examined himself as CW-1 and in his sworn affidavit Ex.CW1/A reiterated the allegations in the complaint. In documentary evidence, he produced Ex.C1 original cheque dated 01.09.2009, Ex.C2 return memo dated 26.02.2010 and Ex.C3 copy of legal notice dated 22.03.2010.

6. Statement of accused under Section 313 of Cr.P.C. was recorded separately wherein the accused abjured his guilt. He denied his signatures on the cheque in question and also denied receipt of any legal notice and claimed to be innocent. In defence evidence, he examined one witness besides placing reliance upon certain documentary evidence.

7. After going through the evidence produced on record and considering the contentions raised by both the sides, the learned Magistrate dismissed the complaint and acquitted the accused by observing that the complainant had failed to prove that he had advanced a sum of Rs.3,75,000/- to the accused and the accused had been able to rebut the presumption drawn in favour of the complainant. It was further observed that no written legal notice was proved to have been sent to the accused.

8. Feeling aggrieved, the present application has been filed by the applicant making prayer for granting him leave to file appeal against the order of acquittal.

9. It is argued by learned counsel for the applicant that the impugned judgment dated 12.11.2014 is liable to be set aside as the findings as given by learned trial Court are not sustainable in the eyes of law, the same being perverse and not based upon proper appreciation of the evidence

produced on record. It is argued that there was overwhelming evidence on record to prove that the complainant had given an amount of Rs.3,75,000/- to the accused by way of friendly loan and to discharge his liability of repaying the said amount, the accused had issued a cheque in favour of the complainant which stood dishonoured. The accused had not specifically denied his signatures over the cheque in question. He has failed to prove as to under what circumstances, the cheque belonging to him had been handed over to the complainant. The complainant had proved that the amount of Rs.3,75,000/- was available with him as he has sold his land for a sum of Rs.2,20,000/- on 27.05.2008. The defence plea was totally improbable and untrustworthy. The legal notice dated 22.03.2010, had been duly proved in evidence but the learned trial Court wrongly held that no such notice was issued. With these broad submissions, it is urged that the impugned judgment of acquittal is liable to be set aside and, therefore, it is urged that the application be allowed and leave to file appeal and pursue the same against the same judgment, be granted to the complainant.

10. Per contra, learned counsel for the respondent-accused has vehemently argued that the findings as given by the learned trial Magistrate are well reasoned and do not require any intervention. It is submitted that the applicant-complainant failed to produce and prove in evidence any postal receipt pertaining to issuance of legal notice dated 22.03.2010 and as the issuance of such notice was a condition precedent for filing of complaint against the respondent-accused which had not been complied with by the complainant, therefore, the learned trial Magistrate has rightly dismissed the

complaint. He further argued that the evidence produced on record by the applicant-complainant was not at all sufficient to prove that he had indeed advanced a sum of Rs.3,75,000/- to the respondent-accused. No documentary evidence qua giving this much amount had been produced on record nor the complainant was able to show that he was having that much amount of money with him. His annual income itself was only between Rs.2 lakhs to Rs.2.25 lakhs at the relevant time and it cannot be assumed that he was in a position to lend the amount of Rs.3,75,000/- to the accused. Accordingly, it is urged that the application is liable to be dismissed.

11. I have heard learned counsel for the parties at considerable length and have perused the trial Court record.

12. The claim of the applicant-complainant is that the respondent-accused had borrowed amount of Rs.3,75,000/- from him on 15.12.2008 and in lieu thereof, he had issue cheque Ex.C1 in his favour as on 01.09.2009 which was dishonoured. According to him, since the respondent-accused failed to respond to the legal notice and to repay the amount of cheque, therefore, he was prosecuted under Section 138 of NI Act and was liable to be punished thereunder.

13. To prove a case for commission of offence under Section 138 of NI Act, the complainant was required to establish that the accused had drawn a cheque on an account maintained by him with a bank, for payment of any amount of money to the complainant from out of that account for the discharge, in whole or in part of any debt or other liability which was legally enforceable. It was further required to be proved by him that the said cheque

was presented to the bank within a period of six months from the date when it was drawn and the same was returned unpaid by the bank either because of insufficiency of money or due to exceeding of the amount arranged to be paid from that account. As per Section 138 of NI Act, if the payee of the amount of cheque makes demand for payment of the amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him regarding dishonour of the cheque, and the drawer of the cheque fails to make payment of the said amount of money within 15 days of receipt of such notice, then a complaint under Section 138 of the NI Act is maintainable.

14. It is clear from a bare perusal of the contents of Section 138 of NI Act that issuance of a notice in writing to the drawer of the cheque within a period of 30 days from the date of information regarding dishonour of the cheque is must. In the instant case, though the applicant produced before the learned trial Court Ex.C3 copy of legal notice dated 22.03.2010 but did not produce any postal receipt regarding sending such notice in writing to the respondent-accused. Rather a perusal of the trial Court file reveals that an application had been filed during trial by the present applicant for granting him permission to produce by way of additional evidence, the copy of postal receipt to prove that he had issued legal notice on 22.03.2010. This application had been allowed vide order dated 29.10.2013 and opportunity was granted to the applicant to prove postal receipt by way of additional evidence. It is, however, revealed from a perusal of subsequent orders passed before the trial Magistrate that the applicant failed to produce any

additional evidence on that point and ultimately the same was closed. Meaning thereby the applicant failed to prove that infact any legal notice had been issued by him to the respondent. Since, the issuance of such notice in writing was a mandatory pre condition for filing of complaint under Section 138 of NI Act and maintainability thereof and as that condition had not been proved to be fulfilled, therefore, in the considered opinion of this Court, the learned Magistrate rightly observed that the essential ingredient for making out a case for commission of offence punishable under Section 138 of NI Act was missing.

15. Proceeding further, the learned Magistrate had observed that the applicant had failed to prove that he had advanced a sum of Rs.3,75,000/- to the respondent-accused and the respondent-accused had issued a cheque to discharge his legally enforceable debt. The learned Magistrate observed that the applicant had admitted that his annual income was only between Rs.2 lakhs to Rs.2.25 lakhs at the relevant time. He had failed to produce any pass book before the Court to show that he had indeed advanced a sum of Rs.3,75,000/-. No receipt had been obtained by him from the respondent to show the advancement of this much amount. He had also failed to prove that he had taken any security from the respondent in lieu of the loan amount. The learned trial Court had made a detailed discussion on this point and in the opinion of this Court had rightly observed that the applicant had failed to prove that the cheque in question was issued by the respondent to discharge his legally enforceable debt.

16. As per the above discussed facts, no manifest illegality or

irregularity can be stated to have been committed by the learned Magistrate while recording findings of acquittal of the respondent-accused. As such, this Court is of the considered opinion that no ground has been made out for allowing this application and granting leave to file appeal against the judgment rendered by the learned Magistrate which is well reasoned. Accordingly, finding no no merit, the application is dismissed.

(MANISHA BATRA)
JUDGE

23.09.2024
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Whether speaking/reasoned Yes/No
Whether reportable Yes/No