2024:PHHC:112966

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

234 **CRM-A 808 of 2023 (O&M)**
Date of Decision: 25.07.2024

Dharmender ...Applicant

Versus

Deepak Saroha ... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Rajesh Malik, Advocate, for the applicant.

N.S.SHEKHAWAT, J.

CRM-26909-2023

1. The applicant/appellant has moved the present application under Section 5 of Limitation Act for condonation of delay of 54 days in filing the present appeal.

2. For the reasons mentioned in the application, the same is allowed and the minimal delay of 54 days in filing the present appeal is ordered to be condoned.

CRM-26910-2023

1. The applicant has moved the present application under Section 391 of Cr.P.C with a prayer to lead additional evidence in the present appeal.

2. Learned counsel for the applicant submits that he wants to place on record J-Form (Annexure A-1); account statement of Dharmender (Annexure A-2) and account statement of Mahabir (Annexure A-3). Learned counsel further submits that from the account statements (Annexure A-2 and Annexure A-3), it is apparent that in the year 2018 applicant and Mahabir were having sufficient amount for advancement of financial help.

3. I have heard learned counsel for the applicant and perused the record.

4. In the present case, the case set up by the applicant is that he had advanced a loan amount of Rs.21 lacs to the respondent/accused. He himself had taken a sum of Rs.9 lacs from Mahabir and Rs.6 lacs from Chand Ram and after borrowing the money from Mahabir and Chand Ram, he had lent a sum of Rs.21 lacs to the respondent/accused. Thus, the plea taken in the present application is contradictory to the stand taken by the applicant before the Trial Court. The applicant himself stated before the Trial Court that he did not have the arrangement to make the payment on his own and he had himself borrowed the money from Mahabir and Chand Ram. Apart from that, the account statement of the year 2018 was in possession of the applicant only and he was well aware of his own financial position in the year 2018. Consequently, he could very well prove the said statements during the course of trial in the year 2018. Thus, it cannot be stated that the applicant could not place on record

Annexures A-1 to A-3 before the Trial Court, despite due diligence. Thus, there is no merit in the present application and the same is ordered to be dismissed.

<u>Main case</u>

1. The applicant has moved the present application under Section 378(4) Cr.P.C for grant of leave to appeal from the impugned judgment dated 13.01.2023, passed by the Court of Judicial Magistrate Ist Class, Sonipat, whereby the respondent has been acquitted of the notice of accusation under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the "the Act").

2. As per the case set up by the applicant/complainant, the applicant as well as the respondent are co-villagers and were having cordial relations with each other. The applicant lent an amount of Rs. 21 lacs as friendly loan on 25.04.2018 to the respondent and the respondent assured to return the same within a period of 03 months. Out of Rs. 21 lacs, the applicant arranged Rs. 9 lacs from Mahabir son of Raj Singh and Rs. 6 lacs from Chand Ram son of Suraj Bhan. In order to discharge the legal liability of refund the amount of Rs. 21 lacs, respondent issued a cheque bearing No. 646151 dated 05.09.2018 drawn on State Bank of India, from his account No. 31079690300 in favour of the applicant. When the applicant presented the cheque through his banker for encashment, the cheque was dishonoured with the remarks "kindly contact drawer/drawee bank", vide memo dated 13.09.2018. The respondent did not make the

payment to the applicant despite requests and the applicant sent a statutory legal notice dated 01.10.2018 and was constrained to initiate the criminal prosecution by filing the present complaint under Section 138 of the Act.

3. After summoning the accused, the applicant examined himself as CW1, Chand Ram as CW2 and Mahabir as CW3 and exhibited the following documents:-

Ex.C1	*Cheque bearing No. 646151 dated 05.09.2018.*
Ex.C2	*Cheque return memo dated 13.09.2018.*
Ex.C3	*Legal notice dated 01.10.2018.*
Ex.C4	*Postal receipt.*

5. After closer of the evidence, the statement of the respondent under Section 313 Cr.P.C. was recorded, who stated that he had never issued any cheque to the applicant. His cheque book was kept at his office and he did not know as to how his cheque book was stolen. He lodged a report with the Police Station City Sonipat regarding the loss of his signed cheque bearing No. 646151. He had also replied to the legal notice, which was sent by the applicant to him. He examined Constable Anand Kumar as DW1, who proved on record Ex.D1, i.e., lost property details dated 10.08.2018.

6. Learned counsel for the applicant vehemently argues that in the present case, the requirement of Sections 138/142 of the Act were fulfilled by the applicant/complainant. The respondent had never denied his signatures over the cheque Ex.C1 and even the cheque was

drawn from a bank account, which was maintained by him. Thus, in view of the presumption by virtue of Sections 118 (a) and 139 of the Act, a presumption of cheque having been issued in discharge of legal liability and drawn for a good consideration, arises in favour of the applicant. Thus, the trial Court had completely overlooked the facts and circumstances of the present case and the settled law.

7. I have heard learned counsel for the applicant and perused case file carefully.

8. In the present case, no doubt, it has been held by the trial Court that the ingredients of the offence under Section 138 of the Act with regard to the time frame were fulfilled by the applicant and the cheque was signed by the respondent. However, the trial Court had held that the respondent had succeeded in rebutting the presumption of law, which had arisen in favour of the applicant. It was held that the accused only had to create a doubt in the version of the complainant, while the complainant had a legal obligation to prove the guilt of the accused beyond the shadow of reasonable doubt.

9. In the present case, in para 18 of the impugned judgment, the trial Court had discussed in detail the factors, which proved the non-existence of the consideration, by raising a probable defence by the respondent. In the present case, as per the applicant, a sum of Rs. 21 lacs was given by the applicant to the respondent. However, while appearing as CW1, the applicant stated that he did not know the name of mother, wife or children of the accused. Further, he lent

money to the respondent/accused without interest and without any other document in this regard. Still further, the applicant was not having money arrangement for making payment of Rs. 21 lacs to the respondent and he had obtained a sum of Rs. 9 lacs from Mahabir CW3 and had taken a sum of Rs. 6 lacs from Chand Ram CW2. It is unbelievable that a person, who does not have sufficient funds, would arrange a sum of Rs. 15 lacs from third parties and would lend the same to a person without any interest or without executing any document in this regard. Apart from that, the applicant also failed to state as to from where, he had arranged a sum of Rs. 6 lacs by himself. Even, he failed to prove that he had sufficient funds at his disposal. He also failed to prove his annual income or source of livelihood.

10. On the other hand, the respondent had raised serious questions with regard to the financial capacity of the applicant. I find sufficient force in the findings recorded by the trial Court that it is highly unbelievable that a persons would arrange funds from different persons so as to give loan to a third person. Thus, the conclusion drawn by the trial Court that the advancement of loan by the applicant to the respondent was doubtful, appears to be correct.

11. Still further, this Court as well as the Hon'ble Supreme Court have held in number of judgments that the complainant has no legal obligation in all cases under Section 138 of the Act to prove his financial capacity. However, in the cases, where the complainant

states that he had lent money to the accused in cash and that the accused issued the cheque in discharge of his legal liability and if the accused challenges the financial capacity of the complainant to advance the money, then despite presumption under Section 139 of the Act, the complainant has a legal obligation to prove his financial capacity as well as the source of money. The complainant can never be burdened with proving the fact of his financial capacity or source of money in the beginning and the obligation only arises, when his capacity or capability to advance the money is challenged by the accused. Applying the aforesaid ratio to the facts of the present case, the applicant is stated to have advanced a formal loan in cash to the respondent, however, the transaction of loan is not evidenced by any documentary evidence or reliable evidence. Still further, it is also apparent from the testimonies of the complainant that the applicant and the respondent were not so close to each other and it is highly unbelievable that the applicant had advanced a sum of Rs. 21 lacs to the respondent, without executing any document in this regard. Still further, even admittedly, the applicant was not having sufficient resources at his disposal and he had borrowed a sum of Rs. 15 lacs out of total sum of Rs. 21 lacs from CW2 Chand Ram and CW3 Mahabir. Thus, I find that the trial Court had rightly held that the respondent had been able to rebut the presumption of law, which had arisen in favour of the applicant.

12. Even otherwise, the trial Court has recorded sufficient reasons for dismissing the complaint filed by the present applicant and this Court finds no reason to differ from the same.

13. Thus, finding no merits, the petition is ordered to be dismissed.

25.07.2024 **(N.S.SHEKHAWAT)**
amit rana **JUDGE**

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