

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-4916-2015

Hakam Singh

.....Petitioner

Vs.

Mander Singh

.....Respondent

Reserved On.: 21.02.2024
Pronounced On: 26.02.2024

CORAM: - HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: Mr. Rahul Rampal, Advocate
for the petitioner.

Mr. Deepak Aggarwal, Advocate
for the respondent.

DEEPAK GUPTA, J.

This revision is directed against conviction of the petitioner as recorded by the Trial Court and as affirmed by the Appellate Court.

2. Perusal of the paper-book would reveal that complainant Mander Singh (*respondent herein*) filed a complaint in the Court of learned Judicial Magistrate 1st Class, Bathinda seeking prosecution of accused Hakam Singh (*petitioner herein*) under Section 138 of the Negotiable Instruments Act. It was stated that accused was running business in the name and style of M/s H.S. Industries as its sole proprietor. In order to meet the necessities for his business, accused borrowed an amount of ₹8,00,000/- from the complainant in November, 2009 on interest @ 1% per annum and agreed to repay the amount within a period of one year. On 31.12.2010, accused after settlement of the

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account, paid the interest component in cash and in order to pay the principal amount, issued two cheques bearing No.621304 and 621306 both dated 31.12.2010 (*Ex.CW1/C & Ex.CW1/E*) for an amount of ₹4,00,000/- each drawn on ICICI Bank Ltd., Sangrur with assurance of their encashment. However, on presentation of the cheques by the complainant, the same were dishonoured vide memos dated 01.01.2011 (*Ex.CW1/B & Ex.CW1/D*) with remarks “account closed”. Complainant then got issued a legal notice dated 12.01.2011 (*Ex.CW1/F*) and sent the same to accused through registered post (*postal receipts - Ex.CW1/G & Ex.CW1/H*) asking him to pay the cheques amount within 15 days of the receipt of the notice. Accused failed to do so and so the complaint was filed on 12.02.2011.

3.1 After recording preliminary evidence, accused was summoned to face prosecution. Upon his appearance, notice of accusation under Section 138 of the Negotiable Instruments Act was served upon him, to which he pleaded not guilty and claimed trial. Complainant then appeared in the witness-box as CW-1 and supported his case with the help of documents *Ex.CW1/B* to *Ex.CW1/H*. Statement of the accused under Section 313 Cr.P.C. was recorded, in which he denied the liability. In his defence, accused examined three witnesses.

3.2 Matter was then heard by learned JMIC, who recorded the conviction vide judgment dated 24.09.2013 under Section 138 of the Negotiable Instruments Act (Annexure P-7). Vide a separate order of the even date, the accused- petitioner was sentenced to undergo rigorous imprisonment for a period of 1½ year and also to pay fine of ₹5,000/-. In case of default in

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the payment of fine, he was further sentenced to undergo rigorous imprisonment for a period of 02 months.

3.3 Aggrieved by the aforesaid judgment of conviction and order of sentence, petitioner preferred appeal before the Court of Sessions but the same was dismissed by learned Additional Sessions Judge, Bathinda vide judgment dated 16.09.2015 (Annexure P-5), with the only modification in the order qua sentence, which was reduced from 1½ year to 1 year imprisonment.

4. Challenging the aforesaid conviction as recorded by the Trial Court and affirmed by the Appellate Court, petitioner has now approached this Court. It is contended by learned counsel that the Courts below failed to take into account the fact that complainant- respondent did not prove on record any source of money so as to advance loan of ₹8,00,000/- to the accused. Said amount was not even shown by the complainant in his income tax returns. The Courts disbelieved the statement of the defence witnesses, as per which complainant was earlier working as an accountant with the accused and had withdrawn an amount of ₹1,56,500/- and ₹65,000/- from the account of the petitioner, due to which he was removed and that cheques in question were managed by the complainant at that time, which have been misused by him. Besides, complainant admitted in cross-examination that ink used for filing the body of the cheques is different from the ink used in the signature, which further creates doubt in the complainant's version. Further, the account from which the cheques were issued had been closed way back in 2006, whereas the cheques were presented in 2010 and that for all these reasons, conviction has been wrongly recorded. With these submissions, prayer is made for setting

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aside the impugned conviction recorded by the Trial Court and as affirmed by the Appellate Court, by accepting this revision; and to acquit the petitioner from the charges.

5. Learned counsel for the respondent, on the other hand, defended the impugned judgments and submit that all the points as raised in this revision were duly considered by the Courts below and the same were found to contain no merit. Learned counsel contends that presumption in favour of the respondent- complainant under Section 139 of the Negotiable Instruments Act, has not been rebutted by the accused- petitioner. Prayer is made for dismissal of the petition.

6. I have considered submissions of both the sides and have perused the record carefully.

7. Petitioner does not dispute his signature on any of the two cheques in question. His defence is that said cheques have been misused by the complainant. Once signature on the cheques are not in dispute, there is a presumption of legal liability under Section 139 of the Negotiable Instruments Act to be read with Section 118 of the Act, in favour of the complainant, though the said presumption is rebuttable.

8. Section 139 and Section 118 clause (a) & (b) of the Negotiable of Instruments Act read as under:-

“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.”

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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date. - that every negotiable instrument bearing a date was made or drawn on such date;”

9. In ***Rangappa vs. Sri Mohan, 2010 (3) Criminal Court Cases 022 (S.C.)***, a three judge bench of the Hon’ble Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the accused to raise a defence, wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in favour of the complainant. Hon’ble Supreme Court further held in above case that Section 139 of the NI Act is stated to be an example of a reverse onus clause, which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Hon’ble Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and legally falls in the arena of a civil wrong and therefore, the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof, reverse onus clause requires the

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accused to raise probable defence for creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of “preponderance of probabilities” and not “beyond shadow of any doubt.”

10. It is in the light of the aforesaid legal position that it is required to be seen that whether accused has been able to probabilise his defence. Here itself, it may be noted that the accused is not required to prove his defence on the standard of proof ‘beyond reasonable doubt’ and rather, he is simply required to probabilise his defence. The presumption under Section 139 of the Act can be rebutted even by evidence led by the complainant; and it is not required for the defence to lead evidence to rebut presumption, as has been held by the Hon’ble Supreme Court in *Shiv Kumar Vs. Ram Avtar Aggarwal, 2020(2) RCR (Crl.) 147*.

11. In order to rebut the presumption available to complainant under Section 139 of the NI Act, accused can either appear in the witness box though it is not mandatory; or he can elicit circumstances favourable to him during the cross-examination of complainant; or put forth his defence in his statement under Section 313 Cr.P.C. supported by evidence. Here itself, it may be noted that statement of accused under Section 313 Cr.P.C is not a substantive piece of evidence. If accused put forth his defence in said statement, he must support it with evidence. Reliance can be placed on *Sumeti Vij Vs. M/s Paramount Tech Fab Industries, 2021(2) CCC 348 (SC)*.

12. In present case, in order to rebut the presumption, petitioner contended that complainant did not have the financial capacity; that he did not

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show the amount allegedly lent to the complainant in his income tax returns; and that cheques were managed by the complainant, when he was working as accountant with the accused and which he later on misused.

13. All the aforesaid points were duly dealt with by learned Trial Court. It has been found that in his testimony, complainant testified that he had arranged the amount by selling 7 canal 4 marlas of land and also from the benefits which he had received from the Army. He further disclosed that land was sold by him to a person belonging to Village Chakkdava in District Bathinda. Learned Trial Court rightly observed that no further question was asked from the complainant as to when the land was sold and for how much sale. Thus, the financial capacity of the complainant to lend the money is duly established.

14. Even otherwise, it is not a civil case, where plaintiff is required to prove the debt. In ***Uttam Ram Vs. Devinder Singh Hudan 2019(4) CCC 596 (SC)***, it has been held by Hon'ble Supreme Court that in case of dishonour of cheque, debt is not to be proved as in a civil suit. In the case before Hon'ble Supreme Court, defence was taken by the accused that cheque book was lost and that cheque was not issued in discharge of any debt or liability. Accused had not appeared as a witness. The complaint was dismissed. Hon'ble Supreme Court set aside the order of dismissal of complaint and acquittal of accused by holding the same to be illegal and unsustainable. Hon'ble Supreme Court held as under :-

“20. The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the

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recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.

21. There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act."

15. Similarly, in ***Rohitbhai Jivanlal Patel v. State of Gujarat & another (2019) 18 SCC 106***, it was held by the Hon'ble Supreme Court that :

"In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing the loan to the accused and want of examination of the relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence."

16. It is clear from the legal position as above that complainant is not obliged to prove the loan or the financial capacity. Once the presumption under Section 139 of the NI Act is available to the complainant, entire burden shifts upon the accused to rebut that presumption, which in the present case accused - petitioner has utterly failed.

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17. Proceeding further, though it is conceded by the complainant in his testimony that he did not show the amount lent to the complainant in his income tax returns but that in itself cannot be a ground to disbelieve the complainant.

Non-mentioning of the loan amount in the Income Tax Returns may attract penal provision of Income Tax Act but cannot be a reason to discard the case of the complainant. In this regard, reliance may be placed on **Ganga Prashad vs. Lalit Kumar, 2008(3) RCR (Criminal) 159**, wherein it was held by this High Court that the payment of loan could not be disbelieved on the ground that complainant did not reflect the amount in his income tax return.

18. In **C.N.Dinesha Vs. Smt. C.G.Mallika, 2017 Cr.R 530**, it was held by Karnataka High Court that the Culpability of offence under section 138 of Negotiable Instrument Act will not freeze for the reason of violation of section 269 of IT Act and nothing prevents operation of statutory presumption.

Further, in a decision rendered in Writ Petition No.29144/2018 titled **Dr. M. Krishna Shetty Vs. Sri. H.R.Nagabhushan**, on 29th day of August 2018, Karnataka High Court has held that the prosecution under Section 138 of N.I.Act cannot be stalled for non-compliance of Section 269 SS of the Income Tax Act. Any cash transaction in violation of section 269 SS of Income Tax Act may give rise to an independent criminal offence, but on account of violation of the said provision, the prosecution of the petitioner for the alleged dishonour of cheque under Section 138 of Act does not become bad in law.

19. Further, the accused – petitioner claims misuse of the cheques.

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Complainant in his testimony has emphatically denied that he ever worked as an employee of accused in 2006 in his factory. He denied that he was ever the accountant of the accused. He further denied to have withdrawn ₹65,000/- from the account of the accused in the year 2006 or another amount of ₹1,65,000/- or to have cheated the accused. Though he admitted that he had withdrawn amount of ₹70,000/- from the bank in which accused had maintained his account but explained that amount was withdrawn by him through cheque number 700820, which was earlier deposited by him in the account of the accused.

20. DW-1 Kulvir Singh, the Clerk of State Bank of India proved on record certain cheques belonging to the account of the accused Hakam Singh, the payments of which were received by the complainant. However, learned Trial Court rightly observed that the cross-examination of the witness did not in any manner reveal that withdrawing of the amount of ₹20,000/-, ₹45,000/- or ₹70,000/- by the complainant, in any way proved that he was employee or accountant with the accused any point of time.

21. DW3 Baghwan Singh, who deposed that complainant used to work as accountant in the factory of the accused, has been found to be an interested witness, inasmuch as he admitted that he and accused are good friends and had even studied together.

22. DW2 Pardeep Bansal, an official of the ICICI Bank, deposed that account from which the two cheques in question were issued had been closed by the accused in November, 2006. Instead of supporting the case of the petitioner- accused, it rather magnifies his crime to the effect that he issued two

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such cheques to the complainant of such an account, which he had already closed in 2006 itself.

23. Learned Trial Court has rightly observed that in case the complainant ever worked as accountant in the factory of the accused, the accused could have very easily produced record of his factory to show any entry in any account book, ledger book or any other document in the handwriting of the complainant, as an accountant is required to make the entries in various kinds of ledgers/books. No such document has been placed on record. No salary record has been produced. No appointment letter has been produced. Thus, the defence as pleaded by the accused is absolutely concocted so as to wriggle out from the liability.

24. Apart from above, it is further important to notice that prior to filing of the complaint, a legal notice dated 12.01.2011 had been sent to the accused, in which all the details of the cheques in question were mentioned. It is only when the accused did not respond to the notice that the complaint was filed. In case, the cheques in question had been misused as is alleged by the accused, he would have immediately responded to the legal notice by stating that cheques in question had been misused. He would have, in normal course, filed a complaint against the complainant for misuse of the cheques. No such step was ever taken by the accused, which further falsifies the defence as pleaded by him.

25. In view of the above discussion, it is held that the learned Trial Court rightly concluded that the defence as pleaded by the accused was not probable and thus, he had failed to rebut the presumption under Section 139 of

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the Negotiable Instruments Act available to the complainant. Learned Appellate Court has also considered all the pleas as raised by the petitioner-accused. This Court does not find any illegality in the impugned order.

26. Present revision is accordingly hereby dismissed.

27. Petitioner is directed to surrender in the Court of learned Chief Judicial Magistrate, Bathinda, on or before 11.03.2024. On his such surrender, the Court of learned Chief Judicial Magistrate shall prepare the necessary jail warrants and send the petitioner- accused to jail to carry out the sentence. In case of non-compliance by the petitioner, necessary legal proceedings shall be initiated by learned Chief Judicial Magistrate in accordance with law for carrying out the sentence.

(DEEPAK GUPTA)
JUDGE

February 26, 2024

Neetika Tuteja

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No