

Judgment reserved on: 07.05.2024
Judgment delivered on: 24.06.2024

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No.52 of 2008

Manoj Nagpal Appellant

Vs.

State of Uttarakhand and another Respondents

Presence:

*Mr. Ramji Srivastava, Advocate for the appellant/
complainant.*

*Mrs. Pushpa Bhatt, learned D.A.G. along with Mr.
S.C. Dumka, learned A.G.A. and Mr. J.P. Kandpal,
learned Brief Holder for the State of Uttarakhand.*

*Mr. Devang Dobhal, learned counsel holding brief of
Mr. Lokendra Dobhal, learned counsel for respondent
No.2-accused person.*

Hon'ble Pankaj Purohit, J. (Per)

Vide order dated 07.05.2024, written submissions were called from learned counsel for the appellant. The same was produced on 09.05.2024, which is taken on record.

2. This is an appeal preferred by the appellant/complainant under Section 378(4) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as 'Cr.P.C.') against judgment and order dated 25.11.2004 passed by learned Special Judicial Magistrate-II, Dehradun in Criminal Case No.1127 of 2004 *Manoj Nagpal Vs. Ashok Kumar*, whereby, the said Court had acquitted the respondent No.2-Ashok Kumar for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred to as 'the Act').

3. The case of the prosecution set into motion by the appellant/complainant by filing a complaint before learned trial court with the averments that the

appellant lived in a joint family and the respondent No.2-accused had business relations with his brothers for the last so many years and he also had good relations with the appellant/complainant. In the first week of November 2001, respondent No.2/accused came to the appellant and expressed a need of One Lakh rupees referring the above business relations. When the appellant expressed his inability to arrange such a huge amount, respondent No.2/accused told the appellant to give him whatever amount of money could be arranged within 20-25 days. In between, respondent No.2/accused came to the appellant/complainant several times and on 06.12.2001, complainant gave Rs.50,000/- in cash to the respondent No.2/accused, in lieu thereof, respondent No.2/accused handed over appellant/complainant a post-dated cheque No.055840 amounting to Rs.50,000/- drawn at PNB, Dehradun and assured the appellant/complainant that the cheque would be encashed on presenting the same in Bank. On 25.03.2002, respondent No.2/accused informed the appellant/complainant over phone not to present the cheque in Bank and requested him to present the same in the first week of April 2002, by which time, the money would come in his Bank account or he would give it to the appellant/complainant in cash. But even after the first week of April 2002, when respondent No.2/accused did not pay the amount under cheque in-question to him, he presented the cheque in the Bank, which was dishonoured by the Bank with the remark 'account closed'. The appellant issued a notice through his advocate on 26.04.2002 to the respondent

No.2/accused regarding dishonour of above cheque and demanded his amount, but the said notice was deliberately not received by the respondent No.2/accused. It was received back by the appellant with a remark “लेने से इंकार”. Consequently, the complaint was filed by the appellant/complainant on 31.05.2002 before the court of Chief Judicial Magistrate, Dehradun under Section 138 of the Act.

4. The complaint filed by the appellant/complainant was accompanied with documents Ext. Ka-1 written note of Ashok Kumar-respondent No.2, Ext.Ka-2 dishonoured cheque, Ext.Ka-3 endorsement of Bank while dishonouring the cheque with remark ‘account closed’, Ext.Ka-4 Bank Slip, Ext.Ka-5 Carbon copy of notice dated 26.04.2002, Ext.Ka-6 postal receipt of notice and Ext.Ka-7 registered envelope in which the original copy of notice with endorsement of refusal of respondent No.2/accused was sent. Apart from that the acknowledgement was also produced.

5. During trial, appellant/complainant got himself examined under Sections 200 and 202 of Cr.P.C., consequent to which, the respondent No.2/accused was summoned under Section 138 of the Act. In his statement recorded under Section 251 of Cr.P.C., respondent No.2/accused pleaded not guilty and claimed for trial.

6. The appellant/complainant during trial examined himself as PW-1 and proved the aforesaid documentary evidence as mentioned in the Para 4 of this judgment. He refused to produce any other witness.

7. In his statement under Section 313 of Cr.P.C., respondent No.2/accused denied the averment made in the complaint and produced one defence witness DW-1 Madhukar Kapoor in his defence.

8. On the basis of the evidence and the documentary evidence filed by the appellant/complainant before the learned trial court, he supported his case as put forth in his complaint, whereas, the respondent No.2/accused denied the entire case of the prosecution saying that the prosecution was launched falsely against him.

9. Learned trial court, after hearing both parties and going through the record, framed 4 points for determination, which are as under:

- (i). For which liability the cheque in-question was given and as to whether any such liability was mentioned in the complaint or not.
- (ii). As to whether the cheque in-question is invalid due to overwriting on the figure of year mentioned next to the date and month of issue of cheque
- (iii). As to whether on the date of issuance of cheque, the drawer had an existing account in the concerned bank
- (iv). As to whether the notice sent by the appellant/complainant is readable in evidence.

10. On these points of determination, learned trial court proceeded to decide the complaint. According to the impugned order, there is no mention in the complaint by the appellant/complainant that for

what reason, the amount was due against the respondent No.2/accused.

11. Learned trial court found interpolation and cutting in the cheque at the column of the year which bore no signature or initial of the drawer of the cheque, and, therefore, came to this conclusion that interpolation and cutting brought about change in the genuineness of the cheque, which is in violation of the provisions of Section 87 of the Act, and, accordingly, the point of determination was decided against the appellant/complainant.

12. The respondent No.2/accused produced and examined DW-1 Madhukar Kapoor, Senior Manager, PNB, Rishikesh, who deposed that the account, against which the cheque in-question was issued, was already closed on 20.09.1999.

13. From these statements, it is proved that the cheque was issued after the closure of the account of the respondent No.2/accused in the concerned Bank.

14. According to the learned trial court, respondent No.2/accused must have an account in the Bank concerned on the date of issuance of the cheque, and, accordingly, it is concluded that the cheque was ineffective under the provisions of the N.I. Act and this did not give rise to any obligation upon the respondent No.2/accused to make the payment of cheque. The notice was not found duly served upon the respondent No.2/accused, as endorsement of refusal was not got proved by the appellant/complainant in the Court. The notice was not duly exhibited in the Court, and the notice cannot be read in evidence. Accordingly, learned

trial court came to this conclusion that the appellant/ complainant failed to prove its case and acquitted respondent No.2/accused for the offence under Section 138 of the Act vide judgment and order impugned in the present appeal.

15. Heard learned counsel for the parties.

16. Learned counsel for the appellant submitted that the conclusion arrived at by the learned trial court is not acceptable as the same is against the evidence on record. It is also submitted by him that the liability for which the cheque was issued has clearly been mentioned in Paras 4 and 5 of the complaint and in order to prove the said liability, the acknowledgment of receipt of payment of Rs.50,000/- was given by respondent No.2/accused and issuance of the cheque was also duly proved and exhibited on record as Ext.Ka-1 & Ka-2. Thus, he strenuously submitted that the conclusion arrived at by the learned trial court that the liability, for which the cheque was issued, has not been mentioned in the complaint, is totally misreading of the evidence.

17. Learned counsel for the appellant argued that under Sections 118 and 139 of the N.I. Act, there is a presumption operating against the drawer of the cheque and the burden lies on the respondent who was drawer of the cheque to prove that he had not issued any cheque towards any liability. In support of his contention, he pressed into service judgment rendered by Hon'ble Apex Court in the case of **Kalamani Tex and another Vs. P. Balasubramanian** reported in **(2021) 5 SCC 283** and **Bir Singh Vs. Mukesh Kumar** reported in **(2019) 4 SCC 197**.

18. It is further argued by the learned counsel for the appellant/complainant that the learned trial court has wrongly concluded that there was overwriting on the cheque and accordingly, declared the cheque invalid. He tried to convince the Court saying that the overwriting was there only on the first part of the year i.e. '20', there was no overwriting on the date, month and year of the cheque. He tried to explain the reason for that overwriting saying that the cheque book which was issued had cheque leaves starting from the year '19' and for the year '20', there was no cheque leaves available with the drawer. He further submitted that even if, some alteration was there, the same would not be considered as a material alteration, therefore, in absence of material alteration, the said cheque cannot be said to be invalid.

19. Learned counsel for the appellant/complainant also relied upon another judgment rendered by Hon'ble Apex Court in the case of **Bhaskaran Chandrasekharan Vs. Radhakrishnan** reported in **(1998) SCC OnLine Ker 464** to submit that the alteration/overwriting in the cheque in-question cannot be termed to be a material alteration and would not come to help to the respondent No.2/accused and the findings recorded by the learned trial court is incorrect.

20. Learned counsel for the appellant/complainant also tried to convince this Court that the findings recorded by the learned trial court while acquitting the respondent No.2/accused that the account was closed in the year 1999, whereas, the cheque in-question was issued in the year 2002, and,

therefore, on the date, when the cheque was issued, no account of the respondent No.2/accused was available with the Bank, hence, the cheque in-question would not come under the purview of the Act, are not legal. The purpose of issuance of the cheque of a closed account by the respondent No.2/accused was to cheat the appellant since very inception. Thus, he submits that this fact would not come to the rescue of the respondent No.2/accused.

21. The said conclusion of the Court was also brought in question by the learned counsel for the appellant/complainant by saying that once the cheque was returned as dishonoured with the endorsement of 'account closed', it would amount to return the cheque unpaid. In order to buttress his argument, he relied upon a judgment rendered by Hon'ble Apex Court in the case of NEPC Micon Ltd. And Others Vs. Magma Leasing Ltd. Reported in (1999) 4 SCC 253.

22. Lastly, on the finding recorded by learned trial court that the notice will not be read in evidence as the same has not been proved by the appellant/complainant during trial. It is submitted by learned counsel for the appellant/complainant that the notice was sent by registered post to the correct address of the respondent No.2/accused and the same was not disputed by him in evidence and thus, the notice shall be deemed to have been duly served upon him and the findings recorded by the learned trial court are perverse and cannot be sustained.

23. Per contra, learned counsel for respondent No.2/accused supported the judgment of acquittal and argued that it is a settled proposition of law that the

Court should be slow in interfering with the judgment of acquittal recorded by the learned trial court that too only under compelling circumstances, as the innocence of the accused is further re-enforced by his acquittal. Unless and until there is perversity in the judgment of acquittal, the same should not be interfered with.

24. Having heard learned counsel for the parties and on meticulous examination of the record, this Court does not find any reason to interfere with the well reasoned judgment and order passed by the learned trial court, by which, the respondent No.2/accused was acquitted. Even if, this Court finds that the arguments of the learned counsel for the appellant/complainant with regard to the points of determination 1 & 3 find favour with the appellant/complainant, but the points of determination 2 & 4 are still against him. The cheque in-question does not contain any initial over the alteration; therefore, the unsigned change in figure of the cheque in-question would make the said cheque invalid. Further, the notice sent by the appellant/complainant was not legally served upon the respondent No.2/accused and the same cannot be termed as a sufficient service. When, there is no demand and the notice has not been properly served upon the drawer of the cheque by the appellant/complainant, in that eventuality, the complaint cannot be maintainable. I have given a thoughtful consideration to Case Laws given by the learned counsel for the appellant/complainant. The Case Laws cited by the learned counsel for the appellant/complainant are distinguishable on facts.

25. The question herein is not about the sending of the notice at a correct address by the registered post and its unreturned to the sender, but the question is of service and treating the endorsement of “refusal” as sufficient service. Since, the endorsement of refusal was made by the postman, in that eventuality, it was necessary to examine the said postman to prove that endorsement of “refusal” to make out a case of sufficient service on respondent No.2/ accused.

26. It is trite law that that while hearing the appeal against acquittal, the power of reviewing evidence must be exercised with great care and caution. In order to ensure that the innocents are not punished, the appellate court should attach due weight to the lower court’s acquittal because the presumption of the innocence is further strengthened by the acquittal. The appellate court should reverse an acquittal only when it has “very substantial and compelling reasons”. I am fortified in my view by the judgment of the Hon’ble Apex Court in case of **“Ghurey Lal Vs. State of Uttar Pradesh”** reported in (2008) 10 **SCC 450**. For the sake of convenience, paragraph no.3 of the said judgment is quoted below:-

“3. We have endeavoured to set out the guidelines for the appellate courts in dealing with appeals against acquittal. An overriding theme emanates from the law on appeals against acquittals. The appellate court is given wide powers to review the evidence to come to its own conclusions. But this power must be exercised with great care and caution. In order to ensure that the innocents are not punished, the appellate court should attach due weight to the lower court’s acquittal because the presumption of innocence is further strengthened by the acquittal. The appellate court should, therefore, reverse an acquittal only when it has “very substantial and compelling reasons”.

27. For the aforesaid reasons and following the dictum of the Hon'ble Apex Court, I am also of the considered view that no ground for interference, at all, is made out in this matter, as there is no illegality and perversity in the impugned judgment and order dated 25.11.2004. It is trite law that where two views are possible, the view in favour of the accused shall be accepted and be given weight.

28. The appeal is bereft of merit and the same is accordingly dismissed. The judgment and order dated 25.11.2004 passed by learned Special Judicial Magistrate-II, Dehradun in Criminal Case No.1127 of 2004 *Manoj Nagpal Vs. Ashok Kumar*, is hereby affirmed.

29. Let a copy of this judgment, along with the TCR, be transmitted to the Court concerned for information/compliance.

30. Pending application(s), if any, stands disposed of accordingly.

(Pankaj Purohit, J.)
24.06.2024

PN/-