IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Revision No.410 of 2023

Date of Decision: 27.04.2026

Birbal Guleria **.....Petitioner**

Versus

Hans Raj and Another **.....Respondents**

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting?

For the Petitioner: Mr. Jagan Nath, Advocate.

For the Respondents: Mr. Mukul Sood, Advocate, for respondent No.1.

Mr. Rajan Kahol & Mr. Vishal Panwar, Additional Advocates General, with Mr. Ravi Chauhan and Mr. Anish Banshtu, Deputy Advocates General, for State.

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 read with Section 401 of Cr.P.C., lays challenge to judgment dated 26.11.2022, passed by the learned Additional Sessions Judge, Sundernagar, District Mandi, Himachal Pradesh, in Criminal Appeal No.110 of 2022, titled *Birbal Guleria Vs. Sh. Hans Raj,* affirming judgment of conviction and order of sentence dated 29.06.2022/14.07.2022, passed by the learned Judicial Magistrate First Class, Court No.2, Sundernagar, District Mandi, Himachal Pradesh, in criminal case No.80/2020, whereby the learned trial Court while holding the petitioner-accused **(hereinafter, "*accused*")** guilty of having committed offence punishable under Section 138 of the Negotiable

Instruments Act **(in short the "Act")**, convicted and sentenced him to undergo simple imprisonment for a period of five months and pay compensation to the tune of Rs.6,50,000/- to the respondent-complainant.

2. Precisely, the facts of the case, as emerge from the record are that respondent-complainant ***(hereinafter, 'complainant')*** instituted a complaint under Section 138 of the Act, in the competent Court of law, alleging therein that accused with a view to discharge his liability issued Cheque bearing No.000598 dated 09.12.2019, amounting to Rs.5,00,000/-, drawn on ICICI Bank, Sundernagar, Himachal Pradesh. However, fact remains that afore Cheque on its presentation to the Bank concerned, was dishonoured with the remarks "Funds Insufficient". After receipt of aforesaid return memo, complainant served accused with a legal notice calling upon him to make the payment good well within stipulated time. However, since accused failed to make the payment good within the time stipulated in the legal notice, complainant was compelled to initiate proceedings under Section 138 of the Act in the Court of learned Judicial Magistrate First Class, Court No.2, Sundernagar, District Mandi, Himachal Pradesh.

3. Learned trial Court on the basis of material adduced on record by the respective parties, vide judgment/order dated 29.06.2022/14.07.2022, held the accused guilty of having committed

offence under Section 138 of the Act and accordingly, convicted and sentenced him, as per the description given hereinabove.

4. At the first instance, accused preferred an appeal in the Court of learned Additional Sessions Judge, Sundernagar, District Mandi, Himachal Pradesh, however, same was dismissed vide judgment dated 26.11.2022. In the aforesaid background, accused has approached this Court by way of instant proceedings, seeking therein his acquittal after setting aside the judgments of conviction recorded by the Courts below.

5. Vide order dated 08.08.2023, Co-ordinate Bench of this Court stayed the substantive sentence imposed by the learned Court below, subject to petitioner/accused depositing 50% of the compensation amount and furnishing personal bond in the sum of Rs.50,000/-, however, fact remains that despite repeated opportunities, aforesaid order was never complied with.

6. Case file reveals that repeatedly matter was adjourned enabling petitioner to settle the matter with the accused, but in vain. Today during proceedings of the case, learned counsel representing the petitioner fairly stated that since petitioner/accused is not coming forward to impart instructions and he has not complied with the order dated 08.08.2023, this Court may proceed to decide the petition on its own merits.

7. Having heard learned counsel for the parties and perused material adduced on record, vis-a-vis reasoning assigned in the impugned

judgments, this Court sees no reason to agree with Mr. Jagan Nath, learned counsel representing the petitioner, that Courts below have fallen in grave error while appreciating the evidence, rather this Court finds that both the Courts below have meticulously dealt with each and every aspect of the matter and there is no scope left for interference.

8. Petitioner-accused in his statement recorded under Section 313 Cr.P.C. while denying that he had issued Cheque Ex.CW1/B in order to discharge his legal liability towards the complainant, nowhere disputed factum with regard to his having issued the Cheque as well as his signatures thereupon, rather he attempted to set up a plea that he had paid the entire sum to the complainant, but yet he proceeded to file false complaint against him. Though accused examined one Sohan Singh as DW-1, but by examining afore person, he was not able to probabilise afore defence, which he attempted to set-up.

9. Complainant in the case at hand examined himself as CW1. In his examination-in-chief, he tendered evidence by way of affidavit Ex.CW1/A, reiterating therein averments contained in the complaint. Apart from above, he also tendered documentary evidence such as Cheque Ex.CW1/B, memo Ex.CW1/C, legal notice Ex.CW1/D, postal receipt Ex.CW1/E, track consignment report Ex.CW1/F and copy of passbook Ex.CW1/G. If the cross-examination conducted upon this witness is perused in its entirety, it can be safely concluded that accused was unable

to extract anything contrary to what this witness stated in his examination-in-chief. In his cross-examination, he while stating that he had good relations with the accused, who is his neighbour, stated that accused disclosed that he was in dire need of money, as, due to code of conduct, he was not receiving payment of bills from the government. He stated that accused borrowed a sum of ₹5,00,000/- from him and issued Cheque in December, 2019, in order to discharge his liability. He submitted that one Cheque was of ₹5,00,000/- and second was of ₹10,00,000/-. He submitted that both the Cheques were bounced. He specifically denied suggestion put to him that no Cheque was issued. In his cross-examination, no suggestion worth the name ever came to be put to the complainant with regard to issuance of Cheque as well as signatures thereupon. No suggestion with regard to liability of the accused qua which he issued Cheque ever came to be put forth to the complainant.

10. Accused examined one Sohan Singh as DW-1, who deposed that he is ex-serviceman and has good relation with the complainant as well as accused. While stating that accused is a contractor, he stated that accused had handed over Rs.4,00,000/- in his presence. In his cross-examination, he deposed that no receipt has prepared in his presence. He also stated that he cannot tell date or month when Rs.4,00,000/- were handed over by the accused to the complainant. He also stated that he does not know for what purpose payment was made.

11. Since afore witness was unable to produce evidence, if any, with regard to return of ₹4,00,000/- to the complainant, which otherwise was not the case of the complainant, no illegality can be said to be committed by both the Courts below while discarding the testimony of afore witness. As has been observed hereinabove, nothing relevant could be elicited in the cross-examination of the complainant. No suggestion worth the name ever came to be put forth to the complainant with regard to repayment of Rs.4,00,000/-, if any, by the accused in the presence of DW-1 Sohan Singh. No suggestion, if any, ever came to be made with regard to return of money by the accused to the complainant. Since factum with regard to issuance of Cheque as well as his signatures thereupon never came to be refuted, no illegality can be said to have been committed by the Courts below while invoking Sections 118 and 139 of the Act, which speak about presumption in favour of the holder of the Cheque that Cheque was issued towards discharge of a lawful liability. No doubt, aforesaid presumption is rebuttable, but to rebut such presumption, accused either can refer to the documents and evidence led on record by the complainant or presumption can be rebutted by leading positive evidence, if any. However, in the case at hand, accused was unable to point out from the documents as well as evidence adduced on record by the complainant that Cheque issued by him was not issued towards discharge of lawful liability.

12. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR(Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the Cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the Negotiable Instruments Act, regarding commission of the offence comes into play. It would be profitable to reproduce relevant paras No.23 to 25 of the judgment herein:-

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is

a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds

> and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

13. Having scanned the entire evidence adduced on record by the respective parties, this Court finds that all the basic ingredients of Section 138 of the Act are met in the case at hand. Since Cheque issued by accused towards discharge of his lawful liability was returned on account of insufficient funds in the bank account of accused and he despite having received legal notice failed to make the payment good within the stipulated time, complainant had no option but to institute proceedings under Section 138 of the Act, which subsequently rightly came to be decided by both the Courts below on the basis of pleadings as well as evidence adduced on record by the respective parties.

14. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.P.C to re-appreciate the evidence, especially in view of the concurrent findings of fact and law relied upon by the Courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** (1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said

> revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

15. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as fact, if any, committed by the Courts below, while passing impugned judgments, there is no occasion, whatsoever, to exercise the revisional power.

16. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but learned counsel representing the accused has failed to point out any material irregularity committed by the Courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the Courts below.

17. Consequently, in view of the discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned judgments recorded by the Courts below, which otherwise, appear to be based upon proper appreciation of evidence available on record and as such, same are upheld.

18. Accordingly, the present criminal revision petition is dismissed being devoid of any merit. The petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already surrendered. Bail bonds of the petitioner, if any, are cancelled. Interim order dated 08.08.2023 stands vacated. Pending applications, if any, also stand disposed of.

(Sandeep Sharma),
Judge

April 27, 2026
(Rajeev Raturi)