
(2019) 09 SHI CK 0143
In the High Court Of Himachal Pradesh
Case No : Criminal Revision No. 210 Of 2015

Babli Chauhan

APPELLANT

Vs

M/S Mahindra And Mahindra Finance Services Limited

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 28, 118(a), 138, 139
Code Of Criminal Procedure, 1973 — Section 313, 397

Citation : (2019) 09 SHI CK 0143

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Onkar Jairath, G.C. Gupta, Meera Devi

Judgement

Sandeep Sharma, J

1. Instant criminal revision petition filed under S.397 CrPC, lays challenge to judgment dated 13.3.2015 passed by learned Sessions Judge, Shimla, Himachal Pradesh in Cr. Appeal No. 110-S/10 of 2011 affirming judgment of conviction and sentence dated 12.10.2011 recorded by learned Judicial Magistrate 1st Class, Court No. 3, Shimla, District Shimla, in Case No. 1423-3 of 10/09 titled M/s Mahindra and Mahindra Finance Services Limited vs. Smt. Babli Chauhan, whereby learned trial Court, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereafter, 'Act'), convicted and sentenced her to undergo simple imprisonment for a period of one year and to pay compensation to the tune of Rs.3,50,000/- to the respondent-complainant (hereinafter, 'complainant').

2. Facts, as emerge from the record are that the complainant instituted a complaint under S.138 of the Act, in the Court of learned Judicial Magistrate 1st Class, Court No. 3, Shimla, alleging therein that the accused borrowed a sum of Rs.3,64,000/- from the complainant on 27.7.2005, vide loan agreement No. 332035, for the purchase of Mahindra Mini Bus. Loan amount was agreed to be

repaid alongwith financial charges by the accused in 60 monthly installments of Rs.8,550/-, but the accused defaulted in repayment of loan, whereafter cheque bearing No. 617502 dated 2.6.2009, amounting to Rs.2,92,760/-came to be issued in favour of the complainant by the accused, in discharge of her debt drawn on an account maintained by her with the State Bank of India, Kholighat, District Shimla. However, the fact remains that the said cheque (Ext. CW-1/C) came to be dishonoured on account of insufficient funds. Immediately, after receipt of return memo from the Bank, complainant served the accused with statutory notice, calling upon her to make good the payment within the stipulated period but since the accused failed to make good the payment within the stipulated period as prescribed in the notice, complainant approached learned trial Court in the proceedings filed under S.138 of the Act. Learned trial Court, in the totality of evidence led on record by respective parties, held the accused guilty of having committed offence punishable under S.138 of the Act and accordingly convicted and sentenced her, as per description given herein above.

3. Being aggrieved and dissatisfied with the judgment of conviction and sentence passed by learned trial Court, accused preferred an appeal in the court of learned Sessions Judge, Shimla, who vide judgment dated 13.3.2015, dismissed the appeal, as a consequence of which, judgment of conviction and sentence recorded by learned trial Court came to be upheld. In the aforesaid background, accused has approached this Court in the instant proceedings, seeking therein her acquittal after setting aside judgments of conviction and sentence recorded by learned Courts below.

4. On 8.7.2015, this Court suspended the substantive sentence imposed by learned trial Court, subject to petitioner's furnishing personal bonds in the sum of Rs.25,000/- and to pay amount of compensation within a period of two weeks. However, the fact remains that despite repeated opportunities, accused failed to make good the payment in terms of order dated 8.7.2015. On 21.8.2015, accused undertook before this Court to deposit amount in question on or before 30.9.2015 but again, complete payment in terms of judgment passed by learned trial Court has not been made. Orders passed by this Court from time to time reveal that this Court, with a view to accommodate the accused, afforded as many as 15 opportunities enabling her to deposit the amount in question.

5. On 29.5.2017, accused made payment of some amount, yet a sum of Rs.80,000/- still remains payable by her. Though, today the accused has brought a sum of Rs.15,000/-, but Mr. Gupta, learned Senior Advocate appearing for the complainant states that he has no instructions to receive the money and as such, accused may deposit the same with the complainant company. In view of the aforesaid conduct of the accused, whereby she, despite repeated opportunities given by this Court, failed to deposit the amount, this Court has no other option but to decide the present revision petition on its merit.

6. Having heard learned counsel for the parties and perused the material

available on record, this court finds no illegality or infirmity in the judgments passed by learned Courts below. Though, Mr. Onkar Jairath, learned counsel appearing for the accused, made a serious attempt to persuade this Court to agree with his contention that learned Courts below have failed to appreciate the evidence in its right perspective, but this Court finds from the record that it stands duly proved on record that the cheque in question, Ext. CW-1/C was issued by accused towards discharge of her lawful liability. In nutshell, defence as set up by the accused is that she never filled in the amount in the cheque in question but since there is no dispute, if any, with regard to signatures on the cheque, Ext. CW - 1/C, rather same stand admitted, learned Courts below have rightly held that benefit of presumption as envisaged under Ss.118 and 139 of the Act is available to the complainant being holder of cheque. Accused, in her statement under S.313 CrPC, has categorically admitted that she has borrowed a sum of Rs.3,64,000/- from the complainant. She also admitted that the said amount was to be repaid by her alongwith interest in 60 monthly installments of Rs.8,550/- each. Apart from above, though the complainant categorically denied the suggestion that ten blank cheques including cheque Ext. CW-1/C were obtained by it at the time of advancing loan to the complainant but, as has been noticed herein above, since there is no dispute with regard to the signatures of the accused on the cheque in question, defence set up by her, which is otherwise not probable, is of no consequence.

7. Complainant by successfully proving issuance of cheque Ext. CW-1/C, has discharged its onus as such, the onus to prove otherwise was very much upon the accused. Evidence available on record clearly suggests that the complainant has successfully proved the ingredients of S.138 of the Act.

8. Mr. Mohinder Gautam (CW-1), while deposing before learned Court below, has categorically deposed that the accused had borrowed a sum of Rs.3,64,000/- from the complainant for the purchase of vehicle and the loan alongwith financial charges was required to be repaid by the accused in 60 monthly installments. He also proved the statement of account of the accused Ext. CW-1/B during his examination-in-chief. As per this witness, accused was irregular in making repayment of installments, as a consequence of which, she issued cheque Ext. CW-1/C drawn in favour of the complainant. He has categorically stated that on presentation, cheque Ext. CW-1/C was dishonoured on account of insufficient funds. This witness successfully proved issuance of statutory demand notice Ext. CW-1/F by stating that same was sent on the correct address of the accused, vide registered post as well as under postal certificate, Exts. CW-1/G and CW-1/H. During his examination, this witness denied the suggestion put to him that he is not authorised to appear on behalf the complainant. He further denied the suggestion put to him that blank cheques were obtained from the accused for security purpose at the time of advancing loan. Cross-examination conducted upon this witness nowhere suggests that the defence was able to extract anything contrary to what he has stated in his examination-in-chief, rather, close scrutiny of same suggests that the testimony of this witness remained un-

shattered.

9. Accused, while appearing as DW- 1, deposed that the blank cheques obtained from her by the complainant have been misused by it. She further stated that the contents of cheque Ext. CW-1/C were not filled in by her. In her cross-examination, she categorically admitted that the complainant had advanced loan to her for the purchase of vehicle. She also admitted due execution of loan agreement, Ext. P6. Most importantly, this witness categorically admitted her signatures upon the cheque Ext. CW-1/C.

10. Having carefully perused the evidence available on record, as has been discussed herein above, this Court is in total agreement with the complainant that the cheque in question, Ext. CW-1/C was issued by the accused for consideration in discharge of her debt/liability. Since presumption as referred to herein above has not been successfully rebutted by the accused, she rightly came to be held guilty of having committed offences punishable under S.138 of the Act.

11. Once signatures on the cheque are not disputed rather stand duly admitted, aforesaid plea with regard to cheque having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon *Hiten P. Dalal v. Bartender Nath Bannerji*, (2001) 6 SCC 16, wherein it has been held as under:

"The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

12. S.139 of the Act provides that 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.

13. True it is that to rebut aforesaid presumption, accused can always raise probable defence either by leading positive evidence or by referring to material, if any, adduced, on the record by the complainant, but, in the case at hand, accused has miserably failed to raise probable defence, much less sufficient defence to rebut the presumption available in favour of the complainant under Ss. 118 and 139 of the Act. Close scrutiny of material available on record compels this Court to agree with learned senior counsel for the complainant, that there is absolutely no evidence available on record to probabalise the defence so projected by accused that blank cheques were issued to the complainant and one of the cheques has been misused. Accused with a view to set up aforesaid plea was required to substantiate the same by leading cogent and convincing

evidence but, in the case at hand, accused even during her statement under S.313 CrPC, has not denied the factum with regard to issuance of cheque but has taken a plea that ten blank cheques were procured by the complainant at the time of advancing the loan and one of the cheques has been misused. Mere statement of the accused is not sufficient to prove that the cheque in question has been misused, rather the accused, with a view to rebut the presumption available in favour of the holder, is/was under obligation to prove by leading positive evidence that the cheque in question was issued as a security.

14. Hon'ble Apex Court in *M/s Laxmi Dyechem vs. 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 upon the material submitted by the complainant. Needless to say, if the accused/drawer of cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, statutory presumption under S.139 of the Act regarding commission of the offence comes into play. It would be apt to reproduce following paras of judgment (supra) herein below:

"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 138 can 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."

15. Recently, Hon'ble Apex Court, having noticed various judgments passed on earlier occasions, reiterated the principles to be kept in mind while extending benefit of presumption under Ss. 118 and 139 of the Act *ibid*, in *Basalingappa vs. Mudibasappa*, Cr. Appeal No. 636 of 2019 decided on 4.9.2019. Hon'ble Apex Court held as under:

"23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
27

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 28 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused."

16. In view of detailed discussion made above and the law laid down by Hon'ble Apex Court (supra), the petition at hand is dismissed being devoid of merit. Judgments passed by learned Courts below are upheld. Accused is directed to surrender before the learned trial Court to serve the sentence imposed upon her, forthwith.

Pending applications, if any, stand disposed of. Bail bonds, if any, furnished by the accused stand cancelled.