HIGH COURT OF PUNJAB AND HARYANA

Bench: Hon'ble Mr. Justice Deepak Gupta

Date of Decision: 02.11.2023

CRR-1469-2016

GIRRAJ SHARMA . . . . Petitioner

Vs.

DEVENDER . . . . Respondent

Legislation:

Section 20, 49, 58, 86, 87, 118, 125, 138, 139 of the Negotiable Instruments Act, 1881
Section 313, 315, 389 of the Criminal Procedure Code (CrPC)

Subject: Cheque Dishonour under Section 138 of the Negotiable Instruments Act, 1881; Reversal of conviction by the appellate court and restoration of trial court's conviction and sentence.

Headnotes:

Cheque Dishonour – Section 138 of the Negotiable Instruments Act – Reversal of conviction by the appellate court challenged – Trial court convicted the accused for dishonour of cheque amounting to ₹1,75,000; Appellate court acquitted the accused – High Court finds misappreciation of evidence by appellate court, reinstates trial court's conviction. [Para 1, 18-42]

Delay in Filing Appeal – Condonation of delay in filing appeal – Accused's application for condonation of delay erroneously allowed by the appellate court without proper justification – High Court finds accused's conduct and reasons for delay unjustifiable, reverses appellate court's decision on this point. [Para 16-17, 37]

Presumption Under Section 139 of NI Act – Accused admitted to issuing the cheque in question – High Court observed that once signature on cheque is admitted, presumption under Section 139 is in favour of the complainant – Accused failed to probabilize his defence adequately. [Para 20-27, 31-34]

Appeal Judgment Misappreciation – Appellate court's judgment based on conjectures and surmises – High Court finds that appellate court misread evidence and ignored crucial admissions by accused – Appellate court's judgment set aside. [Para 36, 41]

Sentence Restored – Conduct of the accused considered – High Court finds no infirmity in trial court's order of sentence, thereby restoring the same – Accused directed to surrender within 15 days. [Para 43-44]

Decision – Appellate Court's judgment set aside – Trial Court's conviction and sentence order restored – Accused directed to surrender for serving sentence. [Para 42-44]

Referred Cases:

- **Rangappa vs. Sri Mohan, 2010 (3) Criminal Court Cases 022 (S.C.): 2010 (3) Civil Court Cases 115 (S.C.): 2010 (2) Apex Court Judgments 285 (S.C.): 2010 (11) SCC 441**
- **Basalingappa Vs. Mudibasappa, 2020 SCC OnLine SC 491**
- **Shiv Kumar Vs. Ram Avtar Aggarwal, 2020(2) RCR (Crl.) 147**
- **Sumeti Vij Vs. M/s Paramount Tech Fab Industries, 2021(2) CCC 348 (SC)**
- **Uttam Rama Vs. Devinder Singh Hudan & Anr., 2019(4) CCC 596 (SC)**

Representing Advocates:

Petitioner: Mr. Shiv Kumar, Advocate
Respondent: Mr. Yogeshwar Dayal, Advocate

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DEEPAK GUPTA, J.

Petitioner is aggrieved by the judgment dated 26.02.2016 passed in Criminal Appeal N: 62 of 2015 titled 'Devender vs. Girraj Sharma' by ld. Additional Sessions Judge, Faridabad, acquitting the respondent from the charges under Section 138 of the Negotiable Instruments Act, 1881 [for short 'the NI Act'], by reversing the judgment of conviction, recorded in Complaint Case N: RBT 1429 of 2009 titled 'Girraj Sharma vs. Devender' by the Court of ld. Judicial Magistrate 1st Class.

2. In order to avoid confusion, parties shall be referred as per their status before the trial Court.

3. Perusal of the trial Court record reveals that complainant - Girraj Sharma *(petitioner herein)* sought prosecution of accused - Devender *(respondent herein)* under Section 138 of the NI Act, by filing the complaint in the Court of ld. JMIC, Faridabad, by alleging that accused had taken friendly loan of `1,75,000/- in May 2009 for a period of one month, promising to refund the same along with interest @ 24% per month. In order to discharge his liability, accused issued account payee cheque No.344062 dated 10.06.2009 for an amount of `1,75,000/- drawn on IDBI Bank Ltd. Sector 16, Faridabad, favoring the complainant. However, on presentation, the cheque was returned unpaid vide return memo dated 11.06.2009 with remarks 'drawers signature incomplete'. Intimation was received by the complainant in this regard from his banker on 13.06.2009. Complainant then served a legal notice dated 15.06.2009 through his Advocate and sent it to the accused through registered post, asking him to make payment of the cheque amount within 15 days of the receipt of the notice. However, despite receipt of the notice, accused failed to make payment. With these allegations, complaint was filed on 30.07.2009.

4. After recording preliminary evidence, process against the accused was issued on the same day i.e., 30.07.2009. Despite service, in accordance with law, accused did not put in appearance and was ultimately declared proclaimed person vide order dated 07.03.2012. He was produced by the police before the Court of ld. JMIC, Faridabad on 19.03.2012 and was released on bail.

5. Notice of accusation was served upon the accused on 17.09.2012 under Section 138 of the NI Act, to which he pleaded not guilty and claimed trial. Complainant appeared as his own witness, faced cross-examination and concluded his evidence. Statement of the accused under Section 313 CrPC was recorded, in which he took the stand that he had borrowed only `55,000/- from the complainant and that cheque in question was issued by him as a security cheque. He further stated that cheque bears his signature at one place, adjacent to the seal of Ex.C1 on the cheque. He admitted to have received the legal notice. He opted to adduce evidence in defence. Application of the accused under Section 315 CrPC to appear as his own witness was allowed and accused then appeared in the witness box as DW1 and further examined one Babu Lal as DW2 and after tendering documents Ex.D4 & D5, closed his defence evidence.

6. After hearing counsels for both the sides, Ld. JMIC, Faridabad vide judgment dated 16.01.2014 recorded conviction of the accused under Section 138 of the NI Act and vide a separate order of the even date, sentenced him to undergo rigorous imprisonment for a period of one year and further directed him to pay an amount of `2,46,000/- as compensation to the complainant. In case of default of payment of compensation, he was further directed to undergo simple imprisonment for a period of two months. 7. On the same day i.e., 16.01.2014, when the conviction was recorded, sentence was suspended under Section 389 CrPC and interim bail was granted to accused for a period of 30 days to enable him to file appeal. However, the accused (now convict) neither filed the appeal within the time allowed to him nor surrendered before the trial Court. His bail was cancelled on 01.03.2014 and warrants of arrest were issued against him. He was arrested by the police on 01.07.2015 and produced before the Court and then sent to jail.

8. Against the judgment of conviction and order of sentence both dated 16.01.2014, the accused-convict filed an appeal in the Court of Sessions by pleading that his conviction has been wrongly recorded; that there was no documentary evidence to prove the existence of loan transaction; that cheque in question had been misused; that actual loan amount was `55,000/- only, out of which he had already paid

`40/45,000/- and thus, there was no liability. It was contended further that trial Court had ignored the evidence produced by him and had wrongly convicted him. Prayer was made to set aside the conviction and sentence as recorded by the trial Court.

9. The aforesaid appeal, as filed on 13.07.2015, was accompanied by an application for condonation of delay. It was pleaded in the application that the previous counsel had not informed the applicant-accused about the decision of the case; that he came to know about the decision only on 01.07.2015 and after obtaining the certified copy of the judgment, he filed the appeal, and so the delay was not intentional.

10. Perusal of the appeal file reveals that without passing any order on the application for condonation of delay, the appeal was admitted on

16.07.2015. The accused-convict was released on bail on the same day. Notice of appeal only was issued to the respondent-complainant. Thereafter, vide impugned judgment dated 26.02.2016, the Court of ld. Additional Sessions Judge, Faridabad not only allowed the application thereby condoning the delay, but further set aside the judgment of conviction and order of sentence as passed by the trial Court and acquitted the appellant-accused, thus allowing his appeal.

11. The complainant of the case i.e., petitioner herein is now in this revision against the aforesaid reversal and also challenges the order condoning the delay in filing the appeal.

12. (i) It is contended by ld. counsel that impugned judgment dated 26.02.2016 is completely based on conjectures and surmises and by misreading and misappreciation of oral as well as documentary evidence. All the necessary ingredients of Section 138 of the NI Act were duly proved on record. Ld. trial Court had rightly convicted the accused after proper appreciation of evidence. The only defence taken by the accused was that he had taken loan of `55,000/- and had issued the cheque in question for the purpose of surety, but failed to substantiate the said defence.

(ii) Ld. Counsel has further contended that no opportunity was provided to the complainant (respondent before the Court of Sessions) to contest the application for condonation of delay and that the said application was allowed at the time of final disposal, thus, depriving the

complainant to challenge that order and due to that reason, that order has been challenged in this revision itself.

(iii) With aforesaid submissions, prayer is made to set aside the impugned judgment of acquittal recorded by the Court of Sessions and to restore the judgment passed by the trail Court thereby convicting and sentencing the respondent-accused.

13. On notice to the respondent-accused, he made appearance though his counsel and contested the revision.

14. I have considered submissions of both the sides and have appraised the record carefully.

15. Facts, as noticed above, would reveal that complainant (petitioner herein) was not granted any opportunity to oppose the application to condone the delay in filing the appeal by the appellate court and so, he has the right to challenge the order before this court.

16. In order to see justifiability for condonation of delay, overall conduct of accused is important to notice. Though, process against the accused was issued by the Court of ld. JMIC on 30.07.2009 but despite service and even receipt of legal notice prior to filing of the complaint, he did not appear in the Court nor responded to the legal notice. He was ultimately declared proclaimed person on 07.03.2012 and was produced by the police on 19.03.2012. After the trial was concluded and his conviction was recorded on 16.01.2014, his sentence was suspended for a period of 30 days to enable him to file appeal before the Court and in the meantime, he was admitted to interim bail vide order dated 16.01.2014. However, as noticed earlier, he neither filed appeal nor surrendered before the trial Court and rather, absconded. His bail was cancelled and ultimately, he was produced by the police after arresting him on 01.07.2015.

17. In the aforesaid circumstances, the plea taken by the accused in his application for condonation of delay moved before the Appellate Court to the effect that his previous counsel had not informed about the decision and that on coming to know of the same, he obtained the certified copy and then filed the appeal, is absolutely not sustainable. There was no justifiable reason for condoning the delay in filing the appeal on 13.07.2015 i.e., with delay of more than one year and as

such, the order of ld. Appellate Court, allowing the application for condonation of delay, is reversed.

18. Though appeal of the accused against his conviction deserved to be dismissed on the ground of limitation itself and so, this revision deserves to be allowed, but even on merits, the revision deserves to be allowed for reasons as recorded below.

19. As per the trial Court record, Ex.C1 is the cheque in question dated 10.06.2009 for an amount of `1,75,000/- drawn on IDBI Bank issued in favour of the complainant by the accused. Ex.C2 is the bank return memo report dated 11.06.2009, as per which cheque was returned unpaid for the reasons 'drawers signature incomplete'. Ex.C4 is the copy of legal notice dated 15.06.2009 sent by the complainant through his counsel to the accused. The notice was sent through registered post as evident from postal receipt Ex.C3 and accused duly received the notice as evident from acknowledgment due card Ex.C5. All these documents are duly proved by the testimony of CW1-complainant Girraj Sharma.

20. During his cross-examination, it was suggested on the part of the accused to the complainant-Girraj Sharma that cheque Ex.C1 was given by Devender (accused) after filling and signing the same. Said suggestion was admitted by the complainant to be correct. The said suggestion in itself contains the clear admission of the accused to have issued the cheque Ex.C1 in favour of the complainant after filling and signing the same. In his statement recorded under Section 313 CrPC also, accused admitted his signature on the cheque Ex.C1, though claimed that it was issued as a security cheque. When accused entered in the witness box as DW1, here also he candidly admitted to have handed over the cheque Ex.C1 to the complainant-Girraj Sharma after signing the same.

21. Once the signature on the cheque is admitted by the accused, presumption under Section 139 of the NI Act to be read with Section 118 of the NI Act are clearly available to the complainant. Said provisions 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;"*

22. In ***Rangappa vs. Sri Mohan, 2010 (3) Criminal Court Cases 022 (S.C.): 2010 (3) Civil Court Cases 115 (S.C.): 2010 (2) Apex Court Judgments 285 (S.C.): 2010 (11) SCC 441***, a three judges 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.

23. 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 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."

24. In ***Basalingappa Vs. Mudibasappa 2020 SCC OnLine SC 491***, referring to various precedents on Section 118(a) and 139 of the Negotiable Instruments Act, Hon'ble Supreme Court summarized the principles as under:

• 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.

• 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.

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

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

25. 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, 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.***

26. 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).***

27. In a case to prosecute the accused under Section 138 of the NI Act, the accused gets first opportunity to put forth his defence by responding to the legal notice, which is sent to him, prior to filing of the complaint. He gets second opportunity, when notice of accusation is served upon him and if he so desires, he can put forth his defence. He gets next opportunity by eliciting the answers from the complainant in his cross-examination by suggesting his defence to the complainant. The next time, accused gets the opportunity to put forth his defence when his statement under Section 313 is recorded and lastly, he gets the opportunity, when he produces his own defence.

28. In the present case, ld. Appellate Court has been swayed by the fact that accused had put forth his defence to have taken loan of `55,000/- only, by replying to the legal notice. However, ld. appellate Court very conveniently ignored the fact that the reply dated 16.09.2009 (Ex.D1) to the legal notice dated 15.06.2009, was sent by the accused, after filing of the present complaint, which had been filed way back on 30.7.2009. During his cross-examination as DW1, accused admitted this fact that he sent reply to the legal notice after filing of the complaint. As such, the reply Ex.D1 to the legal notice, sent by the accused after filing of the complaint, could not have been taken into consideration.

29. Even if the stand taken by the accused in reply dated 16.09.2009 to the legal notice dated 15.06.2009 is taken into consideration, as per him, he had taken loan of `55,000/- only on 10.11.2008 and that complainant had received his (accused's) signature on some blank papers and had also received a blank cheque as security. Further stand was taken that he (accused) had already paid an amount of `45,000/-. In his statement recorded under Section 313 CrPC also, accused took the same stand.

30. However, it is important to notice that neither the reply to the legal notice nor the statement of the accused under Section 313 CrPC, are on oath. These cannot be considered as evidence to prove the stand of the accused, particularly when reply has been sent after filing of the complaint. Reliance in this regard can be placed upon ***Sumeti Vij's case (supra),*** wherein it has been held by the Hon'ble Supreme Court

that statement of accused recorded under Section 313 Cr.P.C is not substantive evidence of defence, but is only an opportunity to accused to explain the incriminating circumstances appearing in the prosecution case. Similar view was taken by Hon'ble Supreme Court in ***Uttam Rama Vs. Devinder Singh Hudan & Anr., 2019(4) CCC 596 (SC)*** to the effect that statement of accused under Section 313 Cr.P.C is not substantive evidence.

31. In view of the above legal position, simply by taking the stand either in reply to the legal notice or in the statement under Section 313 CrPC that accused had taken loan of `55,000/- only and that blank cheque was given as a security, it cannot be stated that presumption in favour of the complainant stands rebutted or that the defence is probablized.

32. It is no doubt true that when accused entered the witness box as DW1, he repeated this stand by way of his affidavit Ex.DW1/A to the effect that he had taken `55,000/- on 10.11.2008, in lieu of which accused had taken his signature on blank papers and had also taken a blank signed cheque as security. However, most importantly, when complainant-Girraj Sharma entered the witness box as CW1, this stand was not confronted by the accused to the complainant at all. There is no suggestion that loan of `55,000/- only was taken on 10.11.2008. There is absolutely no suggestion that complainant had taken signature of the accused on any blank papers. There is no suggestion that complainant had taken any blank signed cheque as security from the complainant.

33. To the contrary, as has already been noted, specific suggestion was given to the complainant that accused Devender had given cheque Ex.C1 after filling and signing the same and said suggestion was admitted by complainant to be correct. Not only this, in his cross-examination as DW1 also, accused admitted that he had given cheque Ex.C1 to the complainantGirraj Sharma after signing the same. The above suggestions put forth to complainant-Girraj Sharma and the admission in his cross-examination by the accused, completely falsify his stand taken in reply Ex.D1 to the legal notice or the statement under Section 313 CrPC to the effect that he had taken loan of `55,000/- only or that he had already returned `45,000/- or that he had handed over a blank signed cheque as security.

34. Still further, without holding so, let it be assumed for a moment that accused had taken loan of `55,000/- only from the complainant and as a security, he had given cheque Ex.C1. It simply means that there was no such trust between the parties that complainant could give the money to the accused without any security. If it is so, it is hard to believe that accused will return the amount of `45,000/- to him as is projected by him, without obtaining any receipt or writing from the complainant or without insisting upon return of the security cheque. The said circumstance further goes against the accused, falsifying his defence.

35. Ld. Appellate Court, while reversing the judgment of conviction passed by the trial Court, observed that probable defence has already been taken by the accused by replying to the legal notice; that complainant had failed to prove the existence of liability; that complainant was involved in money lending business violating the provisions of Section 58 of the NI Act; that signature on the cheque was made complete by overwriting and so, Section 87 of the NI Act was attracted and that loan was for a period of 30 days as pleaded by the complainant and so, how within 10 days request could have been made to return the loan.

36. After appraising the entire record, I find reasonings given by the appellate Court to be absolutely irrelevant and based on conjectures and surmises and by totally misappreciating the evidence on record.

37. As already noticed that despite receipt of the legal notice much prior to the filing of the complaint as evident from AD card Ex.C5 and as also candidly admitted by the accused, he did not respond to the legal notice and rather gave reply much after filing of the complaint and so said factor could not have been taken into consideration. Once the signature on the cheque were admitted by the accused in so many words, not only by making positive suggestion to the complainant, but also in his statement under Section 313 CrPC and then in his defence evidence, the existence of legal liability remained not in dispute at all, in view of presumption under Section 139 of the NI Act. Simply because it was pleaded by the complainant that he had given friendly loan of `1,75,000/- on interest @ 24% per annum, it could not be concluded that complainant was indulging in money lending business, particularly when he disclosed during cross-examination that he is not having any case pending against any of his other friends. Section 58 of the NI Act provides about the instrument obtained by unlawful means or for

unlawful consideration. The said provision is absolutely not applicable to the facts of the present case, simply because complainant had given the loan of `1,75,000/- against interest as was pleaded by him.

38. Section 87 of the NI Act provides about the effect of material alteration. It reads as under: -

***"87. Effect of material alteration**. —Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;*

***Alteration by indorsee.** —And any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of sections 20, 49, 86 and 125."*

39. Bare perusal of the aforesaid provision would clearly make it out that it is applicable when any material alteration is made against the consent of a party to the negotiable instrument.

40. In the present case, the aforesaid provision was not at all attracted simply because signature on the cheque was made complete by the accused by overwriting on it. It was never the case of the accused that any material alteration was made in the cheque against his consent by the complainant or anybody else. Rather, he admitted his signature on the cheque in so many words at various stages of the trial, as already noticed.

41. It is, thus, clear that ld. Appellate Court clearly mis-appreciated the evidence and set aside a well reasoned judgment of conviction recorded by the trial Court, on the basis of conjectures and surmises.

42. Consequent to the aforesaid discussion, the impugned judgment of acquittal dated 26.02.2016 as passed by ld. Appellate Court is hereby set aside; and the judgment of conviction as recorded by the trial Court on 16.01.2014 is hereby restored.

43. As far as restoration of order of sentence of the trial Court is concerned, this Court does not find any infirmity in that order also. Apart from the fact that accused concocted a false story so as to avoid his liability, his conduct is also important to notice. As has already been noticed that

though process against the accused was issued by the Court of ld. JMIC on 30.07.2009 but despite service, he did not appear in the Court. He was ultimately declared proclaimed person on 07.03.2012 and was produced by the police on 19.03.2012. After the trial was concluded and his conviction was recorded, his sentence was suspended for a period of 30 days to enable him to file appeal before the Court and in the meantime, he was admitted to interim bail vide order dated 16.01.2014. However, he neither filed appeal within time nor surrendered before the trial Court and rather, absconded. His bail was cancelled and ultimately, he was produced by the police after arresting him on 01.07.2015.

44. Having regard to the overall conduct of the accused-respondent, he does not deserve any leniency. As such, the order dated 16.01.2014 qua the quantum of sentence, as recorded by Ld. JMIC, is also hereby restored. Respondent-accused is directed to surrender before the concerned trial Court/ld. CJM Faridabad within a period of 15 days from today, failing which the concerned Court will procure his presence by taking coercive steps, in accordance with law, and send him to jail for carrying out the sentence.

Disposed of.

A copy of the judgment be sent to the Court concerned.