

HIGH COURT OF PUNJAB AND HARYANA**CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR****Date on:14.12.2023**

CRM-M No.19897 of 2019 (O&M)

Balraj Singh**vs.****HDFC Bank Limited****Legislation:**

Section 482 of CrPC

Section 138 of the Negotiable Instruments Act

Section 420 of IPC

Section 118 and 139 of the NI Act

Article 21 of the Constitution of India

Section 63 of the Indian Evidence Act

Subject:

Petition challenging the orders allowing secondary evidence to prove a cheque return memo in a case involving cheque dishonour under Section 138 of the NI Act.

Headnotes:

Section 482 CrPC Petition Against Secondary Evidence Admission - Challenge against order allowing secondary evidence to prove cheque return memo dated 30.01.2014 in a cheque dishonour case - Initial oversight in producing the correct memo led to application for secondary evidence - Petitioner contested the admissibility of secondary evidence citing a legal precedent. [Paras 1, 5]

Facts of the Case - Cheque issued by petitioner dishonoured for insufficient funds - Legal notice followed, and criminal complaint filed under Section 138 NI Act - Incorrect memo exhibited initially, leading to application for secondary evidence. [Para 2]

Legal Notice and Complaint Specifics - Mention of cheque return memo dated 30.01.2014 in both legal notice and complaint - Error in initial memo presentation regarded as an oversight. [Para 7]

Respondent's Argument on Secondary Evidence - Emphasis on lack of dispute over cheque number and amount - Error attributed to oversight due to work rush - Respondent aimed to correct the error through secondary evidence. [Para 6]

Court's Analysis - Foundational evidence for secondary evidence present in legal notice and complaint - No prejudice against petitioner as he has opportunity to cross-examine and lead evidence - Judgments cited by petitioner not applicable in this context. [Paras 7, 9]

Parameters for Secondary Evidence - Court referred to Bharat Dixit vs. Smt. Usha Dixit outlining conditions for secondary evidence - Essential to lay foundational evidence in pleadings - Authenticity to be established on oath. [Para 8]

Decision - No illegality in the impugned order allowing secondary evidence - Respondent's right to fair trial under Article 21 considered - Petition dismissed, upholding the orders of the lower courts. [Para 10]

Referred Cases:

- Smt. J. Yashoda Vs. Smt. K. Shobha Rani 2007 (2) RCR (Civil) 840
- Vijay Vs. Union of India and others, Civil Appeal No.4910 of 2023
- Bharat Dixit Vs. Smt. Usha Dixit 2023 (4) RCR (Civil) 39

Representing Advocates:

- **Mr. Ravish Bansal for petitioner**

- **Mr. Saurabh Bhardwaj for respondent**

HARPREET SINGH BRAR, J.

1. The present petition under Section 482 of CrPC is preferred against the impugned order dated 26.03.2018 (Annexure P-6) passed by learned Judicial Magistrate Ist Class, Bathinda vide which application dated 22.03.2018 filed by the respondent to lead secondary evidence to prove cheque return memo dated 30.01.2014 was allowed and also against dismissal order dated 10.04.2019 (Annexure P-8) passed by learned Additional Sessions Judge, Bathinda in revision petition filed against the above-mentioned order.

2. The facts, in brief, are that the petitioner-accused availed Kisan Gold Card (KGC) of ₹21,40,000/- vide account No.22538040000042 from the respondent-complainant. In order to discharge his legal liability, the petitioner issued a cheque No.008916 dated 30.01.2014 for the amount of Rs.21,40,000/out of his bank account No.22531690000044 in favour of the respondent. The cheque was dishonoured on presentation vide memo dated 30.01.2014 with the remarks “funds insufficient.” Thereafter, a legal notice dated 25.02.2014 was served upon the petitioner. In response, the petitioner sought for a period of 7 days to make the requisite payment. However, he failed to make said payment and a criminal complaint under Section 138 of the Negotiable Instruments Act (hereinafter referred to as ‘NI Act’) read with Section 420 of the IPC was filed. 3. Due to oversight on part of the respondent, cheque dishonour memo dated 30.03.2014 was exhibited instead of memo dated 30.01.2014. An application to lead secondary evidence to prove and produce the memo dated 30.01.2014 was moved by the respondent, which was allowed by the learned trial Court vide order dated 26.03.2018.
4. The petitioner preferred a revision against the order dated 26.03.2018 before the learned Revisional Court but the same was dismissed vide order dated 10.04.2019.
5. Learned counsel for the petitioner *inter alia* contended that the approach of the learned trial Court in granting opportunity to the respondent-complainant to prove the memo dated 30.01.2014 by leading secondary evidence is contrary to settled law. The alleged memo dated 30.01.2014 cannot be allowed to be produced by way of secondary evidence, as the memo dated 30.03.2014 has already been exhibited and is available on record. The memo dated 30.03.2014 cannot be said to be an accidental oversight or *bona fide* mistake and the respondent-complainant had failed to explain how memo dated 30.03.2014 came into existence in respect of the same cheque and the

complainantrespondent cannot be allowed to fill the lacuna in its case. He relied upon the judgments of the Hon'ble Supreme Court in **Smt. J. Yashoda Vs. Smt. K. Shobha Rani 2007 (2) RCR (Civil) 840** and **Vijay Vs. Union of India and others** passed in Civil Appeal No.4910 of 2023 decided on 29.11.2023 to contend that photocopies of the originals cannot be produced as secondary evidence in terms of Section 63 of the Indian Evidence Act.

6. Per contra, learned counsel appearing for the respondent- complainant submitted that there is no dispute with regard to cheque number and cheque amount. On presentation, the cheque was first processed by the Head Office at Mumbai and in the event of dishonour of the cheque, memo is prepared by the Bank at Mumbai and Local Branch was informed thereafter. The local bank on receiving the information from the Head Office, Mumbai issued the memo making endorsement of 'dishonour of cheque'. Learned counsel for the respondent-complainant further contended that the cheque in question was returned dishonoured vide memo dated 30.01.2014. The legal notice was issued and a specific demand was made on the basis of memo dated 30.01.2014 and after expiry of the statutory period, the complaint was filed under Section 138 of the NI Act. Even in the complaint, there is a mention of cheque returning memo dated 30.01.2014 but while exhibiting documents due to rush of work and oversight, inadvertently memo dated 30.03.2014 issued by the local branch was exhibited instead of memo dated 30.01.2014 issued by the Head Office branch at Mumbai. As such, the respondent-complainant has approached the learned trial Court for proving memo dated 30.01.2014 as secondary evidence.
7. Having heard learned counsel for the parties and after perusal of the record of the case with their able assistance, it transpires that the complaint as well as the legal notice specifically mentions the date of cheque return memo as 30.01.2014 and there is no mention of memo dated 30.03.2014 issued by the local branch. The legal notice was issued to the petitioner by raising a specific demand of the cheque amount on 25.02.2014 and therefore, it is impossible to consider the date of memo as 30.03.2014. The trial is at the stage of recording of complainant's evidence and therefore, no prejudice is going to be caused to the petitioner as he would get sufficient opportunity to cross-examine the witnesses and lead his evidence to rebut the presumptions created in favour of the respondent-complainant under Sections 118 and 139 of the NI Act, as the petitioner is only required to raise a probable defence casting a doubt on the existence of consideration which he can do by

adducing direct evidence, circumstantial evidence or even on the basis of presumptions of law or fact. Furthermore, the judgments relied upon by the petitioner are not applicable to the facts and circumstances of the present case.

8. A Division Bench of this Court in ***Bharat Dixit Vs. Smt. Usha Dixit 2023 (4) RCR (Civil) 39*** has summarized the following parameters on the basis of which secondary evidence can be taken:-

“29. In view of the aforesaid discussion. the following parameters are summarised below for the purpose of taking secondary evidence:-

- (i) the party seeking to lead documentary evidence must laydown some foundational evidence either in the plaint or in the written statement as the case may be that the alleged copy is in fact the true copy of the original;*
- (ii) the party seeking to lead secondary evidence should demonstrate the exact inability in producing the original; (iii) that there is no requirement that an application for leading secondary evidence is filed in terms of section 65 (c) of the Indian Evidence Act before such evidence is led;*
- (iv) that the trial Court is not required to pass detailed order allowing or rejecting the objection with regard to the admissibility of secondary evidence at the time when such objection is taken;*
- (v) that the trial Court can proceed further by marking the document and decide the admissibility of such document on the basis of the evidence led at the time of passing of the final judgment;*
- (vi) that if the trial Court finds that the party seeking to lead secondary evidence has failed to prove the document in accordance with law such document should be eschewed from evidence;*
- (vii) that the authenticity of the copy shall be established on oath by executant or by the person who prepared such copy from the original.”*

9. One of the condition precedent in leading secondary evidence is that the applicant must lay down some foundational evidence in the pleadings. In the present case, the foundational evidence for leading secondary evidence has already been laid down in the legal notice dated 25.02.2014 and in the complaint itself the cheque return memo dated 30.01.2014 has been specifically mentioned. Furthermore, production of such evidence would assist the Court in discovering the truth in the pursuit of justice. Depriving the respondent-complainant from bringing on record best evidence available with him would amount to denial of free and fair trial as enshrined under Article 21 of the Constitution of India.

10. In view of the aforesaid facts and circumstances, no illegality or perversity is found in the impugned order dated 26.03.2018 passed by the Judicial Magistrate 1st Class, Bathinda, which has been affirmed vide order dated 10.04.2019 passed by the Additional Sessions Judge, Bathinda. Consequently, the instant petition stands dismissed.

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