IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 10TH DAY OF AUGUST, 2022

BEFORE

HON'BLE MR. JUSTICE SANDEEP SHARMA

CR. REVISION NO. 191 OF 2021

Between:-

RAMESH KUMAR

PETITIONER

(BY MR. AJI SHARMA, ADVOCATE)

AND

1. **STATE BANK OF INDIA,**
   BRANCH SUNDERNAGAR,
   DISTRICT MANDI, H.P.
   THROUGH ITS BRANCH MANAGER,
   SH. VED PRAKASH DOHROO

2. **THE STATE OF H.P.**

RESPONDENTS

(MR. ARVIND SHARMA, ADVOCATE
FOR R-1)

(MR. NARINDER GULERIA,
ADDITIONAL ADVOCATE GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL
FOR R-2)

Whether approved for reporting:

This petition coming on for orders this day, the court passed the following:

O R D E R

Instant criminal revision petition filed under S. 397 /401 CrPC, is directed against judgment dated 29.6.2021 passed by learned

Additional Sessions Judge, Sundernagar, District Mandi, Himachal Pradesh in Cr. Appeal No. 140/2015, affirming judgment of conviction and order of sentence dated 27.4.2015 passed by learned Additional Chief Judicial Magistrate, Court No.1, Sundernagar, District Mandi, in Cr. Complaint No. 113-I/2010//100-III/2010, titled State Bank of India v. Ramesh Kumar, whereby learned trial Court, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereinafter, 'Act') ordered accused to undergo simple imprisonment for one year and pay Rs. 8,00,000/- as compensation to the respondent No.1-complainant (hereinafter, 'complainant') and in default of payment of compensation, to further undergo simple imprisonment for two months.

2. Precisely, the facts of the case, as emerge from the record, are that complainant instituted proceedings under S.138 of the Act in the competent court of law, alleging therein that for lawful consideration, accuse issued cheque bearing No. 478183, dated 26.4.2010, amounting to Rs. 5,50,000/- in favour of the complainant. However, facts remains that the aforesaid cheque on its presentation was dishonoured on account of insufficient funds. Since despite having received legal notice, accused failed to make payment of cheque amount, within the time stipulated in the legal notice, complainant instituted proceedings under S. 138 of the Act in the competent court of law, which subsequently on the basis of evidence adduced on record by the parties, held accused guilty of having committed offence punishable under S.138 of Act and convicted and sentenced him as per description given above.

3. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence recorded by learned trial Court accused preferred an appeal before learned Additional Sessions Judge Sundernagar, Mandi, which was dismissed on 29.6.2021. In the aforesaid background, accused has approached this court in the instant proceedings, praying therein for his acquittal after setting aside judgments of conviction and order of sentence.

4. Vide order dated 3.9.2021 substantive sentence imposed upon the accused by learned trial Court was suspended subject to deposit of 15% of cheque amount within a period of four weeks. However, fact remains that the aforesaid amount was never paid by the accused, as a consequence of which, order dated 3.9.2021 came to be vacated on 22.12.2021, when despite there being last opportunity, 15% cheque amount and bail bonds of Rs. 25,000/- were not deposited/furnished by the accused. However, subsequently on 15.3.2022, this court on the vehement request of learned counsel for the petitioner, adjourned the matter for today's date, enabling the accused to comply with the order dated 3.9.2021. However, learned counsel for the accused states that despite repeated communications, accused is not coming forward to impart instructions nor depositing amount as such, petition be heard on merit.

5. Having heard learned counsel for the parties and perused the record vis-à-vis judgments of conviction and order of sentence impugned in the instant proceedings, this court finds it difficult to agree with learned counsel for the accused that learned courts below have failed to

appreciate evidence in its right perspective, rather, this court finds that learned court below have meticulously dealt with each and every aspect of the matter and despite there being sufficient opportunities, accused failed to repay the amount taken from the complainant as loan. Interestingly, in the case at hand, there is no denial on behalf of accused with regard to issuance of cheque and signatures thereupon. Accused has set up a case that Bank account was joint in his and name of his wife Smt. Asha Kumari, who was under obligation to repay the loan. Besides above, it has been further claimed by the accused that he did not take any loan from the Bank and property of wife was mortgaged on account of her having availed facility of loan.

6. Once there is no denial of issuance of cheque and signatures thereupon, presumption as available under Ss.118 and 139 comes into play. Section 118 and 139 of the Act clearly provide 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. True, it is that to rebut aforesaid presumption accused can always raise probable defence either by leading some positive evidence or by referring to the material, if any adduced on record by the complainant.

7. Reliance in this regard is placed upon judgment rendered by Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** v. **State of Gujarat**, (2019) 18 SCC 106, wherein, it has been held as under:

> "18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as

regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.

19. In order to discharge his burden, the accused put forward the defence that in fact, he had had the monetary transaction with the said Shri Jagdishbhai and not with the complainant. In view of such a plea of the accused-appellant, the question for consideration is as to whether the accused-appellant has shown a reasonable probability of existence of any transaction with Shri Jagdishbhai? In this regard, significant it is to notice that apart from making certain suggestions in the cross-examination, the accused- appellant has not adduced any documentary evidence to satisfy even primarily that there had been some monetary transaction of himself with Shri Jagdishbhai. Of course, one of the allegations of the appellant is that the said stamp paper was given to Shri Jagdishbhai and another factor relied upon is that Shri Jagdishbhai had signed on the stamp paper in question and not the complainant.

19.1 We have examined the statement of Shri Jagdishbhai as also the said writing on stamp papers and are unable to find any substance in the suggestions made on behalf of the accused-appellant.

19.2 The said witness Shri Jagdishbhai, while pointing out his acquaintance and friendship with the appellant as also with the respondent, asserted in his examination-in-chief, inter alia, as under:

"Accused when he comes to our shop where the complainant in the matter Shashimohan also be present that in both the complainant and accused being our friends, were made acquaintance with each other. The accused had necessity of money in his business, in my presence, had demanded Rs.22,50,000/- (Rupees twenty two lacs fifty thousandly) on temporary basis. And thereafter, the complainant from his family members by taking in piecemeal had given to the accused in my

presence. Thereafter, on demanding the money by the complainant, the accused had given seven (7) cheques to the complainant in our presence but such cheques being washed out in rainy water and on informing me by the complainant I had informed to the accused. Thereafter, Rohitbhai had given other seven (7) cheques to the complainant in my presence and the deed was executed on Rs. 100/- stamp paper in there is my signature."

19.3 This witness was cross-examined on various aspects as regards the particulars in the writing on the stamp paper and the date and time of the transactions. In regard to the defence as put in the cross-examination, the witness stated as under:

> "I have got shop in National Plaza but in rain no water logging has taken place. It is not true that there had been no financial dealings between me and the accused today. It is not true that I had given rupees ten lacs to the accused Rohitbhai on temporary basis. It is not true that for the amount given to the accused, I had taken seven blank duly cheques also blank stamp paper without signature. It is not true that there was quarrel between me and the accused in the matter of payment of interest. It is not true that even after the payment of Rs. ten lacs and the huge amount of the interest in the matter of interest quarrel was made. It is not true that due to the reason of quarrel with the accused, in the cheques of the accused lying with me by making obstinate writing has filed the false complaint through Shashimohan Goyanka. It is not true that no financial dealings have taken place between the complainant and the accused. therefore I also the complainant both at the time of evidence the accused at what place, on what date at what time, the amount taken has not been able to make clearly. (sic) It is not true that the blank stamp paper duly signed were lying in which obstinate writing has been made therefore the same has not been registered through sub registrar. It is not true that the dealings have been made between me and accused therefore there is my signature and the signature of the accused and the complainant has not signed. It is not true that any types of dealings between the accused and the complainant having not been done in my presence therefore in my statement no clarification has been given. It is not true that the accused in my presence as mentioned in the complaint any cheque has not been given. It is not true that I in collusion with the complainant to usurp the false amount the false complaint has been filed through Shashimohan Goyanka. It is not true that in support of the complaint of Shashimohan Goyanka is giving false statement."

19.4 The statement of Shri Jagdishbhai does not make out any case in favour of the accused-appellant. It is difficult to say that by merely putting the suggestion about the alleged dealing to Shri Jagdishbhai, the accused- appellant has been able to discharge his burden of bringing on record such material which could tilt the preponderance of probabilities in his favour.

19.5 The acknowledgement on the stamp paper as executed by the appellant on 21.03.2007 had been marked with different exhibit numbers in these 7 cases. In Complaint Case No. 46499 of 2008, the same is marked as Ex. 54 and reads as under :

> "Today the executor I Rohit Patel Ranchhodray Masala is a partner. Due to the financial difficulties having been arised, I have taken Rs.22,500,000/- (Rupees twenty two thousand fifty thousand only- sic) from my group which are to be paid to Shashimohan Goyanka.
>
> With reference to that today I have given seven (7) cheques of Corporation Bank, Alkapuri Branch bearing No. 763346 to 762252 amounting to Rs. 22,50,000/- (Rupees twenty two lacs fifty thousand only) Dates : (1) 01/4/08, (2) 01/05/08 (3) 01/07/08, (4) 01/08/08 (5) 01/10/08 (6) 01/11/08 (7) 01/12/08 the account of which is 40007.
>
> Earliest these cheques were given but due to rainy water logging the said cheques having been washed out (7) cheques have again been given which is acceptable to me."

19.6 The fact of the matter remains that the appellant could not deny his signatures on the said writing but attempted to suggest that his signatures were available on the blank stamp paper with Shri Jagdishbhai. This suggestion is too remote and too uncertain to be accepted. No cogent reason is available for the appellant signing a blank stamp paper. It is also indisputable that the cheques as mentioned therein with all the relevant particulars like cheque numbers, name of Bank and account number are of the same cheques which form the subject matter of these complaint cases. The said document bears the date 21.03.2007 and the cheques were post- dated, starting from 01.04.2008 and ending at 01.12.2008. There appears absolutely no reason to discard this writing from consideration.

19.7 One of the factors highlighted on behalf of the appellant is that the said writing does not bear the signature of the complainant but and instead, it bears the signatures of said Shri Jagdishbhai. We find nothing unusual or objectionable if the said writing does not bear the signatures of the complainant. The said writing is not in the nature of any bi partite agreement to be signed by the parties thereto. It had been a writing in the nature of acknowledgement by the accused-appellant about existence of a debt; about his liability to repay the same to the complainant; about his having issued seven post-dated cheques; about the particulars of such

cheques; and about the fact that the cheques given earlier had washed away in the rain water logging. Obviously, this writing, to be worth its evidentially value, had to bear the signatures of the accused, which it does. It is not unusual to have a witness to such a document so as to add to its authenticity; and, in the given status and relationship of the parties, Shri Jagdishbhai would have been the best witness for the purpose. His signatures on this document, therefore, occur as being the witness thereto. This document cannot be ruled out of consideration and existing this writing, the preponderance of probabilities lean heavily against the accused-appellant.

8. 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."

9. In the instant case, Ved Parkash Manager, State Bank of India Sundernagar, while deposing as CW-1 successfully proved on record that the accused with a view to discharge the loan liability, issued cheque amounting to Rs.5,50,000 dated 26.4.2010 Exhibit CW-1/A. He categorically stated that the cheque in question was signed by accused and that the cheque on its presentation was dishonoured on account of insufficient funds vide memo dated 3.5.2010, Exhibit Cw-1/B. He also stated that legal notice was issued through their counsel Ext. CW-1/C and postal receipt thereof is CW-1/D. He deposed that the notice was issued to the accused which was issued at the address given at the time of sanctioning of loan. If the cross-examination of this witness is perused in its entirety, it can be safely concluded that the defence was unable to shatter the testimony of said witness or extract anything contrary to what this witness stated in his examination-in-chief. This witness in his cross-examination specifically denied the factum with regard to claim of accused that he was regularly paying loan amounts, rather, aforesaid suggestion made on behalf of the accused proves case of complainant that accused was co-borrower alongwith his wife and as such, he cannot escape liability to pay the loan back. This witness specifically admitted that loan was joint in the name of Asha Kumari and the accused. If it is so, defence of accused that he is not under obligation to repay the loan, rightly came to be rejected. Similarly, once cheque was issued by accused, who was a co-borrower, non-impleadment of his wife is of no consequence as far as these proceedings are concerned. Accused in his statement recorded under S. 313 CrPC, though claimed that he did not take any loan, but as

has been taken note herein above, he himself put a suggestion to bank official that the loan account was joint in his name and his wife. If it so, he being co-borrower was under liability to discharge liability for which he issued cheque and same was dishonoured.

10. Having scanned the entire material available on record, this court finds that the complainant proved on record that the cheque Ext. CW-1/A was issued by the accused in discharge of legally enforceable liability, but the same was dishonoured on its presentation, as such, complainant had no option but to institute proceedings under S. 138 of Act. If the evidence, be it ocular or documentary, adduced on record by complainant is perused, it can be safely concluded that the complainant has proved all the basic ingredients as required to be proved to bring the case within the ambit of S. 138 of the Act.

11. Consequently in view of above, this court finds no merit in the case and same is dismissed. Judgments of conviction and order of sentence passed by learned Courts below are upheld. Accused is directed to surrender before learned trial Court forthwith to undergo sentence, if not already served. Bail bonds, if any furnished by the accused shall stand cancelled.

12. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

(Sandeep Sharma)
Judge

August 10, 2022
(Vikrant)