

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MMO No 776 of 2024.

Reserved on: 18.11.2024.

Date of Decision: 29.11.2024.

Shyam Lal

...Petitioner

Versus

Sinta Devi

...Respondent

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ No.

For the Petitioner : Mr. Vinod Sharma, Advocate.

For the Respondent : Nemo.

Rakesh Kainthla, Judge

The present petition is directed against the order dated 12.06.2024 passed by learned Judicial Magistrate First Class, Chopal, District Shimla, H.P. Circuit Court at Theog (learned Trial Court) vide which the applications under Section 311 Cr.P.C. and Section 311A of Cr.P.C. by the petitioner (accused before learned Trial Court) were dismissed. (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court.)

¹ Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. Briefly stated, the facts giving rise to the present petition are that the complainant filed a complaint against the accused for the commission of an offence punishable under Section 138 of the Negotiable Instruments Act. It was asserted that the complainant is an agriculturist and the accused used to purchase apple boxes from different growers. The accused purchased apple boxes from the complainant in August 2020 for a consideration of ₹ 1,20,000/-. He issued a cheque for discharging his legal liability. The cheque was dishonoured with an endorsement of insufficient funds. The accused failed to pay the amount despite the receipt of a valid notice of demand. Hence, the complaint.

3. When the matter was listed for defence evidence, the accused filed two applications: one under Section 311 of Cr.P.C. and another under Section 311A of Cr.P.C. It was asserted in the application filed under Section 311 of Cr.P.C. that the accused intended to recall and re-examine the complainant as new facts came to his knowledge. The accused had lodged a complaint in Police Station, Shimla, Sadar that his cheque was missing and the complainant had mis-utilized the cheque. He asserted in the application under Section 311A of Cr. P.C. that he had issued the cheque as a security for ₹ 20,000/- and the amount of the cheque

was altered to ₹ 1,20,000/-. He had not filled the amount because he is illiterate. The amount was filled by the complainant or her family member; therefore, it has become necessary to obtain the opinion of the handwriting expert.

4. The applications were opposed by the complainant.

5. The learned Trial Court held that the applications were filed when the matter was listed for defence evidence, the accused had taken 4-5 opportunities to lead the evidence and the last opportunity was granted to him to lead the evidence. The accused had not taken any defence in the application filed under Section 145(2) of Cr.P.C. regarding the lodging of rapat No. 69 in the Police Station. Further, the accused admitted his signatures on the cheque and Section 20 of the Negotiable Instruments Act gave sufficient authority to the complainant to fill the amount. No fruitful purpose would be served by sending the cheque to the handwriting expert. Hence, the applications were dismissed.

6. Being aggrieved from the order passed by the learned Trial Court, the present petition has been filed asserting that the order passed by the learned Trial Court is wrong and illegal. Learned Trial Court failed to appreciate that figure one was added by the complainant. The accused was left with no option except to

seek the opinion of the handwriting expert. The learned Trial Court committed material irregularity while dismissing the application. Hence, it was prayed that the present petition be allowed and the order passed by the learned Trial Court be set aside.

7. I have heard Mr. Vinod Sharma, learned counsel for the petitioner/accused who submitted that the learned Trial Court erred in dismissing the application. The accused has a right to lead defence evidence as a part of a fair trial. He relied upon the judgment of the Hon'ble Supreme Court in *Nagappa vs. Y.R. Muralidhar AIR (2008) 5 SCC 633* in support of his submission.

8. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

9. The accused has not disputed that he had put the signatures on the cheque. He claimed that the amount was filled by the complainant or her family member and it is necessary to get the cheque examined by the handwriting expert to determine the authenticity of the same. This plea is not acceptable. In *Oriental Bank of Commerce vs Prabodh Kumar Tiwari, 2022 SCC OnLine SC 1089*, the accused admitted that he had signed and handed over the cheque to the complainant. He subsequently sought the opinion of the Handwriting Expert to determine whether the details were

filled in the cheque in his handwriting or not. This application was allowed by the High Court. The Hon'ble Supreme Court reversed this judgment and held that once the accused handed over the cheque to the complainant, the other person had a right to fill in the details. Hence, the fact that details were not filled by the drawer but by some other person is immaterial. It was observed:-

16. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under Section 139.

17. In *Anss Rajashekar v. Augustus Jeba Ananth 2020 (15) SCC 348*, a two-judge Bench of this Court, of which one of us (D.Y. Chandrachud J.) was a part, reiterated the decision of the three-Judge Bench of this Court in *Rangappa v. Sri Mohan (2010) 11 SCC 441* on the presumption under Section 139 of the NI Act. The court held:

12. Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the three-judge Bench of this Court in *Rangappa* held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

"28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in

view, 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 that of “preponderance of probabilities”. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.” (emphasis supplied)

18. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a handwriting expert. Even if the details in the cheque have not been filled up by the drawer but by another person, this is not relevant to the defence whether the cheque was issued towards payment of a debt or in the discharge of a liability.

10. In the present case the accused has taken a similar plea that he had handed over a blank signed cheque to the complainant which was filled by the complainant or her family members by mentioning the amount of ₹ 1,20,000/-. He specifically asserted that the name, date, month and cheque were not filled by him. Even if this plea was accepted to be correct, it would not assist the accused because the learned Trial Court had rightly pointed out that handing over a blank signed cheque would give sufficient opportunity to the complainant to fill the amount. Thus, there is no

infirmity in the order of dismissing the application filed by the applicant/accused.

11. The other application is to establish that the accused had made a report to the police regarding the misuse of the cheque. This fact was known to the accused as he had got the report registered. Nothing was shown as to why the said fact was not put to the complainant when she appeared in the witness box. It was asserted that this was a new fact but it is not correct because the report was lodged much before the filing of the application.

12. The report is in the nature of admission made by the accused in his favour that his cheque was misplaced. Section 21 of the Indian Evidence Act provides that the admissions can be proved against the person who has made them and not on his behalf; hence, the document was irrelevant and could not have been admitted.

13. Therefore, there is no infirmity in dismissing the application.

14. The present petition has been filed under Section 528 of BNSS which is an extraordinary power that has to be exercised

sparingly and not in routine. There is no reason to exercise the extraordinary power in the present case.

15. Consequently, the present petition fails and the same is dismissed.

16. The observations made hereinbefore shall remain confined to the disposal of the petition and will have no bearing, whatsoever, on the merits of the case.

(Rakesh Kainthla)
Judge

29th November, 2024
(Nikita)