**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Cr. Appeal No. 72 of 2023**
**Reserved on: 24.07.2024**
**Date of Decision: 8th August, 2024**

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**Sharma Shuttering Store**

**....Appellant**

**Versus**

**Rakesh Chauhah**

**....Respondent**

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**Coram**
**Hon'ble Mr Justice Rakesh Kainthla, Judge.**
**Whether approved for reporting? Yes**

**For the Appellant : Mr. H.S. Rana, Advocate,**

**For the Respondent : Mr. Hemant Vaid, Advocate vice Mr. Nitin Misra, Advocate.**

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**Rakesh Kainthla,Judge.**

The present appeal is directed against the judgment dated 22.06.2022 passed by learned Additional Chief Judicial Magistrate, Court No.1, Shimla, District Shimla, H.P. (learned Trial Court) vide which the complaint filed by the appellant (complainant before the learned Trial court ) for the commission of an offence punishable under Section 138 of Negotiable Instruments Act (for short*"N.I.Act"*) was dismissed. (Parties shall

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hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the complainant filed a complaint before the learned Trial Court for the commission of an offence punishable under Section 138 of N.I. Act. It was asserted that the accused has a business transaction with the complainant. He approached the complainant and took shuttering material on rent from him. The accused issued a cheque of ₹5,00,000/- towards the part payment of rent and the cost of material not returned by him. The complainant presented the cheque before his Bank Himachal Pradesh Cooperative Bank, Khalini, District Shimla, H.P. but it was dishonoured with the remarks "insufficient funds". The complainant sent a legal notice asking the accused to pay the amount within 15 days from the date of receipt of the notice. The notice was served upon the accused but he failed to pay the amount. Hence, the complaint was filed against the accused.

3. The learned Trial court summoned the accused. When the accused appeared, a notice of accusation was put to him for

the commission of an offence punishable under Section 138 of N.I. Act. The accused pleaded not guilty and claimed to be tried.

4. The complainant examined himself (CW-1)to prove his case.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the complainant's case. He stated that he had issued a blank security cheque to the complainant, which was misused by him. He had not received any notice. He had a liability of ₹50,000/-. The complainant filled up the security cheque and misused the same. He claimed that he was innocent. He initially stated that he wanted to lead evidence; however, no evidence was led.

6. Learned Trial Court held that the complainant filed the complaint as proprietor of the Firm but he failed to show any document that he was a proprietor of the Firm. He could not be called to be the holder in due course and the complaint filed by him was not maintainable. Hence, the complaint was dismissed and the accused was acquitted.

7. Being aggrieved from the judgment passed by the learned Trial Court, the complainant filed the present appeal

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asserting that the learned Trial Court erred in appreciating the evidence and the law applicable to the controversy in the present case. It was proved that the accused had issued a cheque in discharge of his legal liability, which was dishonoured by the bank. The cheque carries with it a presumption of consideration and the learned Trial Court failed to apply the presumption to the present case. The accused stated that he was dealing with Sharma Shuttering work and admitted that he had issued a cheque. Therefore, essential ingredients of Section 138 of the Negotiable Instruments Act were satisfied. The learned Trial Court erred in acquitting the accused; hence, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

8. I have heard Mr. H.S. Rana, learned Counsel for the appellant and Mr. Hemand Vaid, learned vice counsel for the respondent.

9. Mr. H.S. Rana, learned counsel for the appellant/complainant submitted that the accused did not dispute his signatures on the cheque; therefore, the presumption under Section 139 read with Section 1189a) of N.I.Act will apply to the

present case. The learned Trial Court erred in holding that the complainant was not a payee or holder in due course. Therefore, he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

10. Mr Hemant Vaid, learned vice counsel for the accused submitted that the cheque was issued in the name of Sharma Shuttering Works and the complainant failed to show any connection with the Sharma Shuttering Works. The learned Trial Court had rightly dismissed the complainant. There is no infirmity in the judgment passed by the learned Trial Court. Hence, he prayed that the present appeal be dismissed.

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

12. Before adverting to the merits of the appeal, it is necessary to dispose of the application (cr.MP No. 2270 of 2023_for placing on record the documents filed by the complainant because admission/rejection of documents will have a material impact on the findings on merits.

13. The complainant has filed an application under Section 482 of Cr.P.C. for placing the documents on record. It has been

asserted that the applicant received certain documents under the Right to Information Act, which are necessary to decide the present case. These documents will show that the accused was a contractor for the construction of a parking lot at Hotel Bushar Regency, where he required shuttering. The documents are necessary for the adjudication of the dispute between the parties. Hence, it was prayed that the application be allowed and documents be taken on record.

14. The application is opposed by filing a reply taking preliminary objections regarding lack of maintainability and the applicant having suppressed the material facts from the Court. It was asserted that the documents are not necessary for the adjudication of the dispute between the parties. The documents pertain to the year 2011 and have no relevance to the dispute. Hence, it was prayed that this application be dismissed.

15. A rejoinder denying the contents of the reply and affirming those of the appeal was filed.

16. The learned Trial Court dismissed the complaint on the ground that the complainant had failed to prove that he was a payee or holder in due course. The documents sought to be proved

on record do not help in determining the status of the complainant. Hence, there is a force in the submission of learned counsel for the accused that the documents are not relevant for the adjudication of the case and the documents cannot be taken on record.

17. Consequently the application fails and the same is dismissed. The application stands disposed of.

18. The present appeal is filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in ***Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130*** that an appeal against acquittal cannot be allowed merely on the difference of opinion. It was observed:

> "**25.** We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.
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> **26.** No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in

the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

**27.** It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "*two-views theory*" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

**28.** In ***Selvaraj* v. *State of Karnataka*** [***Selvaraj* v. *State of Karnataka***, ***(2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]*** : (SCC pp. 236-37, para 13)

> "*13.* Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible

one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in ***Jagan M. Seshadri* v. *State of T.N.* [*Jagan M. Seshadri* v. *State of T.N.*, (2002) 9 SCC 639: 2003 SCC (L&S) 1494]** has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus : (SCC p. 643, para 9)

> '*9.* … We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

**29.** In ***Sanjeev* v. *State of H.P.* [*Sanjeev* v. *State of H.P.*, (2022) 6 SCC 294 : (2022) 2 SCC (Cri) 522]**, the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7)

> "7. It is well settled that:
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> > *7.1.* While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial

> court deserves to be upturned (see ***Vijay Mohan Singh* v. *State of Karnataka* [*Vijay Mohan Singh* v. *State of Karnataka*, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586**] and ***Anwar Ali* v. *State of H.P.* [*Anwar Ali* v. *State of H.P.*, (2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395]** ).
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> 7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see ***Atley* v. *State of U.P.* [*Atley* v. *State of U.P.*, 1955 SCC OnLine SC 51: AIR 1955 SC 807]**).
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> 7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see ***Sambasivan* v. *State of Kerala* [*Sambasivan* v. *State of Kerala*, (1998) 5 SCC 412: 1998 SCC (Cri) 1320]**)."

19. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

20. The cheque (Ext. CW-1/A) has been issued in the name of Sharma Shuttering Store. The complainant has been described as Sharma Shuttering Store through its proprietor Ved Prakash. The body of the complainant does not mention that Sharma Shuttering Store is a proprietorship owned by Ved Prakash. The proof affidavits mention the detail of the complainant as Ved Prakash, occupation business (Proprietor Sharma, Shuttering Store); however, no averment was made in this proof affidavit that the complainant is the proprietor of Sharma Shuttering Store.

The complainant stated in his cross-examination that no document was placed on record to show that he is the owner of the Sharma Shuttering Store. He volunteered to say that the bank memo was issued. However, the bank Memos (Ext. CW-1/B to CW-1/D), nowhere mention that Ved Parkash is the owner of Sharma Shuttering Store. The Memo (Ext.CW-1/B) is addressed to Sharma Shuttering Store, Sharma Niwas, DAV, New Shimla and not to Ved Prakash. Thus, the learned Trial Court had rightly held that there was no proof of the fact that the complainant was the owner of Sharma Shuttering Store. It was laid down by the Hon'ble Supreme Court in ***Milind Shripad Chandurkar v. Kalim M. Khan*, *(2011) 4 SCC 275***, that where no evidence was led to prove that the complainant was the owner of proprietorship concern, he cannot be called to be a payee or holder in due course. The Hon'ble Supreme Court noticed the affidavit of the complainant in para-14 as under:-

> "**14.** The relevant part of the affidavit filed by the appellant complainant before the trial court reads as under:
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> > "I, Shri Milind Shripad Chandurkar, aged about 37 years, Indian inhabitant, occupation: business, proprietor of M/s Vijay Automobiles, having an address at Sector 29, Dronagiri Node, Uran, District

Raigad, take oath and state on solemn affirmation as under....

I state that in due discharge of legal liability of the accused as mentioned in the foregoing paragraphs, the accused issued one cheque dated 28-4-2005 in my name i.e. in the name M/s Vijaya Automobiles which was drawn on Development Credit Bank, Kurla Branch, Mumbai 70 bearing Cheque No. 490592, for Rs. 7,00,000 (Rupees seven lakhs only)."

The relevant part of his cross-examination reads as under:

"It is true that till today I had not produced any documentary evidence to show that I am the owner of Vijaya Automobiles.... Till today I had not produced any documentary evidence to support."

21. It was further found that no documentary evidence was produced to show that the complainant was the proprietor of the Firm. It was observed-

"**16.** Thus, from the above, it is evident that the appellant complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles in spite of the fact that the issue had been agitated by the accused-Respondent 1 at every stage. It is also evident from the documents on record that in the list of witnesses the complainant had mentioned the name of his banker as a witness, however, the said banker was not examined.

**17.** It may also be pertinent to mention here that the appellant did not make any attempt to adduce additional evidence at the appellate stage. No document has ever been filed to substantiate his averment in this regard."

22. It was held that the complaint can be filed by a payee or holder in due course and when there was no evidence that the

complainant was not the proprietor, he is not entitled to file the complaint. It was observed:-

> "**26.** In the instant case, it is evident that the firm, namely, Vijaya Automobiles, has been the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be the payee himself and thus, entitled to make the complaint. The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. A mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm.
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> **27.** It is evident that the Firm had a substantial amount of business as in one month it sold the diesel to Respondent 1—a single party, for a sum of Rs. 7 lakhs. The appellant would, in addition, have also been carrying out business with other persons. Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax, etc. Thus, in such a fact situation, there would be no dearth of material that could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent had been raising this issue from the initiation of the proceedings."

23. This judgment was followed by this Court in ***S.P. Saklani v. Ravinder Singh Thakur, 2012 SCC OnLine HP 771***, wherein it was observed: -

"11. Admittedly, cheque Ex.CW-3/A is in the name of Thakur Devi Ram & Sons. Cheque returning memo Ex.CW-2/C is also addressed to M/s Thakur Devi Ram & Sons.

12. True it is that it was averred by the complainant in the complaint that he was running the aforesaid business in the name and style of M/s Thakur Devi Ram and Sons. Though, while appearing as CW-3 in the chief examination the complainant has reiterated the assertion that he is the sole proprietor of M/s Devi Ram and Sons, yet in cross-examination he has admitted that on the day he was making a statement in the court, he was not having any proof that he was the sole proprietor of M/s Devi Ram and Sons. It is further stated that he did not remember when the cement was purchased by the convict. He had also not brought the copy of the bill book to the court. In further cross-examination, he denied that he has any concern with M/s Devi Ram and Sons and has volunteered that Devi Ram is his father.

13. In his statement under Section 313 Cr.P.C. the convict denied that the complainant used to deal in the business of steel and cement known as M/s Devi Ram and Sons. He has also denied that cheque Ex.CW-3/A was issued by him in favour of the complainant.

14. Thus, it is manifest that except the bald assertion made by the complainant in the complaint and reiterated on oath in his deposition as CW-3 that he is the sole proprietor of M/s Devi Ram and Sons, which aspect is vehemently disputed by the convict, there is no other cogent, reliable and trustworthy documentary evidence to prove nexus or connection of the complainant with the firm M/s Thakur Devi Ram and Sons. The evidence led by the complainant is wholly deficient in content to prove his nexus or connection with the said firm as its sole proprietor and the mere averments in the complaint to this effect as reiterated on oath in his deposition as CW-3, which is vehemently contested on behalf of the convict is not sufficient to establish such nexus or connection, as has been held by the Hon'ble Supreme Court in ***Milind Shripad Chandurkar***, supra."

24. Similar is the judgment in ***Ram Chand v. Rafee Mohammad, 2018 SCC OnLine HP 3334***, wherein it was observed:-

> "**19.** Now, adverting to the facts of the case, if cheque, Ext. C-1 is perused, it would be noticed that the same has been issued by a partner of Indian Education Centre and not by the respondent in his name. Moreover, the cheque is in the name of Ramchand and not in the name of Ankit Hire Purchase Pvt. Ltd. The appellant has failed to show that he is the sole proprietor of the firm and has not even pleaded that he is the payee or the holder in due course of the cheque.
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> **20.** It is more than settled that it is only the holder in due course of a negotiable instrument, who is entitled to file the complaint under Section 138 of the Act. (Refer: ***Milind Shripad Chandurkar v. Kalim Khan, (2011) 4 SCC 275, National Small Industries Corporation Ltd. v. State, (2009) 1 SCC 407*** and ***Punjab & Sindh Bank v. VinkarSahkari Bank Ltd., (2001) 7 SCC 721***)
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> **21.** As observed above, the cheque in question Ext.C-1 has been issued by a partner of Indian Education Centre and not by the respondent in his name and the appellant has failed to mention in the complaint or prove in evidence that Indian Education Centre had any connection with him or his establishment or for that matter, even with the respondent. This assumes significance and importance when the specific case of the appellant is that the entire exercise of lending money was done for and on behalf of Ankit Hire Purchase Pvt. Ltd., which allegedly was a company, yet no records of the same were produced.
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> **22.** As a matter of fact, the appellant has filed the complaint as Managing Director of the company, but

> there is no proof of the same. Even otherwise, having failed to establish the connection between the company of which he claims himself to be the Managing Director with that of Indian Education Centre, whose partner has issued cheque, Ext.C1 and further having failed to establish the connection of the respondent with Indian Education Centre, the learned trial court had no other option, but to have dismissed the complaint and acquitted the respondent."

25. Since in the present case no satisfactory evidence was produced to show that the complainant is the owner of Sharma Shuttering Store, therefore, the learned Trial Court had rightly held that the complainant does not fall within the definition of payee or holder in due course and he was not entitled to file the complaint under Section 138 of N.I. Act. This was a reasonable view taken by the learned Trial Court, hence which was possible based on the evidence produced before the learned Trial Court no interference is required with the same.

26. In view of the above, the present appeal fails and the same is dismissed, so also the pending applications, if any.

27. Record of the learned Trial Court be sent back forthwith.

**(Rakesh Kainthla)**
**Judge**

**8th August,2024**(ravinder)