(2004) 01 P&H CK 0020

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 548-SBA of 1998

Capital Leasing and Finance Co.	APPELLANT
Vs	
Navrattan Jain	RESPONDENT

Date of Decision: Jan. 30, 2004

Citation: (2005) 4 RCR(Civil) 208 : (2005) 4 RCR(Criminal) 330

Hon'ble Judges: S.S.Saron, J

Advocate: Mr. Sanjeev Walia, Advocate. Mr. Salil Bali, Advocate., Advocates for appearing Parties

Judgement

S.S. Saron, J.

1. The complainantappellant M/s. Capital Leasing and Finance Company Ltd. in this appeal has assailed the order dated 3.2.1998 passed by the learned Judicial Magistrate Ist Class, Chandigarh, whereby the complaint of the appellant under Section 138 of the Negotiable Instruments Act, 1882 (`N.I. Act'' for short) has been dismissed and the respondent acquitted.

2. The complainantappellant M/s. Capital Leasing and Finance Company filed a complaint under Section 138 N.I. Act against the respondent on the allegations that the complainant is a partnership firm having its registered office at Chandigarh and A.S. Bindra in its partner who has been duly authorised to file the complaint. It is stated that the respondent issued a cheque dated 13.1.1993 for an amount of Rs. 1.00 lac drawn on the New Bank of India, Sector 26D, Chandigarh to the complainant towards repayment/discharge of his debt liability towards the appellantfirm. The said cheque was duly presented to the bankers of the respondent by the complainant (appellant) through their bank but was returned back unpaid with the endorsement of "Insufficient Funds" by the Bankers of the respondent. After the cheque was returned as unpaid, the complainant issued a notice of demand to the respondent for the payment of Rs. 1.00 lac being value of the returned cheque. The said notice was duly sent to the respondent, who despite the notice, did not make the necessary payment. The respondent, it is alleged, has

thus committed an offence under Section 138 N.I. Act and is liable to be punished.

3. During preliminary evidence, Harpreet Singh Narang, a partner of the appellantfirm appeared in Court as CW1 and reiterated on oath that the facts mentioned in the complaint were correct. He also produced on record the cheque, Ex. P1, Memo Ex. P2, the notice Ex. P3, postal receipts Ex. P4 and Ex. P5, statement of accounts Ex. P6 and entries of cheque returning register Ex. P7 and Ex. P8. The learned trial Magistrate from the perusal of oral and documentary evidence found sufficient grounds to proceed against the respondent under Section 138 N.I. Act and, accordingly summoned him in terms of his order dated 22.5.1993. The respondent appeared on 17.8.1993. A notice of the substance of accusation was served on the respondent alleging that he on 13.1.1993, had issued a cheque for Rs. 1.00 lac and on presentation the said cheque was dishonoured. Besides, the respondent was given a notice in this regard but inspite of that he did not pay the amount in question. Accordingly, the respondent was asked to show cause as to why he should not be punished under Section 138 N.I. Act. The respondent, however, by way of Criminal Miscellaneous No. 12750M of 1993 filed in this Court sought quashing of the complaint under Section 138 of the N.I. Act against him. Notice was issued to the appellant and further proceedings before the trial Court were stayed on 18.10.1993. The said criminal miscellaneous petition was ultimately dismissed by this Court on 16.5.1996 and the proceedings before the learned trial Magistrate were recommenced.

4. The appellant examined Arvinder Singh, (CW1) another partner of the appellantfirm, as a witness. He was examined after notice had been served on the respondent. He reiterated the version, as stated in the complaint. Arvinder Singh (CW1) was crossexamined, in which he stated that the partnership firm in the name of complainant was not a registered one. They were having partnership deed but he could not produce the same in Court on the date of recording his evidence. It was also stated that he could not produce any proof to the effect that he had extended loan of Rs. 1.00 lac to the accused and, thereafter voluntarily stated that the payment was made by cheque. It is stated that his brotherinlaw Shri Rupinder Singh introduced him with the respondent in the beginning and their firm had extended the alleged loan of Rs. 1.00 lac for the first time to the accused in the year 1992. This was agreed to be paid by the respondent with an interest at the rate of 2 per cent per month. He was further crossexamined at some length.

5. A.K. Malhotra, ClerkcumGodown Keeper, Punjab National Bank, Sector 26D, Chandigarh (CW2) deposed that he had brought the record pertaining to the cheque in question and certified copy of Saving Bank Account No. 1594. The Cheque Ex. P1 was presented to the Bank on 24.4.1993 which was dishonoured by the Bank vide memo. Ex. P2. The amount in the said account on 24.4.1993 was Rs. 708/. He had brought a certified copy of the Saving Account No. 1594 which was certified under the Banker''s Book Evidence Act, 1881, and this was exhibited as Ex. P6. The said

witness was crossexamined by learned counsel for the respondent.

6. Anil Kapoor, ClerkcumCashier, J&K Bank, Sector 17C, Chandigarh (CW3) deposed that he had brought the summoned record and the cheque in question was presented for clearing to the New Bank of India, Sector 26D, Chandigarh on 24.4.1993, which is clear from Ex. P7. The said cheque was returned back with the remarks "Insufficient Funds" on 26.4.1993, which is clear from Ex. P8. The information regarding return of the cheque was given to the complainant vide Ex. P9. This was objected to. The same it was stated bears the signatures of Mrs. Sneh Gupta and he identified her signatures. This witness was also crossexamined by the respondent.

7. After recording the statement of the said witness, the evidence of the appellant was closed. The statement of the respondent was recorded in terms of Section 313 of the Code of Criminal Procedure, 1973 (`Cr.P.C.'' for short), in which the respondent stated as follows:

"A loan of Rs. 1.00 lac was extended by the complainant firm to me which was finally settled and cleared. First of all I settle (sicsettled) my accounts with the complainant firm at the closing of accounting year 199192 in writing and for balance amount of receipt Ex. D2 was obtained from me by the complainant. Thereafter, I made the payment to the complaint in instalment and the accounts were further settled at the end of accounting year 199293. Final receipt of the payment was issued on Ex. D2 by S. Arminder Singh. Balance payment of Rs. 40,000/ was cleared which is to by (sic) Ex. D1. My cheque was misutilised by the complainant and the same was also tampered. Before presentation of the cheque in dispute no outstanding payment was payable. I have not received any copy of legal notice as alleged to be sent by the complainant. Witnesses were won over by the complainant. I am innocent and falsely involved in this false case."

8. In this defence the respondent examined Devendra Prasad, Document Export (DW1), who examined the signatures, "A. Singh" on the settlement of accounts Ex. D2. It was deposed by Devendra Prasad (DW1) that he has compared the disputed signatures with the standard signatures of the concerned person : "A. Singh Bindra" on his vakalatnama in favour of his counsel, the statement dated 11.10.1996, the crossexamination dated 12.3.1997 and on the complaint dated 21.5.1993. The signatures of these documents were marked as A1 to A6, as detailed in his report. He further deposed that after examination and comparison he was of the opinion that the person who wrote the standard signatures, marked A1 to A6, also wrote the disputed signatures, marked Q1. The grounds of his opinion were contained in his report dated 26.11.1997 which it was stated may be read as part of his statement. The said report is Ex. D 3. In his crossexamination conducted by the counsel for the appellant he stated that he had no licence as there was no statutory body or council for the experts which may grant licence to practice as document expert. He voluntarily stated that he was working as document expert on the basis of his

educational qualification and experience.

9. Ashok Kumar (DW2) stated that he knows the respondent for the last 15 years and he knew the complainant from the last about 6/7 years. It is stated that the contents in blue pen were written between the parties prior to his arrival and he was told by the respondent and the appellant that they had mutually settled one compromise and had got that settlement reduced into writing. The appellant and the respondent had asked him to put his signatures to witnesss to the settlement and he identifies his signatures on Ex. D2 at the bottom. The complainant put his signatures in his presence on Ex. D2 in token of correctness of the settlement. He was crossexamined by the counsel for the complainantappellant in which he denied the suggestion that the respondent told him each and everything about the transaction of his business. He also stated that he could read the contents stated in Ex. D2 but he could not understand their meaning. He voluntarily stated that he was told that they had settled the payment.

10. Rama Shankar (DW3) deposed that he was working in the neighbouring shop of the respondent. During the year 199293 some dispute took place between the respondent and the appellant and he was present at that time. The respondent was demanding some documents from the complainantappellant and, in turn, the complainantappellant was saying that the documents had been lost from him so he was not able to return the same. He was crossexamined by the complainant and he stated that a quarrel took place at about 9/10.00 a.m. The dispute had taken place inside the shop of the respondent. He heard the noise and reached at the spot. It was a verbal dual.

11. The learned trial Magistrate considered the evidence and material on record and held that there was no evidence on the part of the complainant to prove that the Cheque Ex. P1 had been issued in discharge of a legally enforceable liability and no evidence had been produced by the complainant to prove any document showing the existing liability. It was, however, observed that though there is a presumption in favour of the complainant who is holder of the cheque for consideration in discharge in whole or part of the liability, but this presumption is rebuttable. Besides, reliance was placed on the writing Ex. D2 vide which the complainant through Arvinder Singh Bindra, its partner had given in writing that no payment was due except Rs. 40,000/. In the said writing Ex. D2 it is recorded that "accounts finally settled as on 27.3.1993. No payment is due except Rs. 40,000/ which has been received by cheque No. 697473 NBI Chd." The said cheque was got encashed by the complainant and to this effect a certificate had been proved vide which it had been certified that the aforesaid cheque bearing No. 697473 and dated 27.3.1993, in favour of the appellantfirm was passed in the accounts of M/s. P.G. Financiers on 30.3.1993. The cheque Ex. P1 is dated 13.1.1993, and the account had been settled on 27.3.1993, which it is mentioned, is in the normal course of business. Therefore, it was observed by learned trial Magistrate that it could not be presumed from the

complaint that there was more payment due towards the complainant and it had given in writing that no payment was due. It was also observed that the said writing had been put to the complainant in his crossexamination and he stated that he did not settle the accounts on 27.3.1993. When the complainant was recalled for cross examination, he stated that he did not remember that the accounts were settled in writing but he could not deny his signatures. He only stated that he could not say whether the signatures were his or not. This was observed by the learned trial Magistrate that the denial of the complainant had to be proved by examining a handwriting expert. Devendra Prasad, Document Expert (DW1), it was observed had examined the signatures on the writing Ex D2. Accordingly, it was held that it had been proved by the accusedrespondent that the accounts had been settled. Besides, while settling the accounts, the complaint through its partner had given in writing that no payment was due except for a sum of Rs. 40,000/ for which he had received a cheque. The said cheque, it was observed, had been got encashed as per certificate Ex. D1 of the New Bank of India. As such the first ingredient of the complaint was held to be not proved. The other grounds taken into consideration by learned trial Magistrate are regarding the dishonour of the cheque and service of notice as also payment within fifteen days of the notice. As regards the dishonour of the cheque, it was held by the learned trial Magistrate that the same stands proved. Besides, as regards service of notice and payment within fifteen days of the notice it was observed that the same was not disputed. However, it was held that as per the findings as recorded, the respondent was not required to make the payment because he had already settled the accounts with the complainant (appellant). It was also observed that the complainant claimed to be a partnership firm having its registered office at Chandigarh, however, no certificate of registration of the firm had been produced on the file. Besides, in terms of Section 61 of the Indian Partnership Act, 1932 (Partnership Act, for short) no complaint could be filed by an unregistered partnership firm. Accordingly, the complaint of the appellant was dismissed and the respondent was acquitted by learned trial Magistrate in terms of his order dated 3.2.1998 which, as already noticed, is assailed in this appeal.

12. Shri Sanjeev Walia, learned counsel appearing for the appellant has contended that the learned Magistrate gravely erred in passing the impugned order dated 3.2.1998 and there has been a complete misreading of the document dated 27.3.1993 (Ex. D2), whereby the accounts are stated to have been finally settled. He has referred to the provisions of Section 13 N.I. Act to show as to what is a `Negotiable Instrument'', Section 118 N.I. Act, as regards presumption of negotiable instrument and Section 139 N.I. Act with respect to presumption in favour of the holder of a cheque. He has further contended that towards the discharge of an amount of Rs. 1.00 lac plus interest for which sum the appellant was in possession of the cheque Ex. P1, dated 13.1.1993, the respondent are reported to have paid a sum of Rs. 40,000/ as full and final payment which by itself is unbelievable, illogical and unrealistic. Besides, the respondent did not lead any evidence to prove the fact

that any payment whether by cash or otherwise was ever made by the respondent to the appellant earlier to 27.3.1993, i.e., the date of the document Ex D2. It is also contended, that had the respondent indeed settled the accounts finally in terms of the document Ex. D2, dated 27.3.1993, there was no reason for him not to reply in this regard to the demand notice of the complainant and this by itself shows that the stand taken by the respondent as regards the accounts having been settled is selfcontradictory and an afterthought. Besides, the provisions of Section 69(2) of the Partnership Act, are applicable only to suits for enforcement of rights arising out of contract and not to a criminal liability of the person in respect of any offence committed by him and, therefore, the said provision has been wrongly invoked by the learned trial Magistrate. Consequently, it is proved that the appeal be accepted and the judgment and order of the learned trial Magistrate be set aside.

13. In response Mr. Salil Bali, Advocate learned counsel appearing for the respondent has contended that the conclusions reached at by the learned trial Magistrate are just and appropriate and the respondent has rightly been acquitted. Therefore, this Court is not liable to set aside the order of acquittal because another view was possible on the materials on record. In support of his contention he has placed reliance on C. Antony v. K.G. Raghavan Nair, 2002(4) RCR(Criminal) 750. He has also contended that the document dated 27.3.1993 (Ex. D2) settles the accounts between the parties fully and finally and this having been accepted by the learned trial Magistrate, there is no reason for this Court to interfere with the order as passed. Besides, the learned trial Magistrate rightly invoked the provisions of Section 69(2) of the Partnership Act and dismissed the complaint of the appellant.

14. I have given my thoughtful consideration to the respective contentions of learned counsel appearing for the parties and have also gone through the records of he case with their assistance.

15. In order to appreciate the respective contentions, the document, Ex. D2, dated 27.3.1993, which is the bone of contention between the parties as also the primary basis for dismissing the complaint of the appellant and recording a finding of acquittal against the respondent, may be noticed. The said document reads as under :

Ex. D.2

Sd/

JMIC Ph. Office : 22721

12.3.97 Resi : 56336

P.G. Financiers

S.C.F. 172

(Back Side), Grain Market, Chandigarh.

Ref. No. ..... Dated .....

Copy of account in respect of M/s. Capital Leasing & Finance Co. for 30.8.91 to 31.3.92.

Debit Credit

3.3.92 Ch 7030103 1,00,000/

31.3.92 Interest 1,590/

1,01,590/

B/F 1,01,590/

1,01,590/ 1,01,590/

For P.G. Financiers

Sd/

Prop. (seal)

Accounts finally settled as on 27.3.93. No payment is due except Rs. 40,000/ which has been received by cheque No. 697473 N.B.I. Chd.

Sd/ Sd/

Ashok Kumar

A. Singh Q1

Mark A

Sd/

JMIC

18.10.97

(emphasis added)"

16. A perusal of the emphasised portion of the above document Ex. D2 shows that it is recorded that the accounts are finally settled on 27.3.1993 and no payment was due except Rs. 40,000/ which had been received by cheque No. 397473. After seeing the original of this document it is appropriate to note that the same is recorded on the printed letter head of "P.G. Financiers" and the written contents of the said document are primarily written through carbon paper and the portion that has been underlined/emphasised and the signatures as also seal of the proprietor are in ink. After closely scrutinising the said document Ex. D2, I am of the view that the possibility of the emphasised/underlined portion of the lines being inserted below the seal of the proprietor and above the signatures of Ashok Kumar (DW2) and A.

Singh cannot be ruled out. The slant in the writing is as if to avoid the signatures of the proprietor and that of Ashok Kumar (DW2). Even otherwise the "copy of the accounts in respect of M/s. Capital Leasing and Finance Co. for 30.8.1991 to 31.3.1992" as recorded on Ex. D2 showing the cheque of Rs. 1,00,000/ and interest of Rs. 1,590/ does not in any manner depict or show as to how Rs. 40,000/ are due or payable in pursuance of the said copy of accounts. Even Ashok Kumar (DW2) in his deposition in the Court states that the contents in blue pen i.e. the emphasised/underlined portion of Ex. D2 written in ink were written between the parties prior to his arrival and it was informed by the accused (respondent) and the complainant (appellant) that they had mutually settled one compromise and had got into writing that settlement. They asked him to put his signatures as a witness to the settlement. However, the document shows that his signatures almost touch the writing with the blue pen i.e. the emphasised/underlined portion of Ex. D2. In his crossexamination Ashok Kumar (DW2) stated that he can read the contents stated in Ex. D2 but he did not understand their meaning. Thereafter, he voluntarily stated that he was told that they had settled the payment.

17. In may view, the manner in which the document Ex. D2 as has been recorded would show that the emphasised/underlined contents of the document Ex. D2 have been inserted later. This is also for the reason that the other writing part of the document is a carban copy and the emphasised/underlined contents as depicted above are in ink. Therefore, I am inclined to agree with learned counsel for the appellant that when the appellant was having the cheque Ex. P1, dated 13.1.1993 for an amount of Rs. 1.00 lac there was no reason for it to have finally settled the accounts for a sum of Rs. 40,000/ as full and final payment. Another aspect which requires to be noticed is that in case the parties had indeed settled their accounts and no payment was due then there was no reason for the respondent to allow the complainant (appellant) to remain in possession of the cheque dated 13.1.1993 Ex. P1. The respondent, in the circumstances when everything has been reduced into writing would have definitely taken the said cheque back after settling his liability with the appellant. Learned trial Magistrate has observed that there was no evidence on the part of the appellant to prove that the cheque Ex. P1 had been issued in discharge of liability. I am, however, unable to subscribe to the said view of learned trial Magistrate. It has come in the evidence of the appellant that the complainant firm is doing the business of financing and the respondent took a loan of Rs. 1.00 lac from the complainantfirm and for repayment of the loan a cheque in favour of the appellant for a sum of Rs. 1.00 lac was issued.

18. It may also be noticed that Section 13 N.I. Act defines "negotiable instrument" to mean a promissory note, bill of exchange of cheque payable either to order or to bearer. Section 138 N.I. Act in respect or which the offence is alleged against the respondent reads as under:

"138. Dishonour of cheque for insufficiency, etc., or funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended (sic) of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

19. Besides, Chapter XIII of the N.I. Act provides for `Special Rules of Evidence''. Section 118 N.I. Act which falls under Chapter XIII reads as under :

"118. Presumption 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;

(c) as to time of acceptance that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsements that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course that the holder of a negotiable instrument is a holder in due course provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, to for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

20. Therefore, there is a presumption in law that the negotiable instrument, which in the present case is the cheque Ex. P1, was for consideration and that the appellant is holder of the same in due course. It is not the case of the respondent that the cheque Ex. P1 was obtained from him by means of an offence or fraud or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration. The burden to prove in such a case is on the respondent in terms of Section 118(g) N.I. Act. In Kundan Lal Rallaram v. Custodian Evacuee Property, Bombay, AIR 1961 SC 1316, it was held Section 118 lays down a special rule of evidence applicable to negotiable instruments. The presumption, it was held, is one of law and thereunder a Court shall presume, inter alia, that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. Therefore, in terms of the said judgment the burden of proof of failure of consideration was on the respondent. This burden the respondent has failed to discharge. The basis for the discharge of the liability of respondent, as already noticed, is the document Ex. D2, which according to the stand of the respondent is duly signed by a partner who is an authorised person of the complainant (appellant). It is not in dispute that the signatures of Arvinder Singh, partner of the appellantfirm on the document Ex. D2, do stand proved. In fact, he does not deny his signatures and even from the statement of the document expert Devendra Prasad (DW1), the said signatures of Arvinder Singh (CW1) on the document Ex. D2 do stand proved. However, the mere fact that the signatures are there is not a ground in the circumstances by itself to hold that the amount has been finally settled as is the case set up by the respondent. Even otherwise Section 139 N.I. Act reads 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."

21. In Anil Hada v. Indian Acrylic Ltd., 2000(1) RCR(Crl.) 1 (SC) : AIR 2000 SC 145, it was held that under Section 139 N.I. Act there is a legal presumption that the cheque was issued for discharging an antecedent liability and that presumption can be rebutted only by the person who drew the cheque and that the aforesaid presumption is in favour of the holder of the Cheque. In terms of Section 139 N.I.

Act the presumption is in favour of the holder of the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. The presumption in terms of Section 139 is not in favour of the drawer of the cheque. However, the presumption in favour of the holder of the cheque can be rebutted by the person who draws the cheque. Therefore, it is open to a person accused of an offence under Section 138 N.I. Act to adduce evidence to rebut the said presumption. In the case in hand the presumption of appellant being holder of the cheque Ex. P1 in due course has not been rebutted by cogent and convincing evidence led by the respondent. This is more so for the reason that a sum of Rs. 1.00 lac for which the appellant had the cheque would not settle the accounts by receiving a sum of Rs. 40,000 only. The document Ex. D2 is a copy of account in respect of the appellant from 30.8.1991 to 31.3.1992. There is no date on the said document and it is only in the emphasised/underlined portion that it has been mentioned that : "accounts finally settled as on 27.3.93 .....". In the light of the evidence and materials on record it cannot be said that the said document Ex. D2 does indeed finally settled the accounts between the parties. As such, the presumption in favour of the appellant in terms of Sections 118 and 139 N.I. Act remains unrebutted by cogent and convincing evidence.

22. The other ingredients of the findings under Section 138 N.I. Act stand duly proved. The Cheque Ex. P1 is dated 13.1.1993. It was presented by the appellants to the bankers of the respondent for encashment within the period of its validity of six months. The appellant was informed by his bankers in terms of memo. dated 27.4.1993, Ex, P9 that the said cheque has not been honoured by the New Bank of India i.e., the bankers of the respondent on account of insufficient funds. On the same day, the appellant through his counsel served a notice, Ex. P3 dated 27.4.1993, demanding from the respondent to make the payment of said sum of Rs. 1.00 lac within 15 days of the date of receipt of the notice. Registered Postal Receipt is Ex. P4 and the Registered acknowledgement due receipt is Ex. P6. The respondent received legal notice Ex. P3 and did not file any reply to the same. Had the liability, indeed, been cleared and finished on 27.3.1993, i.e., just a month earlier to the issuance of demand notice dated 27.4.1993 Ex. P3, the respondent would have indeed said so by way of reply to the said notice that the accounts have been settled in terms of the document Ex. D2. Therefore, also, in the facts and circumstances of the case in hand the document Ex. D2 by itself cannot be the sole factor for holding that there has been a discharge of the liability. This is more so when the respondent has otherwise failed to rebut the presumption in favour of the holder of the cheque in due course in terms of Sections 118 and 139 N.I. Act.

23. As already noticed, the learned trial Magistrate held that the fact of dishonour of the cheque was proved. The bank statement of account of the accused (respondent) for the relevant period showed a balance of Rs. 708/ in his account. There was an entry Ex. P7 regarding presentation and Ex. P8 regarding return of the cheque. The cheque Ex. P1 was presented within a period of six months from the date on which it

was drawn. The payee/holder in due course of time made a demand for payment of the said amount vide a notice of demand Ex. P3 and the drawer (respondent) failed to make the payment. The complaint was made in writing and was within one month of which the cause of action arose on the failure of the respondent to make the payment. Therefore, the conditions for initiating proceedings as enjoined by the proviso of Section 138 and Section 142 N.I. Act stand fully established. This aspect has been fully proved by the complainant (appellant).

24. The other ground for dismissing the complaint and acquitting the accused taken by learned trial Magistrate is that the complainant is not a registered firm and as per Section 69 of the Partnership Act 1932, no complaint can be filed by an unregistered firm. Section 69(2) of the said Partnership Act reads as under :

"69. Effect of nonregistration

(1) xx xx xx

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm

(3) to (4) xx xx xx."

25. A bare reading of the above shows that Section 69(2) prohibits the enforcement of rights in respect of an unregistered firm by way of a suit. The same does not relate to a criminal complaint. In Kerala Arecanut Stores v. Ramkishore and Sons and another, AIR 1975 Kerala 144, a Division Bench of the Kerala High Court held that provisions of Section 69(2) of the Partnership Act, provide that the suit by a partner for recovery of money of a dishonoured cheque, interest in favour of the firm is not barred. The following observations in the said case are apposite :

"It is sufficient to state here for the purpose of this case that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the endorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the indorsee to enforce a right arising out a contract and therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case."

26. Besides, the Supreme Court in Haldiram Bhujiawala and another (M/s.) v. Anand Kumar Deepak Kumar and another (M/s.), 2000(1) Unreported Judgments 603, held that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

27. In the case in hand the complainant has a statutory claim in terms of Section 138 N.I. Act. Even otherwise Section 69 of the Partnership Act is confined to enforcement

of a right arising out a contract by instituting a suit or other proceedings by an unregistered firm. The criminal complaint that has been filed cannot be treated as a suit or other proceedings to enforce any rights arising under a contract. Therefore, there is no bar to the criminal complaint that has been filed and the nonregistration of the firm would not bar the prosecution of an accused on the ground that the firm was not registered.

28. Mr. Salil Bali, learned counsel appearing for the respondent has, however, contended that there is no debt or liability made out from the facts and circumstances of the case. In support of his contention he has relied upon a judgment of the Hon''ble Rajasthan High Court in Rahul Bhatia v. State of Rajasthan, 2002(2) RCR(Criminal) 169. In the said case it was held that if a cheque is issued as a security and the same is dishonoured no offence is made out under Section 138 N.I. Act as there was no intention to create a debt or liability. Besides, for compliance of Section 138, it is necessary to establish that debt and other liability is legally enforceable against the accused. In the said case the primary question involved for consideration was that the power of attorney holder of the complainant had been examined as a witness although the complainant herself was not examined. Some new facts were brought on record by the accused and the trial Court vide an order dated 3.3.1999 passed in the said case declined to summon the complainant as a witness. The said order was set aside by the High Court in criminal miscellaneous petition filed by the accused and the learned trial Court was directed to summon the complainant as a witness. It was in the said context that the aforesaid observations were made by the Hon''ble Rajasthan High Court. Therefore, the ratio of the said judgment is not applicable to the facts of the present case.

29. In the case in hand Harpreet Singh Narang (CW1) in his statement made on 22.5.1993 stated that he is a partner of the complainantfirm, which is doing business in financing and that the respondent took a loan of Rs. 1.00 lac and for repayment of the loan issued the cheque. Therefore, the cheque Ex. P1 was issued for the repayment of discharge of the liability of Rs. 1.00 lac. As such the learned trial Court did not notice the statutory provisions of the N.I. Act as also the material and evidence on record besides it wrongly took into consideration the provisions of Section 69(2) of the Partnership Act. Therefore, the reasons taken by learned trial Magistrate for dismissing the complaint and acquitting the accused are clearly not borne out and the learned trial Magistrate committed a material irregularity and illegality in acquitting the respondent.

30. In the aforesaid circumstances the question raised by Shri Bali that this Court is not liable to set aside the order of acquittal because another view was possible on the materials on record is not sustainable. The case of C. Antony v. K.G. Raghvan Nair (supra) referred to by the learned counsel lays down that the High Court in an appeal against acquittal is not to set aside an order of acquittal because another view was possible on material on record. It was observed therein that the High

Court should consider the reasons given by the trial Court in the order of acquittal and should come to a definite conclusion that the finding of the trial Court was perverse. In the case in hand the matter has been considered in depth and in my view the conclusions reached at by the learned trial Magistrate in acquitting the accused are indeed perverse. The learned Magistrate has failed to notice the document Ex. D2, which has been noticed in detail and it has been found that the same does not in any manner discharge the liability of the respondent to pay the due amount. Besides, the cheque in question has been found to have been dishonoured which makes out an offence punishable under Section 138 N.I. Act. There has been a failure also on the part of the learned trial Magistrate to properly appreciate the evidence and material on record. Besides, the provisions of Section 69(2) of the Partnership Act, which are not applicable to the case in hand have been wrongly invoked. Therefore, it is case where the findings recorded by the learned trial Magistrate are perverse and unsustainable in law.

31. The question that, however, requires to be considered is as regards the imposition of sentence. I have held that respondent is guilty of the offence under Section 138 N.I. Act inasmuch as the cheque Ex. P1 which was given by him was dishonoured on account of insufficiency of funds in his account. The punishment provided in terms of Section 138 N.T. Act is imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

32. The prosecution and the complaint relate to the year 1993 and, therefore, I feel that no useful purpose would be served by sentencing the respondent to imprisonment. Besides, the case has been tried by the Judicial Magistrate Ist Class who in view of the provisions of Section 29(2) Cr.P.C. could not impose a fine exceeding Rs. 5,000/ besides imprisonment. This Court in view of the second proviso to Section 386 Cr.P.C. is not to inflict greater punishment for the offence than that which might have been inflicted by the learned trial Magistrate. However, in terms of Section 30 Cr.P.C. in default of payment of fine, the Court of a Magistrate may award such term of imprisonment which is not in excess of the powers of the Magistrate under Section 29 Cr.P.C. The Hon''ble Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan, 1999(4) RCR(Criminal) 309, held that the appellate Court cannot obviate the jurisdictional limit prescribed under Section 386 Cr.P.C. It was held that in such cases if a Judicial Magistrate of the Ist Class were to order compensation to the complainant from out of the fine realised, the complainant would be the loser when the cheque amount exceeded the said limit of Rs. 5,000/. In such a case it was observed that a complainant would get only the maximum amount of Rs. 5,000/. But the Magistrate, in such circumstances, can alleviate the grievance of the complainant by taking resort to Section 357(3) Cr.P.C. The Supreme Court in Hari Singh v. Sukhbir Singh, 1988(2) RCR(Crl.) 394 (SC) : AIR 1988 SC 2127, has emphasised the need for making liberal use of that provision and no limit is mentioned in Section 357(3) Cr.P.C. and, therefore, a Magistrate can award any sum

as compensation. Of course, while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a Court of Magistrate in respect of a cheque which covers an amount exceeding Rs. 5,000/ the Court has the power to award compensation to be paid to the complainant. The said judgment in K. Bhaskaran''s case (supra) was retired in Pankajbai Nagjibhai Patel v. State of Gujarat and another, 2001(1) RCR(Crl) 343 (SC) : (2001)2 Supreme Court Cases 595.

33. In view of the above facts and circumstances, the appeal is allowed and the judgment and order dated 3.2.1998 passed by the learned Judicial Magistrate Ist Class Chandigarh is set aside and the respondent is convicted and directed to pay a fine of Rs. 5,000/ and in default of payment of fine to undergo imprisonment of six months and, in any case, to pay to the appellant a sum of Rs. 1.00 lac as the amount of compensation being the amount of cheque Ex. P1.