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IN THE COURT OF 21st ADDL. SENIOR CIVIL JUDGE AND A.C.J.M., AT VADODARA.

Criminal Case No.4932 of 2022

Exh.

Complainant:-

PRAMOD SUBHASH BELSARE
Age : Adult, Occupation : Business,
Residing at : C/22, Mangaldeep Society,
B/h Yamuna Nagar,
Nr. Swaminarayan Temple,
Iscon Temple Road, Gotri,
Vadodara.

-:: **Versus** ::-

Accused:-

DEVANGBHAI BUCH
AUTHORISED SIGNATORY PRIYANSH TOURS
Address: 9/B, Rupal Park Society,
Vadodriya Park, Hill Drive,
Bhavnagar – 364 001.

Offence : Under Section 138 of Negotiable Instrument Act, 1881.

Advocates :-

-Learned advocate Mr.V.A.Johi, for the complainant.

-Learned advocate Mr.S.H.Chauhan, for the accused.

:: J U D G M E N T ::

(1) The accused is facing trial for commission of the offence punishable under section 138 of the Negotiable Instruments Act. Brief the facts of the complaint is residing at Vadodara, the complainant is doing business. It is further stated that the accused is doing business of Tours and travel and also for visa consultancy. The complainant had a job offer in Russia in the year 2021 for which the complainant had come in contact with one Ravinaben through whom the complainant had known about the consultancy. Thereafter the complainant had contacted the accused and telephonically had communicated that complainant was in need of work permit for 1 year in Russia. The accused informed the complainant that the total expenses would come to Rs.2,00,000/- for the procedures and the said amount was to be paid after the visa has arrived. Further, the accused had via whatsapp informed the complainant about the arrival of visa, since, at that time corona was at its peak therefore the complainant's father and wife could not visit Bhavnagar as corona was at its peak. Later on 26.05.2021 the complainant went to Bhavnagar to meet the accused in person. On meeting the complainant was informed that the visa had arrived and the accused had demanded an amount of Rs.2,00,000/- for the procedures and paper work and Rs.12,000/- for miscellaneous work. However, Rs.12,000/- was paid through cash and Rs.1,60,000/- was paid through RTGS and as per the agreement Rs.40,000/- would be paid after the tickets are booked. However, the copy of the tickets were not sent by the accused to the complainant and kept on giving excuses about pandemic and the later informed the complainant that the visa was cancelled and the said amount would be refunded back to the complainant.

1.1) Thereafter, the accused on 29.10.2021, through courier issued a cheque of AU Small Finance Bank Ltd., for an amount of Rs.1,72,000/- bearing cheque no.000011 dated:30.11.2021 to the complainant for the purpose of paying / clearing legal dues.

1.2) Complainant states that, he deposited the said cheque as issued by the accused, in favour of the complainant for payment of legal dues, the said cheque dishonored, by the banker of accused with an endorsement of “Insufficient Funds” in his bank account on dated 22.12.2021.

1.3) After the cheque was dishonored, the complainant bank issued a legal demand notice under Sec. 138 of Negotiable Instrument Act, served to the accused through the complainant’s Ld. Advocate on 18.01.2022 by R.P.A.D. Despite of the receipt of said notice was duly unserved to the accused on 20.01.2022 with an endorsement of “left”. Thus inspite of due service of the notice to the accused, he has not bothered to pay the cheque amount as demanded through the notice. By doing this, accused has committed an offence punishable under Sec. 138 of the Negotiable Instrument Act. Hence present complaint is filed against accused.

(2) Upon filing of the complaint, the verification of the complainant was recorded on oath under Section 200 of Criminal Procedure Code and thereafter, the present criminal complaint was ordered to be registered and summons were issued upon the accused under Section 204 of Criminal Procedure Code. The said summons were duly served to the accused by R.P.A.D. and the accused was present in Court with his Ld. Advocate and his plea was recorded vide Exh.08 on 29.09.2022. Accused pleaded not guilty and claimed trial, wherein the accused was denied the facts as mentioned by the complainant in the complaint. The matter was often adjourned for settlement. But the matter could not proceed due to the absence of accused so, the matter was kept pending. Subsequently, warrants were issued by the Court often as the accused was absent repeatedly. Due to which the proceedings of the Court are obstructed so the court again issued a warrant against him and matter was adjourned for recording of further statement of the accused. On 18.08.2023 accused remain present with his Ld. Advocate for recording of Further Statement.

2.1) Further the Ld. Advocate for the complainant in his arguments submitted that the complainant has proved his case beyond reasonable doubt. It is proved that the accused has failed to repay the amount which was used for visa and ticket booking from the complainant. Accused had given the subject cheque to pay the legal dues to the complainant. The complainant has proved that the accused had issued the alleged cheque to discharge his legal liability. It has been proved that the cheque was dishonored. Service of legal notice has been proved. The accused was liable to make the payment within stipulated time, however, he did not make the same despite service of legal notice. Hence, requested to convict the accused under Section 138 of N.I.Act.

(3) To prove guilt of the accused, the complainant has produced following oral as well as documentary evidence on record.

Oral Evidence

Sr.	Exh.	Particulars

No.	No.	
1	4	Deposition of complainant namely: **PRAMOD SUBHASH BELSARE** - complainant in form of affidavit.

Documentary Evidence

Sr. No.	Exh./ Mark No.	Particulars	Date
1	10	Original cheque no.000011 issued by the accused	30.11.2021
2	11	Original cheque return memo	22.12.2021
3	12	Copy of legal demand notice to the accused	18.01.2022
4	13	Original of RPAD of sending slip	18.01.2022
5	14	Acknowledgment receipt of the said legal notice unserved to the accused	20.01.2022
6	24	Closing pursis	11.09.2023

(4) After the oral submission by the complainant, the accused has appeared before the court for giving his further statement. The accused was examined under Section 313 Cr.P.C. read with Section 281 of Cr.P.C. by putting all the incriminating evidence before him and his statement was recorded. He denied all the incriminating evidence and stated that he had not issued the cheque for legal debt and the complainant had misused the security cheque. After the recording F.S. of accused, the accused did not lead any evidence in his defence or produced himself as defence witness. Thereafter, the matter was fixed for final arguments but neither the accused nor his Ld. Advocate have remained present and did not make any argument in support of his defence. Hence, the right of argument on the part of the accused side has been closed.

Although, no documentary as well as oral evidences have been adduced by the accused in support of his defence.

4.1) The learned advocate for the complainant has filed written arguments vide Exh.30, wherein the complainant has reiterated the facts as mentioned in the main petition and also produced all the relevant documents which have been exhibited by this court and taken on record. According to the cross examination of the learned advocate of the complainant to the accused, he admits the facts that the mentioned cheque bearing No.000011 of AU Small Finance Bank ltd., was issued by the accused himself. Further, it also proved that no particular defence has been taken on by the accused side. Therefore, the accused has failed to prove the presumption rebuttal. Therefore, the cheque issued by the accused for clearing his legal dues in favour of the complainant. The said cheque is signed by the accused himself and further the accused has not proved his defence that the complainant has stolen the cheque from the accused which is not acceptable by the complainant. In accordance of his defence, the complainant has relied upon the judgments which are as follows:

(1) In case of **Bir Singh Versus Mukesh Kumar** reported in **2019 (0) AIJEL - SC 63577** before the Hon’ble Punjab & Haryanan High Court.

(2) In case of **Rohitbhai Jivanlal Patel Versus State of Gujarat** reported in **2019 (0) AIJEL – SC 63830** before the High Court of Gujarat.

(3) In case of **Sumeti Vij Versus Paramount Tech Fab Industries** reported in **2021 (0) AIJEL – SC 67105**

before the Hon’ble Himachal Pradesh High Court.

(4) In case of **Aps Forex Services Pvt. Ltd., Versus Shakti International Fashion Linkers** reported in **2020 (0) AIJEL – SC 65765** before the Hon’ble Delhi High Court.

(5) In case of Kalamani Tex Versus P. Balasubramanian reported in **2021 (0) AIJEL – SC 66998** before the Hon’ble Madras High Court.

Hence, the complainant has filed this complaint against the accused and has prayed to convict the accused with heavy cost.

4.2) The learned advocate for the accused has also submitted his written argument at Exh.31 and stated that all the facts and allegations mentioned by the complainant are not true and correct. He has further contended that the plea of the accused has been recorded vide Exh.8 and he has pleaded not guilty. Further, the accused has recorded his further statement and stated that complainant had assigned the work for visa application for his aunt and her son Parth to the accused. For each visa application, the accused had charged Rs.2,00,000/- and the total due was Rs.4,00,000/- Thereafter, complainant had only paid Rs.1,60,000/- to the accused and the remaining amount was due to be paid to the accused by the complainant. The subject cheque was stolen by the complainant and he has misused the said cheque and filed a false complaint. Cross-examination of the accused has been recorded at Exh.27 to prove his case. Furthermore, the accused has prayed that he is innocent and has been falsely trapped by the complainant and his learned advocate in the said case.

(5) <u>Issues:-</u>

For the adjudication of the present complaint, following issues are necessary to determine:

1. Whether the complainant bank proves that the accused has issued cheques No.000011 of Rs.1,72,000/- dated 30.11.2021 of “AU Small Finance Bank” Bhavnagar Branch in favour of the complainant, towards legal dues of amount and upon presenting the said cheque in complainant's bank for encashment, the same was returned back unpaid with an endorsement of the bank "Insufficient Funds”?

2. Whether the complainant proves beyond doubt that the accused has failed to make payment of amount of cheque to the complainant inspite of demand notice served duly thereby has committed an offence under Section 138 of N. I. Act?

3. What order ?

(5.1) My answers to the above points are as under:

1. Affirmative
2. Affirmative
3. As per final order

(6) <u>Reasons For The Decision Of Issue No. 1 And 2:</u>

The evidence lead by the complainant is respectfully considered and the same are discussed herein below. for offence u/s 138 NI Act the **necessary ingredients** to be proved by the complainant are: **a)** legal liability / debt towards the complainant and the accused issued a cheque in discharge of the said legal liability / debt. **b)** that the accused was maintaining a bank account for the cheque issued by him. **c)** that the cheque was presented by the complainant within its validity period and the said cheque was dishonored on its presentation. **d)** that the complainant issued legal demand notice within 30 days from the date of dishonor of the cheque and the accused failed to pay within 15 days of receipt of legal demand notice. If the above ingredients are proved then an offence punishable u/s 138 NI Act is committed.

6.1) *Further it is necessary to see the proviso i*n case of ***M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. and ors. etc, AIR 2000 SC 954 Hon'ble Supreme Court has held as under:***

On a reading of the provisions of Section 138 NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the

cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability.

6.2) Further it is necessary to refer the proviso of ***The Hon'ble Apex Court in Basalingappa vs. Mudibasappa (2019) 5 SCC 418 has held as under:***

"23. We having noticed the ratio laid down by this Court in the above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in the following manner:

(i). Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii). The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii). To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv). That it is not necessary for the accused to come in the witness box in support of his defence. Section 139 imposed an evidentiary burden and not a persuasive burden.

(v). It is not necessary for the accused to come in the witness box to support his defence."

(7) <u>Evidences and Defence regarding the above ingredients:</u>

legal liability / debt towards the complainant and the accused issued a cheque in discharge of the said legal debt.:

7.1) The complainant in his deposition on affidavit at Ex. 4, in which, the complainant has reiterated the facts stated in the complaint, therefore, the same are not reproduced here-in-below and the complainant has produced some relevant documents in support of his affidavit viz **(1)** Original cheque issued by the accused produced at Exh.10 **(2)** Bank return memo produced at Exh.11 **(3)** Statutory Notice under Sec. 138 of N. I. Act against the accused produced at Exh.12 **(4)** RPAD white receipt of the said notice at Exh.13 **(5)** Acknowledgment that notice received by the accused at Exh.14. So far as the accused has failed to repay the amount paid by the complainant for the visa procedures. However, the accused has issued a cheque beraring no.000011 on 30.11.2021 to the complainant for clearing his legal dues, which was deposited by the complainant to his bank and the said cheque was returned with an endorsement of 'Insufficient Funds'. Now, at this juncture, it is necessary to look into **Sec. 139 of the Negotiable Instument Act, 1881,** which provides for **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 in part, of any debt or other liability.

7.2) To rebut the presumption in favour of the complainant, the accused had remained absent but his Ld. Advocate has remained present for further proceeding, and he has taken cross-examination of the complainant. In this cross-examination, the complainant has stated that, it is not true that the complainant had come to apply for the visa procedures. The accused had failed to get the visa due to the on going pandemic situation. Further the complainant has stated in his cross-examination that, It is true that the complainant has not mentioned in the complaint that the said subject cheque was received by the complainant through courier. It is true that the cheque was deposited. It is true that the complainant has not produced the cheque deposit receipt in the present case. The said cheque was return on 22.12.2021. It is true that the notice was issued after the cheque was returned. It is not true that the complainant gave false testimony on oath without sufficient evidence against the accused and here is the cross-examination completed. As per the above all cross-examination, the complainant has proved the fact that he has paid Rs.12,000/- by way of cash and Rs.1,60,000/- through RTGS to the accused for visa and ticket procedures. In pursuant of the said fact of the complainant, the accused had issued a cheque in favour of the complainant for an amount of Rs.1,72,000/- of AU Small Finance Bank, Bhavnagar Wagvadi Branch on date 30.11.2021 through courier service which was dishonoured for the same on 22.12.2021. After taking cross-examination of the complainant by the learned advocate of the accused, there is no sufficient rebuttal evidence brought on the record by the accused which proves that the said cheque was not issued by him with his signature for clearing his legal dues of the complainant. Further more, the accused denies that the disputed cheque was issued by him. There is no any rebuttal evidence brought on record by them from which, it does not prove that the said cheque was not issued to the complainant for legal liability and dues. Furthermore, considering the fact that the cross-examination has been taken wherein, he has denied the complainant’s facts. Therefore, there is no enough built-up, reasonable and probable defense and also the accused is not at all challenging the all documents which are produced by the complainant with his complaint. Therefore, merely confronting some questions of the complainant or witness is not enough to believe the defense evidence.

7.3) If looking to the entire case papers and records, the accused remained absent many times and warrant has been issued against him also. It is pertinent to note here that, the accused has to try to put up his case by bringing facts that the complainant has misused his cheque which was not issued for discharge of his legal liability. But nothing has been brought on the record as to when he issued the cheque in question to the complainant for the purpose of payment. It is also not the case of the accused that which amount he has to pay to the complainant. Looking to the record of the case, the legal debt is owed by the accused is crystallized, as the accused has failed to repay the said amount, the complainant is liable to receive cheque amount for which the accused had issued a cheque bearing no.000011 of Rs.1,72,000/- on date 30.11.2021 to the complainant. Further the accused has produced his examination in chief vide Exh.27 and accused was cross-examined by the learned advocate of the complainant and the accused has admitted in his cross examination that the complainant had deposited Rs.1,60,000/- on date 01.06.2021 in State Bank of India bearing A/c No.20085647165. Furthermore, the accused has stated that the disputed cheque was stolen by the complainant, however, the accused has failed to file any complaint against the complainant. Since the accused has not produced any documentary evidence, therefore it proves the fact that this is not a legal debt.

7.4) As discussed above, I am of the view that the complainant had succeeded and proving the legal debt on accused and as the accused remained absent and the accused has not at all denied his signature on the cheque, on the contrary he has admitted the legal debt owed by him. Therefore, in view of the above discussion, this court is of the opinion that the complainant has succeeded in proving the fact that the cheque in question was issued by the accused in discharge of a legal liability towards the complainant.

(8) <u>Accused is maintaining a bank account for the cheque issued by him.</u>

So far as this ingredient is concerned, no dispute is raised by the accused, rather it is admitted fact that the cheque was issued by the accused and also not denied his signature on the cheque. Further, considering the facts of the case on hand, it appears that, the accused is having an account of AU Small Finance Bank Ltd., Bhavnagar Branch. Therefore, this ingredient is satisfied on the record.

(9) <u>The said cheques were presented by the complainant within its validity period and it was dishonored on its presentation.</u>

Looking to the documentary evidence of the complainant, at Exh.10 original cheque is produced, which is issued on 30.11.2021. At Exh.11 Bank Return Memo is produced, which states that the cheque in question was returned on 22.12.2021 respectively, with a reason for return noted is 'Insufficient Funds'. The complainant has also stated the same in his deposition. Thus, these documents sufficiently proves the above requirement of presentation of cheque in question within its validity period and the same was dishonored on its presentation.

(10) <u>Issuance of demand notice within 30 days of dishonor of the cheque and failure to pay within 15 days of receipt of the said demand notice.</u>

Looking to the bank return memo, the cheque was returned on 22.12.2021 and the demand notice was sent through R.P.A.D. on 18.01.2022 Acknowledgment of Tracking Consignment is produced at Exh.14 to prove the service of the said demand notice to the accused which was labeled as “left”. That, by this it appears that the demand notice was sent within 30 days of dishonor of cheque to the accused. Moreover, in the present case, the accused had not sent the reply to the demand notice and he has not raised any objection that the notice was not duly executed. Therefore the service of the demand notice is not disputed. That, it is also the case of the complainant that though the accused has received the demand notice has also stated that despite service of the legal notice the accused did not make any payment towards the discharge of his legal debt/liability.

In accordance with the case of ***C.C. Alavi Haji Vs. Palapetty Muhammed reported in 2007 (0) AIJEL-SC 39299 Hon'ble Supreme Court of India has held that,***

"Sec. 138 proviso (b) (c) – Evidence Act, 1872- S. 114- dishonour of cheque- service of notice in terms of clause (b) of proviso to S. 138 of the Act, 1881- absence of any averments in complainant to the effect that accused had a role to play in the matter of non-receipt of legal notice or that he deliberately avoided service of notice whether such complaint could be entertained- ……..."

"Evidence Act, 1872- S. 114, Illustration (f)- General Clauses Act- S. 27- communications sent by post – presumption raised under S. 27 of the G.C. Act is a far stronger presumption than one raised under S. 114 of the Act, 1872- while S. 114 refers to a general presumption S. 27 refer to a specific presumption – S. 27 gives to a presumption that service of notice has been effected when it is sent to the correct address by registered post."

Thus, the documentary as well as oral evidence lead by the complainant confirms the fact that cheque bearing no.000011 was issued by the accused and same was returned due to 'Insufficient Funds'. Hence, as per the discussion above, I answer the issue no. 1 and 2 in affirmation.

(17) F<u>or issue no. 3</u>:

I have given my conscious thought and deep consideration to the evidence and material on record. As per my opinion, the offence is well proved against the accused person and hence, the accused person is liable to be convicted as per the above reasons. Further, in the present case, there is no reason which leads this court to conclude that the accused is falsely implicated by the complainant. In such a situation, keeping the seriousness of the offence in mind as well as keeping the object of the Negotiable Instrument Act in consideration, I hold that the complaint against the accused person is duly proved and the accused person is liable to be convicted. Accordingly, the accused person is held guilty and convicted for the offence punishable under section 138 of the NI Act under Sec. 255(2) of the Cr.P.C. Hence, following order is passed:

<u>- : O R D E R :-</u>

1. Accused – **Mr.DEVANGBHAI BUCH** is hereby held guilty and convicted as per Section 255(2) of Cr.P.C. for the punishable offence under Section 138 of Negotiable Instrument Act and is sentenced to suffer simple imprisonment for a period of One year.

2. As per Section 357 (3) of Cr.P.C., the accused is directed to pay the amount of the dishonored cheque amount to the complainant as a compensation within two month from today as per para 209 of the Criminal

Manual. And in default, the accused have to undergo further simple imprisonment for further six months from today as per para 209 of the Criminal Manual.

3. Copy of this judgment be furnished to the accused free of cost.

Signed and Pronounced today on this **05th** day of **September**, **2024** at Vadodara.

Sd/-

Date: 05.09.2024
Place: Vadodara

(ASHISHKUMAR HASMUKHLAL DAVE)
21st Addl. Senior Civil Judge &
Addl.Chief.Judl.Mag.,Vadodara
UID No.GJ01230

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