Received on	:	01.02.2002		
Registered on	:	01.02.2002		
Decided on	:	30.04.2022		
Period	:	Years	Months	Days
		20	*03*	*29*

IN THE COURT OF ADDITIONAL CHIEF METROPOLITAN MAGISTRATE, COURT No.32 (N.I. ACT) AHMEDABAD.

CRIMINAL CASE No. 3201840 OF 2011
(Old Criminal Case No. 324 of 2002)

Exhibit - 28

DINESHBHAI LAKSHMANBHAI PATEL
Authorised Person of Acron Pharmaceuticals
(Amended As Per Order Below Exhibit 23)
Aged about Adult, Occupation: Service,
Address: Naroda G.I.D.C., B/s. Ingle Gold,
Naroda, Ahmedabad. **COMPLAINANT**

V E R S U S

Sidhdharth Sunilkumar Banerjee,
Aged Adult,
Address: Sondhya Enterprise,
8-A, Ishwarchandra Banerjee Lane,
Ariadaha, Calcutta-57. **ACCUSED**

Appearance:
Mr. A.A.Trivedi, Learned Advocate for Complainant.
Mr. P.K.Pathak, Learned Advocate for Accused.

COMPLAINT UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881.

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

Present is the private complaint filed on behalf of Acron Pharmaceuticals *(hereinafter referred to as **`the complainant'**)* under Section 200 of the Code of Criminal Procedure, 1973 (***`the Code'*** for short) against Sidhdharth

Sunilkumar Banerjee (hereinafter referred to as ***`the accused'***) alleging the commission of offence under Section 138 of the Negotiable Instruments Act, 1881 (***`the Act'*** for short).

2. The facts of the complaint, as narrated by the complainant, in short are as under:

2.1 Kanubhai Babarbhai Patel is working as Accountant in Acron Pharmaceuticals since many years and conversant with all kinds of day-to-day work. That, the complainant does business of manufacturing and selling medicines and the accused does business of purchasing medicines in wholesale and selling in retail in the name and style of *`Sondhya Enterprises'* at Kolkatta. That, the complainant was supplying medicines as per orders of the accused through transport and the accused used to make payment of bills as per his convenience.

2.2 On making demand of outstanding amount of bills, the accused issued Cheque No.036379 of Rs.2,65,000/-, dated 19.12.2001, drawn on Bank of India, Kamarhatty Branch, Calcutta, which was deposited by the complainant in its bank account maintained with Cooperative Bank of Ahmedabad Limited, Naroda Branch, Ahmedabad on 19.12.2001 but the same was dishonoured with remarks *`Not Arranged For'* on 26.12.2001. On coming to know about dishonour on 01.01.2002, the complainant got issued notice dated 05.01.2002 by R.P.A.D. & UPC, which was received by the accused on 15.01.2002. The accused gave evasive reply but did not make the payment of the cheque amount.

2.3 Ultimately, the complainant has filed the present complaint on 01.02.2002.

3. Upon receipt of the complaint, this Court took the cognizance of the offence and issued summons against the accused for the offence under Section 138 of the Act by an order dated 01.02.2002.

4. On service of process, the accused appeared before the Court. After complying with the provisions of the Code, the sum and substance of the offence was stated and explained to the accused as per the provisions of Section 251 of the Code. As the accused pleaded not guilty (Exhibit 2) and claimed to be tried, the trial was ordered to be proceeded.

5. In order to prove its case, the prosecution has led the following evidence:

-:: ORAL EVIDENCE ::-

P.W. No.	**Witness**	**Exhibit**
1.	Deposition of Kanubhai Babarbhai Patel, Authorised Person of the complainant	03

-:: DOCUMENTARY EVIDENCE ::-

Sr. No.	**Particulars**	**Exhibit**
1.	Original Authority Letter	06
2.	Original Cheque dated 19.12.2001	07
3.	Original Return Memo dated 26.12.2001	08

4.	Office copy of statutory notice dated 05.01.2002	09
5.	U.P.C. and R.P.A.D. Postal Window Slips	10-Coll.
6.	R.P.A.D. Slip	11
7.	Copy of Ledger Account	12

5.1 After leading the aforesaid evidence, the complainant has closed its evidence by filing *Pursis* at Exh.22.

6. It may be noted that the cross-examination of the prosecution witness was completed on 21.04.2011.Thereafter, an application for change of authorised person of the complainant was moved on 30.12.2016 at Exhibit 23, which was allowed and the name of Kanubhai Babarbhai Patel was replaced by Dineshbhai Laxmanbhai Patel, who was given authority by the complainant.

6.1 It may also be noted that thereafter the accused did not appear before the Court and as the process could not be served, this case was placed on *'Dormant File'*. Upon execution of the warrant of arrest, the accused appeared before the Court on 20.09.2019 and the proceedings came to be regularised.

7. Thereafter, a detailed statement of the accused has been recorded on 06.03.2020 under Section 313 of the Code whereby each and every incriminating fact and circumstance emerging from the evidence against the accused has been explained to him.

7.1 As regards the authority, it is stated that the authority is not given by all the partners and the authorised person is not the accountant. It is also stated that the complainant was accepting advance blank cheque and the disputed cheque was given as blank advance cheque, which is misused by filling in details by the complainant. Pleading ignorance about the dishonour of the cheque, it is stated that the notice was received.

7.2 As regards the documentary evidence, the accused stated that the security cheque is misused and pleaded ignorance about the return memo. As regards the notice, it is stated that a false notice is given but the documents of postal departments are not controverted. Genuineness of the document in the form of ledger account (Exhibit 11) is disputed.

7.3 In addition, it is stated that the order was as per Invoice (Exhibit 20) but the same was not accepted due to non-availability of Form `C' of Sales Tax Department and the goods were returned to *GATI* Courier; that, *GATI* Courier also informed the complainant to take back the goods and ultimately delivered to Aman Midha; that, the blank cheque has been misused. The accused stated that he does not wish to lead evidence nor examined himself on oath.

7.4 It may also be noted that the accused has also produced documents during the cross-examination of the prosecution witness, which are given tentative exhibits. The said documents are UCG Notice issued by *GATI* Courier (Exhibit 18), Fair Copy of Letter written by Sondhya Enterprises (Exhibit-T-19), Xerox Copy of Invoice (Exhibit T-20) and Xerox Copy of disputed cheque (Exhibit T-21). It may be stated that except Exhibit T-20, none of the documents produced by the accused is admitted on behalf of the complainant. Not only that, no attempt has been made on behalf of the accused to prove the documents at Exhibits 19 & 21 and as the said documents are not proved in accordance with the law, the same are not given permanent exhibit.

8. Heard the learned advocates for the parties. Both the learned advocates have relied upon few authorities, which are referred to hereinafter.

9. In view of the above factual background, the following points are framed for determination:

1. Does the prosecution prove beyond a reasonable doubt that the accused in order to discharge the legal debt issued Cheque No.036079 of Rs.2,65,000/- dated 19.12.2001 drawn on Bank of India, which, on deposit, was returned unpaid with remarks *Not Arranged For* on 26.12.2001 and despite the issuance of notice dated 05.01.2002 and its receipt dated 15.01.2002, the accused did not pay the cheque amount and, thereby, committed the offence under Section 138 of the Act?

2. What order?

9.1 For the reasons stated hereinafter, answers to Point No.1 is in the negative and answer to Point No.2 is as per the final order.

- : : R E A S O N S : : -

10. First of all, few decisions relied upon by the learned advocates for the parties may be referred to.

10.1 The learned advocate for the complainant has relied upon a decision of Hon'ble Supreme Court in ***APS Forex Services Private Limited Vs. Shakti International Fashion Linkers & Others, AIR 2020 SC 945*** wherein it is held that Section 139 of the Act is an example of reverse onus clause and therefore once issuance of the cheque has been admitted and even the signature thereon has been admitted, there is always presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter it is for the accused to rebut such presumption by leading evidence. In another decision of Hon'ble Supreme Court in ***Sumeti Vij Vs. M/s. Paramount Tech Fab Industries, AIR 2021 SC 1281*** relied on by the learned advocate for the complainant, it is held that there is a mandate of presumption of consideration in terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act. To rebut the presumptions, facts must be adduced by the accused which on a preponderance of probability must then be proved. It is also held that the statement of the accused under Section 313 of the Code is not a substantive evidence of defence but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case.

10.2 The learned advocate for the accused has also relied upon few authorities, which are referred to hereinafter.

11. It may be noted that the documents produced by the complainant have been ordered to be exhibited by making order below Exhibit 5 and the said order is not under challenge.

11.1 However, the documents produced on behalf of the accused are ordered to be exhibited tentatively and, therefore, it would be apposite to decide as to whether they are to be given permanent exhibit or not?

11.2 Exhibit 18 is the UCG Notice issued by *GATI* Courier. The said notice is original and appears to have been posted at the address of the accused. The prosecution witness has been shown this notice and he has not disputed the genuineness of this notice. As this document is original and genuineness is not under challenge, the said is ordered to be exhibited permanently and given permanent exhibit accordingly.

11.3 A copy of Invoice is given tentative Exhibit 20. On this document, the prosecution witness has admitted the signature of Jaydeepbhai Patel and genuinness of this document is also not challenged. Hence, it is exhibited permanently.

11.4 As regards documents at Exhibits T-19 & 21, they are xerox copies of letter and blank disputed cheque. Though these documents were shown to the witness during his cross-examination, he has disputed the signature of J.S.Patel. Though these documents are disputed, the accused has not made any attempt to prove the same and, therefore, they are not given permanent exhibit.

11.5 It may be noted that during the cross-examination, three documents, i.e. xerox of disputed cheque, xerox of letter of *GATI* Limited and xerox of UCG Notice-I, were produced on behalf of the accused and they were given Mark: A, B & C. However, the accused has failed to prove the said documents and, therefore, they are not exhibited.

Point No.1 ::-

12. At the outset, it may be stated that the first and foremost point urged before this Court on behalf of the accused is regarding the maintainability of the complaint and, therefore, this Court is of the view that the said aspect be discussed and determined first.

13. As regards filing of the complaint, the case of the complainant is that *Acron* Pharmaceuticals is a firm and Kanubhai Patel, who is working as Accountant, is conversant with the day-to-day affairs.

13.1 In his affidavit-in-chief examination tendered at Exhibit 3, it is deposed by Kanubhai Patel that he is working with Acron Pharmaceuticals since many years and is conversant with all information of the accounts. It is also deposed that the company issued authority letter dated 01.02.2002 in his favour, on the basis of which this complaint is filed and the said authority letter is produced at Exhibit-6.

13.2 This witness has been cross-examined on the point of authority. In his cross-examination, this witness has stated that Acron Pharmaceuticals is a partnership firm and there are three partners, who all have equal shares in profit-loss. It is stated that the authority letter (Exhibit 6) is signed by only one partner and other partners have not given him authority to file the present complaint but it is denied that the partner who has given authority had no such authority and that Mr.J.S. Patel had given authority without knowledge of other partners. It is also stated that he does not know as to whether there is written resolution among the partners to give authority to him. It is also denied that all the partners have not authorised him to file the present complaint. It is also stated that he is ready to produce authority letter issued by three partners. Thought it is denied that no such authority letter is produced along with documentary evidence list, it is stated that authority letter signed by Jaydeepbhai Patel is produced. Admitting the fact that no authority letter of three partners is produced, it is denied that all the partners have authorised him to file the complaint by giving consent.

13.3 At this stage the arguments of the learned advocate for the accused may be seen. It is firstly argued that the authority letter is also not proved in accordance with law and, therefore, cannot be acted upon. It is also argued that as all the partners have not given authority and signed the authority letter, it is not legal and valid. It is further argued that it has come on record that there are three partners and as only one partner is alleged to have signed the authority, it cannot be termed legal and valid. In support of these arguments, the learned advocate for the accused has relied upon decisions of Hon'ble Gujarat High Court in ***Surendranagar Mercantile Cooperative Bank Through Recovery Officer Vs. State of Gujarat, 2013 (1) DCR 178*** and Hon'ble Bombay High Court in ***Chico Ursula De Souza Vs. Goa Plast Private Limited, Laws (Bom.) 2008 6 61***.

13.4 As against this, it is argued by the learned advocate for the complainant that as one of the partners has signed the authority, it is legal and valid and the act done by one of the partners is binding to all the partners.

14. First of all, if the deposition of witness (Exh.3) is read, the witness has only stated that one authority letter was issued on 01.02.2002 and on the basis of it, the complaint is filed. Except this nothing has been stated by the witness. Thus, on the basis of the statements made in the affidavit-in-chief examination, the authority letter, strictly speaking, cannot be said to be proved inasmuch as nothing is stated to prove the said document nor the signature on the authority letter is identified. Hence, there is substance in the argument of the learned advocate for the accused that the authority

letter is not proved. In the decision of *Chico Ursula De Souza (supra)*, it is also observed that it is the duty of the prosecution witness to prove the document and the complainant in the present case fails to do so.

14.1 It is true that the witness has stated in his cross-examination that it bears the signature of one partner namely J.S.Patel and it is not the case of the accused that J.S.Patel is not the partner of the firm. On the basis of this statement for the sake of arguments, let it be believed that the authority letter is proved.

14.2 Believing the authority letter proved, if it is read, it is stated therein that Mr. Kanubhai Babarbhai Patel is authorised to file complaint on behalf of the firm as he is aware of all the transactions between the firm and M/s.Sondhya Enterprise, Kolkata. The partner of the firm has authorised witness to file complaint against M/s.Sondhya Enterprise, Kolkata under Section 138 of the Act. Thus, a bare reading of the authority letter makes it clear that the authorised person is given authority to file complaint against M/s.Sondhya Enterprise, Kolkata. However, the cause title and the averments made in the complaint clearly indicate that the complaint is filed against Mr.Sidhdharth Benarjee and as per the case of the complainant Mr.Benarjee is doing business in the name of Sondhya Enterprise. Suffice it to say that by no stretch of reasonings, it can be said that the authorised person has filed the complaint against Sondhya Enterprises. As the letter does not confer authority on the authorised person to file the complaint against the present accused, this Court is of the firm view that the complaint based on the authority produced at Exhibit 6 is not maintainable. In other words, on the basis of the authority letter (Exhibit 6), the present complaint is not maintainable against this accused.

14.3 Be that as it may. Now, if the authority is read as it is, it only confers the power upon the authorised person to file the complaint and nowhere authorises such person to depose on behalf of the complainant. In this regard, if the decision in *Chico Ursula De Souza (supra)* is read, it is observed therein that the authority letter is required to be read strictly and if read so, it does not indicate that the authorised person by virtue of the letter at Exhibit 6 was given authority to depose on behalf of the complainant. Thus, this aspect of the matter also cannot be lost sight.

14.4 Now, if the cross-examination of the prosecution witness is read, it becomes clear that it is specifically admitted that the authority letter is signed by one of the partners out of three and it is admitted by the witness that other partners have not given any authority to file him the complaint. Moreover, though the witness stated that he is ready to produce the letter authorising him by all the partners, he has not preferred to produce the same and also admitted that no such letter is produced. Not only that, it also becomes clear that he has admitted that three partners have not given consent to file the complaint. Thus, the evidence of the complainant's witness himself makes it clear that though the witness is putting his case that he is authorised to file the complaint on behalf of the firm, it appears that all the three partners have not authorised him to file the present complaint. This would lead the Court to hold that the authority is not legal and valid. The decision in *Chico Ursula De Souza (supra)* relied upon by the accused is also helpful to the defence.

15. In view of the above discussion, this Court comes to a conclusion that the present complaint filed on behalf of the complainant - partnership firm - through its authorised person against the present accused is without legal and valid authority and, therefore, not maintainable.

16. It may also be stated that learned advocate for the accused has also argued that if the disputed cheque is seen, it is drawn on behalf of M/s.Sondhya Enterprises by its partner and, therefore, it becomes clear that in absence of arraying M/s.Sondhya Enterprises as one of the accused, the present complaint is not maintainable. In support of this submission, he has also relied upon a decision of Hon'ble Gujarat High Court in ***Onali Ismailji Sadikot Vs. State of Gujarat & Another, 2016 (1) Crimes 79*** wherein it is held that a complaint against partner without arraying partnership firm is not maintainable. Needless to state that disputed cheque (Exhibit 7) clearly indicates that it is drawn on behalf of partnership firm – M/s. Sondhya Enterprises and admittedly the said firm is not joined.

The complainant has stated that the accused Sidhdharth Banerjee is doing business in the name of Sondhya Enterprises and though the cheque is issued on behalf of the said firm, the complainant has neither issued notice to the firm nor arrayed it as accused. It also appears that the complainant firm was fully aware that the cheque was issued on behalf of Sondhya Enterprises and, therefore, authority is given to file the complaint against the said firm. Not only that the ledger account is also maintained in the name of M/s.Sondhya Enterprises. This fact also indicates that the complaint in the present form is not maintainable and the ratio laid down in *Onali Ismailji Sadikot (supra)* is applicable.

17. Now, let it be seen as to whether the execution of cheque stands proved or not?

17.1 In this regard, the prosecution case is that on amount of outstanding bill being demanded, the accused sent the disputed cheque. This fact is reiterated by the witness in his affidavit in evidence at Exhibit 3 but no statement is made to prove the execution of the cheque, that is to say, the witness has remained silent as to who has signed the cheque, cheque belongs to whom, etc. Suffice to say that there is not a single statement made in the affidavit-in-chief examination, which may prove the execution of the cheque. However, during the cross-examination, the accused has put suggestions to the witness that the disputed blank cheque was obtained towards the security in 1999 and that the complainant firm obtained advanced blank cheque from the accused but both the suggestions have been denied. In his further statement also, the accused has stated that the blank cheque is misused. It can, thus, be said that the accused is not disputing the fact that the cheque belongs to him or cheque is executed by him. If this stance is taken as admission on the part of the accused, execution of the cheque can be believed.

17.2 The factum of execution of the cheque would lead this Court to raise presumptions under Sections 118 and 139 of the Act. Meaning thereby, the accused issued the disputed cheque towards the discharge of legal debt.

18. As regards the legal debt, the defence of the accused is that the debt is not legally enforceable.

18.1 The case of the complainant is that the account of M/s.Sondhya Enterprises was maintained by it; that, annual statement was prepared; that, the complainant was dispatching goods as per orders through transport; that, the accused used to pay the amount as per his convenience; that the accused sent the disputed cheque towards amount of outstanding bill. This is reiterated by the witness in his chief examination.

18.2 During his cross-examination, this witness has stated that entries of income & expenditure are made in *Rojmel*; that, entries of sale on credit and cash are also made in *Rojmel*; that, the disputed cheque was towards the sale on credit; that, the entry of the disputed cheque was made in Bank-Book and he is ready to produce the Bank-Book. It is also stated that one copy of Bill-T and one copy Bill of the dispatched goods are kept with the firm but refused to produce the copy of bill of dispatched goods to the accused and voluntarily stated that the cheque was towards the due amount on account. It is also admitted that the cheque was not towards any specific goods dispatched.

18.3 It is also admitted that the complainant firm maintains the account and entries are made with date on which goods are sent; that, if goods are sent on credit, entries are also made; that, entries with date of dispatch and date of payments are made in account-books. The witness has stated that he is ready to produce account-books.

18.4 It may now be noted here that the case put forth by the accused that the complainant through *GATI* courier sent goods worth Rs.64,969/- *vide* Docket No.ES-29151 on 28.08.2001, which is admitted by the complainant. This fact indicates that the complainant sent goods through GATI courier. As regards delivery of these goods, the case of the accused is that it was delivered to Mr.Aman Modha under the instructions of the complainant. In order to establish this fact, the witness was confronted with the letter of GATI Courier (Exhibit 18), the genuineness of which was not challenged by the witness. A reading of the said letter indicates that it was addressed to the complainant and a copy thereof was forwarded to M/s.Sondhya

Enterprises and it pertains to delivery of goods bearing Docket No.ES-29151, dated 28.08.2001. It also appears from this letter, there was issue regarding delivery of goods and the shipment remained undelivered. It may be noted that though the accused took the specific defence that the goods were not delivered to him, the witness has not thought it fit to produce any evidence to show the delivery of the goods. In fact, had the complainant sent goods through courier company, the complainant could have produced document showing delivery of goods to the accused. However, the complainant has failed to do so.

18.5 It may also be noted that the facts revealed in cross-examination of the witness clearly indicate that the complainant is maintaining accounts, bill-T, bill, etc., but it has not produced the same to prove the transaction. It is, in fact, duty of the complainant to produce the same more particularly when the defence has disputed the transaction and produced evidence disputing the delivery of the goods. It is not the case of the witness that the complainant was not in possession of the documents and the witness himself has deposed that he would produce the same. Not only, that the witness has also not produced the books of accounts though shown his readiness. It may also be noted that the complainant's witness for the reason best known to him refused to produce copy of bill of dispatched goods, which strengthens the defence of the accused regarding non-delivery of the goods.

18.6 It is true that the witness has voluntarily clarified that the cheque was towards the amount due on account and not for the specific bill amount. If this was the case of the complainant, he could have come with such case and produced the evidence showing such fact. Not only that, despite the clarification made by the witness, no evidence in that regard is produced.

18.7 In this view of the matter and in absence of sufficient evidence, the case of the complainant regarding the delivery of the goods and due amount cannot be believed.

19. It may be noted here that so far as the requirements of Sections 138 (a), (b), (c) and Section 142 (b) of the Act are concerned, suffice it to say that the accused has not raised any dispute in this respect. On the contrary, the learned advocate for the accused has fairly stated that the requirements enumerated in (i) Section 138(a) regarding depositing the cheque within the validity period; (ii) Section 138(b) regarding issuance of statutory notice within the period of 30 days on receipt of information of the dishonour; (iii) Section 138(c) regarding non-payment of the cheque amount within a period of fifteen days from the date of receipt of the notice; and (iv) Section 142(b) regarding filing of a complaint within a period of one from the date of arisen of cause action under Section 138(c) of the Act, stand complied with. The chronology of the events stated in the factual part, which is undisputed, clearly suggests compliance of the requirements.

20. In view of the discussion made hereinabove, this Court is of the view that the present complaint filed against the accused herein on behalf of the complainant firm is not maintainable and the complainant has failed to prove its case beyond a reasonable doubt. This Court, therefore, answers ***Point No.1 in the negative***.

Point No.2 ::-

21. In the result, the following final order is passed:

- : : O R D E R : : -

1. The accused - Sidhdharth Sunilkumar Banerjee, Aged Adult, Address: Sondhya Enterprise, 8-A, Ishwarchandra Banerjee Lane, Ariadaha, Calcutta-57, hereby stands acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. The accused to furnish bail bond in the sum of Rs.7,5000/- as per the provisions of Section 437A of the Code of Criminal Procedure, 1973.

Pronounced in open Court today i.e. on 30th day of April, 2022.

Place: Ahmedabad (RAJENDRA H. PRAJAPATI)
Date: 30.04.2022 Additional Chief Metropolitan Magistrate,
Court No.32 (N.I. Act), Ahmedabad.
(GJ-00889).