GJSK140009952022

Presented on : 19-10-2022
Registered on : 19-10-2022
Decided on : 24-01-2024
Duration : 1 years, 3 months, 5 days

IN THE COURT OF
PRINCIPAL CIVIL JUDGE & J.M.F.C
VADALI AT, SABARKANTHA
(Presided Over by S. Pal)

CC/871/2022

Exhibit No. - 29

Complainant: -

FIROJMIYA JIVAMIYA CHAUHAN
AGE - 52
OCCUPATION: - Driving
VADALI, TALUKA - VADALI, DISTRICT - SABRAKNTHA.

VERSUS

Accused: -

GOFURBHAI RASULBHAI MEMON
Age – 50
OCCUPATION – Broker
NAKOD, P.O. - NAHOD, TALUKA - VADALI, DISTRICT - SABARKANTHA.

Ld. APP for the Complainant: Shri P. J. PATEL;
Ld. Advocate for the Accused persons: Shri A. D. GADHAVI.

Offence punishable under : Section 138, of NEGOTIABLE INSTRUMENTS ACT, 1881,

JUDGMENT
(Delivered on 24-01-2024)

1. This instant criminal case was initiated by the filing of the complainant & the same was done by Ld. Advocate Shri P. J. Patel on behalf of the complainant. After going through the complaint this court came to this conclusion that this criminal case was filed **u/s**

138 of the **Negotiable Instrument Act of 1881.** However after taking over the charge of a Principal Civil Judge & J.M.F.C., court Vadali while on 26th day of July'23 while this matter was first time taken on the board then after going through the record it appeared that this matter was at the stage of cross examination of the complainant. On next adjournment date i.e., on 18th day of October'23 after recording a cross eaminaiton of the complainant a closing pursis (vide exhbit no. 25) was received from the complainant. On the strength of the same this matter was taken for the further statement. Thereafter on 8th day of November'23 further statement of the accused was recorded & after filing a closing pursis (vide exhibit no. 27) this matter was taken for the final argument. On next adjournment date i.e., on 13th day of November'23 both sides of advocates conducted their verbal argument and thereafter this matter was taken for the final judgment.

2. After going through the records, verbal arguments of the both sides, considering the related case papers as well as related documents the fact which came within the knowledge of this court can be narrated by the following words: -

The complainant of this case by profesion is a driver. The accused also by profession is a broker & he use to engage himself for the purchasing as well as selling of car. As per submission of the complainant he and the accused are residing at the same taluka. So the pesent parties to this case is known to each other from long times. The complaiannt sold his Mahindra Scorpio car to the accused perosn & the selling price was fixed on Rs. 1,45,000/- (rupees one lac forty five thousand only). As per submission of the complainant for the purpose of the same a sale agreement was also made. After two months the said accused paid the amount of Rs. 40,000/- (rupees forty thousand only) thougha google pay & the same was paid in two installments. But for the rest of the amount i.e., for Rs. 1,05,000/- (rupees one lac five thousand only) he issued one chaeque (here in after known as a disputed cheque) to the complainant. The details of such dispouted cheque is given below:

Amount	Cheque No.	Dated	Bank
1,05,000/-	000021	17/08/22	The Sabarkantha District Central Co - operative Bank Ltd.(Vadali Branch)

3. But while the complainant tried to encash the said cheque the same was bounced & returned with a memo dated 18th day of August'22 on account of '***drawer signature defect***'.

4. Later on 16th day of September'22 the present complainant through his Ld. Advocate sent a demand notice through R.P.A.D. The said notice was received by the accused on 19th day of September'22. But no reply was found from the accused. Apart from this till date no payment was made by the accused person. So as a mean of last resort, on 19th day of September'22 the complainant knocked the door of this court by filing this criminal case. Thereafter as per procedure

summon was issued to the accused.

5. After service of process the accused appeared & received the copy of the complaint & subsequently Ld. Advocate Shri A. D. Gadvi filed his vakalatnama (vide exhibit no. 8) on behalf of the accused & started to defend this case. On 18th day of November'22 the plea of the accused person was recorded under exhibit 7. In such plea he completely denied the allegation labeled against him & claimed to be tried. So as per procedure this matter was taken for the evidence of complainant (i.e., prosecution).

6. In support of her claim the complainant has filed the following documentary evidences: -

Sr. no.	Name of the document	Dated	Exhibit no.
1	Original copy of the disputed Cheque (vide no. 000021)	17/08/22	9
2	Original copy of return memo (against the disputed cheque no. 000021)	18/08/22	10
3	O/C of the demand notice so issued to the accused.	16/09/22	11
4	Original copy of the receipt of the R.P.A.D.	16/09/22	12
5	Original copy of R.P.A.D. which returned unserved as accused was not found)	23/11/22	13

7. Apart from it following ocular evidence was produced in favour of the complainant: -

Sr. No.	Name of the document	Dated	Exhibit no.
1	Deposition of the complainant	19/10/2022	5

8. In support of their claim the accused neither produced any

documentary evidences nor filed any occular evidence.

9. After going through the written argument filed on behalf of the complainant this court has drawn the following inferences: -

The Ld. Advocate of the complainant mainly conducted of his argument relying upon the evidences as mentioned above.

He mainly emphasized upon the following points: -

a. Accused has given a cheque (vide exhibit no. 9) to the complainant to discharge his legal debt;

b. Notice issued to the accused shows that it was served upon the correct address of the accused;

c. Disputed cheque was bounced due to insufficient of funds was proved by the return memos (vide exhibit no. 10);

d. Copy of the deman notice (vide exhibit no. 11) shows the existence of legal debt towards the accused.

10. At the time of his final argument Ld. Advocate of the accused has emphasized upon the various aspects. However for the conveniance of our discussion these are summarised through the following points: -

a. That the disputed check was abused by the complainant. The present complainant is unable to give such huge amount of loan to the accused person. Because in his cross examination this fact was indirectly admitted by the complainant.

11. Now considering the above discussions in connection with this case following issues were framed: -

I. Whether this criminal case is maintainable for the want of proper legal procedure as compulsorily required to be followed by the Negotiable Instrument Act of 1881?

II. Whether the complainant has proved that on 16th day of November'22 the accused has issued one cheque (vide no. 000021) in favour of him with intention to discharge legal laibility which he was not able to realize on account of drawer's signature defect?

III. What order?

12. In this connection this court has taken following observations:-

I. Affirmative;
II. Affirmative; &
III. As per final order.

//<u>REASON</u>//

13. **<u>While considering the issue no. 1</u>: -**

This issue was framed with intention to get confirm that whether the complaint has followed the provision contained under **clause (b)** & **(c)** of **Section 138** of the **Negotiable Instrument Act of 1881**.

Now as per provision contained **u/s 138 clause (b)** the notice should be given in writing within thirty days (30 days) from the date of receipt of information regarding return of cheque from the concerned bank. Now if we consider the return memo (vide exhibit no. 10) so filed on behalf of the complainant we find that such disputed cheque along with return memo was issued to the complainant on 18th day of August'22 & after considering the office copy of the demand notice (vide exhibit no. 11) it was found that such notice was issued to the accused on 16th day of September'22. So the service of notice is said to have done within the period of limitation. However as per reocrds such notice was returned unserved on 19th day of September'22 with an endorsement that the accused went outside i.e., to say accused was not available at the time of service of demand notice. However In ***State of M. P. v. Hira Lal reported in (1996) 7 SCC 523*** as well as in ***Jagdish Singh v. Nathu Singh reported in AIR 1992 SC 1604***, the Supreme Court held that where the addressee manages to have the notices returned with postal remarks "refused", "not available in the house," "house-locked" and "shop closed" respectively, it must be deemed that the notices have been served on the addressee. So on the strength of the above view the notice is said to have been served to the accused on **19th day of September'22** i.e., to say within the period of limitation.

On the other side if we consider the provision contained **u/s 138 clause (c)** we find that in this case this provision was also complied with strictly. Because as per this provision the case should be filed after expiring of fifteen days (15 days) from the date of receipt of such notice. In this case from the above discussion it is clear that such notice was served upon the accused on ***19th day of September'22.*** But as per avarment so made in the complaint as well as argument so made on behalf of the complainant it appeaed that the accused has received such notice. Moreover Ld. Advocate of the accused didn't raise any specific defense & filed the reply of such demand noice. So it can be presumed that the accused has received such notice on ***19th day of September'22***. This criminal case was filed on ***19th day of October'22*** i.e., to say within one month from the date of expiring of fifteen days. So from this discussion now it can be concluded that the complainant has followed all the requirements given u/s 138 as well as u/s 142 (b) of the Negotiable Instrument Act of 1881.

14. **While considering the issue no. 2: -**

It is now clear from the records that accused has produced the original copy of the documents. But so far the nature & admissibility of these documents are concerned we need to examine them in the light of relevant provisions of ***Indian Evidence Act of 1872***. Moreover Ld. Advocate of the complainant emphasized upon it while conducting is final argument.

First of all the complainant in terms of Indian Evidence Act has filed the primary evidences. So these are admissible ***under section 64*** of the ***Indian Evidence Act of 1872***.

So far the presumption of existence of legal debt is concerned as per provision of section 139 of N. I. Act

> ***"It shall be presumed, unless contrary is proved, that the holder of a cheque received the cheque the cheque of the nature reffered to in section 138 for the discharge, in hole or***

inpart, of any debt or other laibility".

Similarly, Section 118 (a), N. I. Act Provides as follows:

until the contrary is proved, the following presumptionn shall be made: -

> ***(a) of consideration – that every negotiable instrument was made or drawn forn consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferrd, was accepted, indorsed, negotiated or transferred for consideraton;***

Apart from these provisions if we considered the verdict of Hon'ble Supreme Court in ***Rangappa v. Sri Mohan reported in (2010) 11 SCC 441*** it has been now clared that

> ***Once the issuance of chaeque is accepted or proved, the trial court is duty bound to raise the presumption that the dishonoured cheque placed before it was indeed issued in discharge of as legally enforceable debt or liability of the mentioned therein.***

So as per the above discussion this court is duty bound to draw a presumption in favour of the complaiannt that such disputed cheque was issued in favour of the complaiannt with intenton to discharge his legally enforceable debt/liability. But it is rebutable by the accused & to rebut the same it is not necesary that the accused will have to file concrete evidence in his favour. He is at liberty to do the same by raising reasobale doubt/question about the exixtence of a legally enforceable debt or iability by evluating the evidence so filed by the prosecution/complaiannt side. If the accused succeed then the complaint stands fail. Now if we consider the above princile in the light of present fact/case then in this regard then the Ld. Advocate of the accused has failed to do the same.

First of all he has failed to pointed out such defense in the cross examinaiton of the complainant so recorded under exhibit 4. In such cross examined the Ld. Advocate of the accused tried to establish the fact regarding incapbility of the complainant to pay such huge amount of loan. In this connection he emphasised the annual income of the complainant. But it is not enough to disprove this fact that such disputed cheque was given to the complainant with intention to discharge his legal debt & liability. by which a reasonable inference can be drawn that cheque was given to discharge the legal debt or liability.

Apart form that now at this juncture if we consider the decision of Hon'ble Apex Court In ***K.N. Beena v. Muniyappan & Ors. [(2001) AIR (SC) 2895]*** read with ***Rangappa (supra)*** where Hon'ble Supreme Court says:

> ***In case of any complaint filed u/s 138 of the Negotiable Instrument Act of 1881 while question regarding existence consideration for cheque is concerned burden of prove is on accused not upon complainant. Mere denials/averments in reply by accused are not sufficient to shift burden of proof upon the complainant. Accused has to lead the cogent evidence.***

> ***Conviction can't be set aside on the basis of some formal evidence led by accused. Under Section 118 of the NI Act, unless the contrary was proved, it is to be presumed that the Negotiable Instruments (including a cheque) had been made or drawn for consideration. Under Section 139 the court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part of a debt or liability. Thus in complaint case the court has to presume that the cheque has been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque has not been issued for a debt or liability is on the accused.***

Here in this case if we try to apply this principle then presumption can be drawn in favour of the complainant. Because the Ld. Advocate of the accused has failed to prove the fact that no legal debt exists betweent the complainant and the accused & such disputed cheque was not given to discharge legal debt.

Moreover in ***M/S Shri Sudarshan Industries v. Hygenic Palm Oil Pvt. Ltd*. *[2018 (2) DCR 454] read with Krishna Janardhan Bhat v. Dattatrreya Hegde & Rangappa (supra)*** it was held that:

> ***To rebut presumption accused need not to adduce direct evidence nor step into witness box. Burden to rebut statutory presumption can be discharged by relying on material produced by the complainant or witness examined on his behalf.***

Further Hon'ble Supreme Court in the case of ***Rangappa (supra)*** this issue was further clarified in the following terms:

> ***"Section 139 of the Actis an example of the reverse onus clause that has been included in furtherance of legislative objective of improving the credibility of negotiable instruments. While Section 138 if the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the court litigation. However, it must be remembered that the offence made punishable by Section 139 can be better described as a regluatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transaction. In such a scenerio, the test of proportionality should guide the construction and interpretation of revers onus clause and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justification, reverse onus clause usuallly impose an evidentiary burden and not a persusive burden. Keeping in this view it is a settled psition that when an accused has to rebut the resumption under Section 139, that standard of prove faor ding so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creats doubt about the exixtence of a legally enforceable debt of libility, the prosecution can fail. As carified in the citations, that accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.***

The most surprising fact was that in this case the disputed cheque was returned on the ground of defect of signature & neither of the parties (particularly Ld. Advocate of the accused) emphasised upon this matter nor they made any effort to bring this fact within the knowledge of this court. The endorsement so made in the return memo (vide exhibit no. 10) clearly talks about this. Now a quetion involved in this regard is that whether the penal provision of ***Section 138*** of the ***N. I. Act*** attracted on acount of mismatch/defect of the signature. Apart from that the provision so contained ***u/s 138*** of the ***N. I. Act*** didn't recognise this groung as a valid point for applicability of the penal part of the said provision. So prior to decision of ***Laxmi Dychem v. State of Gujarat and Ors. [(2012) 13 SCC 375]*** the judicial approach was different & to some extent stereo type. On that ground criminal complaint were straightway rejected. But after the pronouncement of this judgement the concept was changed. Para no. 6 of the above mentioned judgment clearly tells that: -

> *Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act was introduced in the statute by Act 66 of 1988. The object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its*

very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gainsaying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

So considring the above principle the accused can take the benefit i.e., avoid the penal provision of section 138 of N.I. Act provided he show his bonafideness i.e., at the time of accrural of cause of action there was sufficient funds in the acccount agiant which such disputed cheque was issued. Apart from that he due to bonafide reason couldn't take any alternative meadsure so that such disputed cheque was encashed timely. But here the accused fialed to prove this situation by adducing concrete evidence (if any).So after having a brief discussion this cour didn't found any reason for giving benefit to the accused person.

15. **<u>While considering the issue no. 3</u>: -**

After considering the above discussion, evidence given by the complainant & also considering the other relevant documents the accused was found guilty for this case.

Place: - Vadali
Date: - 24th day of January, 2024.

(SudiptaPal)
GJ01419
Principle Civil Judge &
J.M.F.C., Vadali

ORDER AFTER HEARING ON CONVICTION

On being asked about the punishment the accused didn't found in the court premises. However after considering the judgment so passed by the Honorable High Court of Gujarat in ***Sankarlal N. Parmar V. Dinesh Babulala Bariya*** cited as ***[2007(1) G.L.H. page no. 225]*** where accused was directed to pay the compentation to the complainant by waiving the amount of fine. This court is also following such direction.

After considering the above discussion, related documents,considering the social status of the accused person & also after considering the verdict of Honorable Apex Court in ***R. Vijayan v. Baby*** cited as ***[AIR 2012 page no. 528]*** I'm passing the following order in connection with the issue so framed underpoint no. 3. in open court on 24th day of January, 2024.

ORDER

1. This complaint case filed by the complainant is here by allowed;
2. The accused of this case is hereby convicted u/s 255 (2) as hefound guilty of an offence so mentioned u/s 138 of NegotiableIntrument Act of 1881. So the accused is punished with simpleimprisonment for the term of one year & six months. Apart fromit he is also fined of Rs. 1,05,000/- (rupees one lac five thousand only). On acount of default of payment of fine the accused shall be punished with simple imprisonment for four months & it will be treated in addition to a substantive sentence of imprisonment.
3. Moroever accused is directed to pay the amount of fine i.e., of Rs. 1,05,000/- (rupees one lac five thousand only) to the complainant as a compentation.
4. Let a copy of this judgment be served to the accused on free of cost.
5. If any bail so furnished on behalf of the accused person previously then it is here by cancelled. As the accused person is found absent at the time of declaration of this judgment let a non - bailbale warrant be

issued agianst the accused person.

Place: - Vadali
Date: - 24th day of January, 2024.

(SudiptaPal)
GJ01419
Principle Civil Judge &
J.M.F.C., Vadali

// <u>My Self</u> //