

In the Court of Ashok Kumar, Judicial Magistrate 1st Class, Chachiot, at Gohar, District Mandi, H.P.

CNR No. : 04-000507-2017
Registration No. : 37/207
Case No. : 105-I/2017 / 26-III/2017
Presented on : 19.04.2017
Decided on : 29.06.2018.

Kapoor Singh son fo Shri Tulsi Ram, resident of Village Manjhe, Post Office Jachh, Tehsil Chachiot, District Mandi, H.P.

.....Complainant.

Versus

Shivani Chauhan W/o Shri Bhoop Singh resident Village Port, Post Office Jahal, Tehsil Cahchiot, District Mandi, H.P.

.....Accused.

Complaint under Section 138 of Negotiable Instruments Act.

For the complainant : Shri Lalit Thakur, learned Advocate.
For the accused : Shri Krishan Sharma, learned Advocate.

JUDGMENT

Brief facts of the case as pleaded by the complainant are that the accused being a government contractor used to take contracts from various government departments and in the year 2016 she had taken the contract for the construction of water storage tank from I&PH Department which work was further handed over to him by the accused. He executed that work worth the value of ₹ 1,50,000/-, but the payment was received by the accused from the I&PH department. It is alleged that some payment had been paid by the accused, however, in order to discharge remaining payment of aforesaid liability, accused issued a cheque bearing number 122913 dated 02.12.2016, amounting ₹ 43,000/- of her account number 20329938900 in favour of complainant. The complainant presented the cheque in his bank in Punjab National Bank, Jachh, but the same was dishonoured for the reasons

“funds insufficient” in the account of accused vide memorandum dated 14.12.2016. Thereafter, the complainant issued a legal notice dated 06.03.2017 and demanded the aforesaid amount, but the accused did not make the payment. Hence, this complaint.

2. The accused was summoned and on appearance, notice of accusation under Section 138 of Negotiable Instruments Act was put to her to which she pleaded not guilty and claimed trial.

3. The complainant in order to substantiate his claim has stepped into witness box and has reiterated and reasserted the contents of complaint in verbatim.

4. The accused, in her statement recorded under Section 313 of Code of Criminal Procedure, has admitted that the complainant had executed the work and stated that half payment had already been made. She has admitted that she issued a cheque in favour of complainant. She has also admitted that she received a legal notice. Stated that complainant did not complete the work. She has stated that when department will make the payment then she will give the money.

5. In order to rebut, the accused examined DW1 Shri Sushil Kumar, the then J.E., I&PH, who produced the record regarding contract sanctioned in favour of accused. In cross examination, he has stated that the department had made the payment of ₹ 2,90,211/- to accused. Accused has also stepped into witness box as DW1, wherein she has stated that she had handed over the work of tank and pipe line to complainant and he had taken a security cheque. She has stated that ₹ 20,000/- had already been given to complainant out of ₹ 43,000/-.

6. I have heard learned counsel for the parties and have also gone through the case file.

7. Following points arise for determination:-

I Whether the complainant has been able to prove that the accused had issued cheque amounting to ₹ 43,000/- for discharging her legal liability, which on presentation was dishonoured for the reason “insufficient funds” and despite legal notice she did not make

the payment, as alleged?

II Final Order.

8. For the reasons to be recorded here-in-after, while discussing the aforesaid points for determination, my findings on the same are as under:-

Point No. I : Yes

Final Order : The accused is convicted per the operative part of the judgment.

(REASONS FOR FINDINGS)

Point No. I

9. To prove the case under Section 138 of Negotiable Instrument Act, following points are required to be proved by the complainant:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

10. In this case, the cheque Ext. CW1/B was issued on 02.12.2016. It was presented by the complainant on 14.12.2016. It was dishonoured on the same day vide dishonour memo Ext. CW1/B. Thereafter, the complainant issued a legal notice Ext. CW1/F dated 6th March 2017, through postal service, receipt whereof is Ex. CW1/H. The notice was duly received by accused vide acknowledgement Ext. CW1/G. Admittedly, despite legal notice the accused did not make the payment within stipulated time. Hence, the ingredients of Section 138 of the Negotiable Instruments Act are duly constituted.

11. Otherwise also, there is no dispute that accused had issued cheque amounting ₹ 43,000/- in favour of complainant which was presented by him for

encashment, but the same was dishonoured for “funds insufficient” in the account of accused on which complainant issued a legal notice to accused which was duly received by her. The defence of the accused is that the complainant did not complete the work which was awarded to him. However, the complainant in his statement has denied this fact. He has categorically stated that an amount in the sum of ₹ 43,000/- is yet to be recovered from the accused.

12. As a matter of fact, the accused is a government contractor and in the year 2016, a contract was awarded to her by the I&PH department. Admittedly, she handed over this work to complainant for execution and the complainant had executed the work for the value of ₹ 1,50,000/-. The payment of ₹ 1,50,000/- was received by the accused from the department and this fact is clear for the statement of DW1 Shri Sushil Kumar that accused had received the payment of ₹ 2,90,211/-. The accused has admitted the fact that she had handed over this work for execution for a sum of ₹ 1,50,000/- and that she had already paid ₹ 1,07,000/- to him. She has categorically admitted that she had issued cheque amounting ₹ 43,000/- in favour of complainant. However, she has stated that out of the total amount of Rs. 40,000/-, she has already paid ₹ 20,000/- and she has produced the receipt dated 7.10.2016 amounting ₹ 20,000/-. But, the cheque is of 20.12.2016. If the complainant had not completed the work then the question arises why the accused had issued cheque amounting ₹43,000/- to him. Though, she has stated that accused had taken a security cheque, but if her cross examination is perused then it is clear that she had issued the cheque for remaining payment of ₹ 43,000/-. Moreover, she in her examination under Section 313 of Code of Criminal Procedure has admitted that the complainant has executed the work of the value of ₹ 1,50,000/-. Thus, under these circumstances, it cannot be said that the accused has been able to rebut the presumption attached to negotiable instrument.

13. Under Section 139 of the Act, 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.

14. The Hon'ble Apex Court in case titled as **Rangappa vs. Sri Mohan, Criminal Appeal No.1020 of 2010,** decided on May 7th 2010, held that once the accused had admitted/acknowledged that the signature on the impugned cheque as his own, then the cheque pertained to a legally enforceable debt or liability.

15. There are certain presumptions provided under Indian Evidence Act in Section 114 and in the Negotiable Instruments Act. Negotiable Instrument Act contains presumptions which are provided under Section 118 of the Act. The presumptions under Section 118 of Negotiable Instruments Act, are reproduced hereunder:-

“Presumptions 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, indorsed, negotiate or transferred, was accepted, indorsed, 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 indorsments-that the indorsments 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.**

16. The Hon'ble Apex Court in **S.C.C. 2002(1) Page-234, titled M.M.T. Vs. Medical Chemicals,** has held that the complainant needs not to allege existing or subsisting debt or liability against which cheque issued. The burden of proving non-existence of any debt or liability is on the accused.

17. Similarly, it has been held in **2013(4) Civil Court Cases 200 (S.C.), C. Keshavamurthy Vs. H.K. Abdul Zabbar,** that:

“Presumption under Section 139 of the Act includes the presumption of the existence of a legally enforceable debt or liability. It is for the accused to explain his case and defend it once the fact of cheque bouncing is prima facie established.”

18. In another case **1999(2) Civil Court Cases 505 (S.C.), titled Maruti Udyog Ltd. Vs. Narender & ors**, the Hon'ble Apex Court has held that:

“In view of the express provision of S. 139, a presumption must be drawn that the holder of the cheque received the cheque, of the nature referred to in S. 138 for the discharge of any debt or other liability unless the contrary is proved.”

19. As a matter of fact, accused has admitted that after dishonour of the cheque, she received a legal notice. Admittedly, she had not protested the legal notice issued by learned counsel for complainant. If she had already paid some amount then it was for her to protest and respond that she made the payment. Since she had not done so and, therefore, an adverse inference is required to be drawn against the accused for not replying the notice. Reference to this effect may be made to the judgment reported in, **2006(3) Criminal Court Cases 423 (A.P.)**.

20. Accused in her examination-in-chief has stated that complainant had taken the cheque as security. So far as the plea qua security cheque is concerned, it is well settled that the cheque issued as security is valid in view of Section 138 of Negotiable Instruments Act. Our own Hon'ble High Court in, **Hamid Mohammad vs. Jaimal, Latest HLJ 2016 (HP) 768**, has held that it is well settled law that cheque issued as security would also come under provision of Section 138 of the Act. It was held that revisionist had admitted his liability of antecedent when revisionist signed the cheque. Paras number 9, 11 and 12 of the judgment are reproduced hereunder:-

“9. Submission of learned Advocate appearing on behalf of the revisionist that cheque in question was issued to the complainant as security and on this ground criminal revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 138 of

Negotiable Instruments Act 1881 if any cheque is issued on account of other liability then provisions of Section 138 of Negotiable Instruments Act 1881 would be attracted. Court has perused original cheque Ext. C-1 dated 30.10.2008 placed on record. There is no recital in cheque Ext. C-1 that cheque was issued as security cheque. It is well settled law that cheque issued as security would also come under provision of Section 138 of Negotiable Instruments Act 1881. **See 2016 (3) SCC page 1 title Don Ayengia vs. State of Assam & another.** It is well settled law that where there is conflict between former law and subsequent law then subsequent law always prevail.

11. Submission of learned Advocate appearing on behalf of the revisionist that oral as well as documentary evidence adduced by the non-revisionists is contradictory and self-destructive is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused oral as well as documentary evidence adduced by the complainant. There is no material contradiction in the evidence adduced by the complainant which goes to the root of the case.

12. Submission of learned Advocate appearing on behalf of the revisionist that testimony of CW-1 and CW-2 are not sufficient for conviction of the revisionist in the present case is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of CW-1 and CW-2. Testimonies are trustworthy and reliable and inspire confidence of the Court. There are no reasons to disbelieve the testimonies of CW-1 and CW-2. Testimonies of CW-1 and CW-2 are corroborated with documentary evidence i.e. cheque Ext. C-1, registered letter Ext. C-2, cheque return memo Ext. C-3, demand notice Ext. C-4 and postal receipt Ext. C-5. Even as per provisions of Section 118 of Negotiable Instruments Act 1881 there is presumptions relating to (a) Consideration (b) Date (c) Time of acceptance (d) Time of transfer (e) Order of endorsements (f) As to stamps (g) That holder is a holder in due course. Presumptions of Section 118 of Negotiable Instruments Act 1881 against the revisionist remained un-rebutted on record. Revisionist did not adduce any oral as well as documentary evidence in order to rebut the presumptions of Section 118 of Negotiable Instruments Act 1881. Even as per Section 139 of Negotiable Instruments Act 1881 there is presumption in favour of holder of the cheque. Complainant is the holder of the cheque Ext. C-1. Cheque Ext. C-1 is duly signed by revisionist in sound state of mind. Revisionist was major when he signed the cheque. It is held that revisionist had admitted his liability of antecedent debt when revisionist signed the cheque Ext. C-1 placed on record. Under Section 139 of Negotiable Instruments Act 1881 there is legal presumption that cheque was issued for discharging of antecedent liability. **See Anil Hada vs. Indian Acrylic Ltd. AIR 2000 Apex Court page 145.** Revisionist did not adduce any oral as well as documentary evidence on record in order to rebut the presumption in favour of holder of cheque under Section 139 of Negotiable Instruments Act 1881. Point No.1 is decided against revisionist.”

21. In this case, if the plea of accused that the cheque was issued as

security is taken into consideration then also as per judgment cited supra, she is liable for the offence under Section 138 of the Negotiable Instruments Act.

22. In this case, the complainant has categorically testified that the cheque was dishonoured due to the reasons “insufficient funds” and as such the complainant has discharged the preliminary burden by exhibiting memo Ext. CW1/B that the cheque has been bounced and now the burden shifts to the accused to rebut that the cheque was not bounced or this cheque was not issued by him. Nothing has been brought on record by the accused which could show that the cheque Ext. CW1/A has not been bounced or this memo Ext. CW1/B is forged or fictitious. Therefore, the complainant has established his case against the accused person under Section 138 of the Negotiable Instruments Act. However, the accused could not rebut the legal presumption. Thus, it can safely be said that the complainant has been able to prove his case. It was for the accused to disprove the legal presumptions, but she has failed to do so. Accordingly, point number 1 is decided in affirmative and in favour of the complainant.

POINT NO.II (FINAL ORDER):

23. As a sequel to my findings on point number 1 above, the accused is convicted under Section 138 of Negotiable Instruments Act. Complaint stands disposed of. After due completion it be consigned to records.

Announced and signed in the open
Court on this 29th day of June 2018.

[Ashok Kumar]
Judicial Magistrate 1st Class,
Chachiot, at Gohar, District Mandi HP

(harsh)

QUANTUM OF SENTENCE

12.07.2018:

Present:- Complainant in person Shri Lalit Thakur, learned Advocate.
Convict in person with Shri Krishan Sharma, learned Advocate.

I have heard learned counsel for the complainant and learned defence counsel on the quantum of sentence and also scrutinized the case record with care and caution. The learned defence counsel has stated that lenient view be taken as the accused is a lady and is first offender.

Per contra, learned counsel for the complainant has submitted that there is no question of leniency in this case. It is argued that accused be dealt stringently.

In the instant case, it is already proved on record that accused/convict had issued cheque which was thereafter dishonoured for the reason "funds insufficient" in the account of the accused. Therefore, keeping in view the mode, manner and magnitude of committing the offence and the facts and circumstances of the instant case, I hereby proceed to pass following sentence:-

That the convict shall undergo simple imprisonment for a period of three months for the commission of offence punishable under Section 138 of Negotiable Instrument Act and shall also pay compensation in the sum of ₹ 65,000/- (₹ sixty five thousand only) to the complainant.

Copy of this judgment be given to the convict free of cost. File after due completion be consigned to the record room.

Announced.
12.07.2018.

(Ashok Kumar)
Judicial Magistrate 1st Class,
Chachiot, at Gohar, District Mandi, H.P.

Form-A**List of witnesses**

Sr. No.	Name of Witness	Whether witness of complainant or accused.
CW1	Shri Kapoor Singh	Complainant.
DW1	Sushil Kumar	Accused.
DW1	Shivani Chauhan	-do-.

Form-B**List of Exhibits**

Exhibit	Date of Exhibit	Description of Exhibits.
Ext. CW1/A	10.11.2017	Affidavit of complainant.
Ext. CW1/B	-do-	Cheque.
Ext. CW1/C	-do-	Memorandum dated 14.12.2016
Ext. CW1/D	-do-	Intimation Letter
Ext. CW1/E	-do-	Memorandum dated 17.02.2017
Ext. CW1/F	-do-	Legal Notice
Ext. CW1/G	-do-	Acknowledgement
Ext. CW1/H	-do-	Receipt
Ext. DW1/A	08.06.2018	Record of I&PH department.

[Ashok Kumar]
Judicial Magistrate 1st Class,
Chachiot, at Gohar, Distt. Mandi, HP